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MARKETABLE TITLE ACTS—PANACEA OR PANDEMONIUM?

Walter E. Barnett†

Almost everyone concerned with land titles in the United States has come to realize that our basic legal framework for providing title security is an albatross. Although the weight of the burden varies from state to state and community to community—the older states and the larger urban centers suffering the most—in every place the burden grows inexorably.

The recording acts are the heart of our present title security system. Theoretically, anyone dealing with a piece of land will be adequately protected if all major transactions involving that land have been made a matter of public record. With all prior transactions spread upon the records at the county courthouse, a buyer or lender can ascertain whether his seller or borrower does in fact own the land in question “free and clear.” To ensure recordation, the acts void all unrecorded transactions.1 As a result, records of nearly all major land transactions are now collected in central repositories.

The prime drawback of the system is that no provision is made for official verification of either the validity or the effect of any transaction. The record of the transaction is simply available for inspection, and each person is left to draw his own conclusions at his own risk. Thus, a prospective purchaser or mortgagee ordinarily hires an “expert” to examine the records and draw the conclusions. Whether the expert is a lawyer or a title insurance company, the task is the same: to ascertain

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1 The recording acts do not require all prior transactions to be spread upon the records. First, they affect only transactions evidenced by written documents; thus, titles based on adverse possession or user and certain interests that have been created by oral agreement (such as a lease for less than a year) will, though undisclosed by the records, be effective even against subsequent bona fide purchasers. Second, many recording acts specifically except some interests based on written instruments, or simply omit them from the list of instruments required to be recorded. (Again, the short-term lease is a good example.) Finally, few recording acts render an unrecorded instrument ineffective as between the parties to it. The majority render an instrument ineffective only against certain protected classes, such as subsequent bona fide purchasers. Good discussions may be found in Cross, Weaknesses of the Present Recording System, 47 Iowa L. Rev. 245 (1962), and Johnson, Purpose and Scope of Recording Statutes, 47 Iowa L. Rev. 231 (1962).
from the records both that title has passed in an unbroken chain from the sovereign to the vendor or mortgagor, and that no third persons have outstanding interests or rights that might interfere with the client's purposes. In most states a third unofficial "expert" has entered the picture—the abstractor. His task is merely to compile from the mass of official records an "abstract" of all transactions concerning the parcel in which the client is interested. The examining expert is thereby saved the time of ferreting out the appropriate records. Yet, despite the costs of hiring these experts, the purchaser obtains no more than an unofficial opinion that the title is good.

Another disadvantage of the system is that defects in title—such as a gap in the chain of conveyances down from the sovereign, a fatally defective conveyance in the chain, or an outstanding interest reserved or conveyed away by a former owner—are never cured simply by the passage of time. Of course, the longer the time since the defect arose, the less likely it is that the defect will be asserted against the present owner or, if asserted, will succeed in divesting or diminishing his title. But until the defect is judicially eradicated by a quiet title action, one can never be certain that it will not cause a loss. Thus, the examining expert must check the recorded transactions all the way back to the sovereign. Since each expert can obtain no official imprimatur on his conclusions and is liable only to the client who hired him, each person dealing with the land must hire his own expert and each expert must perform the whole task over again. As the records swell with each transaction, the burden of examination becomes more oppressive.

In recent years, an increasing number of states have turned to marketable title acts to stunt the growth of the albatross. Although a rudimentary act of this type was enacted in Iowa in 1919, the major

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2 The doctrine of laches may be of some help on occasion, but the basic weapon in the present owner's arsenal is found in the adverse possession statutes. Of course, they only protect those owners who have been in continuous possession, claiming exclusive ownership, for a substantial period of time. Unfortunately, the protection even then is rather spotty. Under most statutes, the possessor must show "color of title" and prove payment of taxes. Also, the statutes generally do not run against persons under disabilities, unless the possession has continued for an extremely long period of time. Further, they do not run against future interests until the interests become possessory, nor against mineral interests unless the minerals as well as the surface have been "possessed."

3 The liability of a lawyer-examiner may extend beyond the client who hired him. See Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 987 (1962) (intimating that a lawyer may be liable to the intended beneficiary of a will provision that failed because of his negligent draftsmanship).
impetus toward enactment of such statutes dates from 1945, when Michigan adopted one that was to become a prototype for other states, and particularly from 1960, when Simes and Taylor published a "Model Act" adapted from the Michigan statute. The purpose of these acts is to eliminate old title defects and interests automatically with the passing of time and thereby to shorten the necessary title examination.

The literature dealing with marketable title acts has been almost universally favorable. Thirteen states have now adopted them in one form or another. But their virtues are not unqualified, and perhaps the dissenting view herein presented may lead to more cautious consideration of such devices by the remaining states. Because these states are most likely to copy the Model Act, the discussion has been limited

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5 L. Simes & C. Taylor, Improvement of Conveyancing by Legislation 6-10 (1960) [hereinafter cited as Simes & Taylor]. The Model Act is set forth in an appendix to this article at pp. 95-97 infra.
6 A comprehensive bibliography appears in Simes & Taylor 359-61. Articles appearing since its publication include Basye, Trends and Progress—The Marketable Title Acts, 47 Iowa L. Rev. 261 (1962); Boyer & Shapo, Florida's Marketable Title Act: Prospects and Problems, 18 U. Miami L. Rev. 103 (1963); Catsman, A Proposed Marketable Record Title Act for Florida, 19 U. Fla. L. Rev. 394 (1960); Cribbet, Conveyancing Reform, 35 N.Y.U.L. Rev. 1291 (1960); Cromwell, The Improvement of Conveyancing in Montana by Legislation—A Proposal, 22 Mont. L. Rev. 26 (1960); Jossman, The Forty Year Marketable Title Act: A Reappraisal, 87 U. Detroit L.J. 422 (1960); Pray, Title Standards and the Marketable Title Act, 38 Okla. B. Ass'n J. 611 (1967); Rohde, Illinois Marketable Title Act, 39 Chicago-Kent L. Rev. 49 (1962); Ruemmele, The North Dakota Marketable Record Title Act, 41 N.D.L. Rev. 475 (1965); Simes, The Improvement of Conveyancing: Recent Developments, 34 Okla. B. Ass'n J. 2357 (1963); Smith, The New Marketable Title Act, 22 Ohio St. L.J. 712 (1961); Swenson, The Utah Marketable Title Act, 8 Utah L. Rev. 200 (1963); Webster, The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation, 44 N.C.L. Rev. 89 (1965); Note, The Indiana Marketable Title Act of 1963: A Survey, 40 Ind. L.J. 21 (1964); Note, Constitutionality of Marketable Title Legislation, 47 Iowa L. Rev. 413 (1962); Note, Marketable Title Legislation—A Model Act for Iowa, 47 Iowa L. Rev. 389 (1962); Note, A Marketable Title Act for New Mexico, 6 Natural Resources J. 446 (1965).
8 The writer does not pretend that all, or even most, of the criticisms of marketable title legislation discussed in this article are original. Simes and Taylor themselves recognize a number of them. But their commentary, as well as that of others, is so generally favorable that one is left with the impression that the difficulties may safely be ignored.
to that act and those statutes that are simply variations on the same theme.\textsuperscript{9}

I

PRIORITIES AT COMMON LAW AND UNDER THE RECORDING ACTS

At common law the cardinal principle was "first in time, first in right." If \( O \), owner of Blackacre, conveyed it one day to \( A \), and the next day to \( X \), \( A \) prevailed over \( X \), even if \( X \) happened to be a bona fide purchaser without notice of the prior conveyance.\textsuperscript{10} The theory was that \( O \) parted with his title by conveying to \( A \), and thus had nothing left to pass to \( X \). If \( O \) and \( A \) had merely entered a contract of sale, however, the subsequent bona fide purchaser would prevail. Since the contract of sale gave \( A \) only an equitable interest in the land, \( O \) retained the legal title and could thereafter effectively convey it to \( X \). A bona fide purchaser of the legal title without notice of prior equities was held to cut them off.\textsuperscript{11} Finally, if \( A \) received a legal interest less than entire ownership, such as a lease, mortgage, or easement, \( X \) could not prevail. Having parted with a portion of his legal title, \( O \) could pass only the remainder to \( X \).

The clear favoritism shown by the common law for prior grantees of legal interests led to the adoption of recording acts in the United States. Basically, most of the acts provide that the senior grant, unless recorded before the junior grant is made, is ineffective against it. But they limit this protection to a certain class of junior grantees; so unless one is within that class, the senior grantee may still prevail according to the common law principle of "first in time, first in right." The protected class is defined differently by the various acts. "Notice" acts ordinarily protect only subsequent purchasers and lien creditors who are without notice of the prior transaction at the time they take their

\textsuperscript{9} The statutes of Florida, Indiana, Ohio, Oklahoma, and Utah are based on the Model Act. Since, however, the Model Act was itself simply an effort to improve the language of the Michigan act, on which the Nebraska and North and South Dakota acts were patterned, it is useful to include these four in the discussion as well. The basic format and much of the language of all these acts are the same. The Illinois, Iowa, Minnesota, and Wisconsin acts, however, are so completely dissimilar as to make comparison difficult. Their kinship with the others lies solely in the idea of cutting off old defects and interests existing prior to a certain point in the past, unless a notice of claim is timely filed to preserve them. Though the acts of these four states will not be discussed, occasionally it will be useful to refer to court decisions applying them. Most of the acts to be discussed have been enacted so recently that there is a dearth of court decisions construing them.

\textsuperscript{10} 4 AMERICAN LAW OF PROPERTY § 17.1 (A.J. Casner ed. 1952).

\textsuperscript{11} Id.
deed, lease, or mortgage, or perfect their lien. The equally common "notice-race" acts are even more limited; they protect the subsequent bona fide purchaser only if he records his instrument before the senior grantee records his.

Under both types of recording acts, heirs, devisees, and donees, since they are neither purchasers nor lien creditors, are usually left unprotected against prior unrecorded instruments. The same is true of subsequent purchasers who take with knowledge of facts sufficient to put them on inquiry concerning the existence of an unrecorded instrument, or who are deemed to have constructive notice of such instrument by virtue of some reference to it in the records or by virtue of the senior grantee's occupation of the land.

Recording acts are often viewed as allowing each grantor to retain, until the grantee records the deed, the power to divest the title of the grantee by subsequently conveying to a bona fide purchaser. But the practical reasoning behind the recording acts is simply that, if both the senior and the junior grantee are innocent, it is better to place the loss on the senior grantee, who, by taking some such easy step as recording, could warn the junior grantee before the latter parts with his money.

In many jurisdictions, the recording acts have been interpreted to protect a subsequent bona fide purchaser not only against unrecorded instruments but also against recorded instruments not discoverable by a "reasonable search" of title. What constitutes a reasonable search ought to depend on whether an official tract index or only a grantor-grantee index is available. Since a tract index shows all recorded instruments describing a particular parcel together, all such instruments would be within a reasonable search. But where the land records are covered only by a grantor-grantee index, as is most often the case, title searching is more complex. A purchaser normally searches for the name of his seller in the grantee index, proceeding back in time until he finds a conveyance of the land to his seller. From this he obtains the name of his seller's grantor, and then proceeds to search for

12 Johnson, supra note 1, at 231-37.
13 Id.
14 4 American Law of Property § 17.10 n.27 (A.J. Casner ed. 1952).
15 Id. § 17.11.
16 Id. §§ 17.12-.15, 17.17.
17 See, e.g., 5 H. Tiffany, Real Property § 1262 (3d ed. 1939). This power has been viewed as passing on the death of the grantor to his personal representative, heir, or devisee, who by conveyance to a bona fide purchaser will divest the title of the grantee in the unrecorded deed.
that name in the grantee index. The process continues until a “chain” of such conveyances is established all the way back to the sovereign. Then the purchaser turns to the grantor index and searches the name of each grantor in the chain from the date of the conveyance by which the grantor acquired title to the date of recordation of his conveyance to the next person in the chain. The purpose of this search of the grantor index is to ascertain that no person in the chain, during the period of his ownership, made or suffered any transfer that might derogate from the title passed on to the next person in the chain. In most jurisdictions this procedure constitutes a reasonable search.18

One common instance in which the “reasonable search” doctrine has been held to render ineffective a promptly recorded senior grant is the “estoppel by deed” situation. Suppose that \( P \), the present purchaser, searches the title through a grantor-grantee index and finds the following chain of title: (1) sovereign to \( A \), executed 1910, recorded 1910; (2) \( A \) to \( B \), executed 1915, recorded 1915; (3) \( B \) to \( C \), executed 1938, recorded 1939. \( P \) is purchasing from \( C \) in 1967. \( P \) would check the grantor index under \( A \)'s name from 1910 to 1915, under \( B \)'s name from 1915 to 1939, and under \( C \)'s name from 1938 to the present. Consequently, if \( B \) had executed a deed to the land to \( X \) in 1914 and \( X \) had recorded it that same year, \( P \) would not find it. Yet, apart from the recording acts, \( X \) would prevail over \( P \) because, though \( B \) had no title at the time of the 1914 deed to \( X \), the interest which \( B \) acquired from \( A \) in 1915 would inure to \( X \) under the doctrine of estoppel by deed. Hence, \( P \)'s seller, \( C \), would have obtained no interest by the 1938 deed from \( B \). Literally interpreted, the recording acts would bring about the same result, because the 1914 deed from \( B \) to \( X \) was actually recorded before the grants to \( C \) and \( P \) were made. A number of jurisdictions, however, would hold that \( P \) prevails, because the 1914 deed was outside a reasonable search of \( C \)'s title and is therefore deemed “unrecorded.”19

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18 This doctrine that recorded instruments outside a reasonable search of the subsequent purchaser’s “chain of title” can be held ineffective against him not only flies in the teeth of the recording acts' language but is often applied so inconsistently within the same jurisdiction as to amount to hypocrisy. For example, many courts that subscribe to the doctrine deem an instrument recorded as soon as it is filed for record, so that it is effective against subsequent bona fide purchasers even though the clerk, by failing to record or index it properly, renders it impossible to find. (Presumably, the effectiveness of the recording in such a case depends on the fact that the instrument would have been found “within the chain of title” but for the clerk's fault.) See Cross, The Record “Chain of Title” Hypocrisy, 57 COLUM. L. REV. 787 (1957). These objections notwithstanding, the “reasonable search” doctrine is pretty well ensconced in most jurisdictions.

19 4 AMERICAN LAW OF PROPERTY § 17.20 (A.J. Casner ed. 1952); R. & C. PATTON,
The normal protection provided senior recorded grants may also be withheld where a deed, though executed when the grantor owned the land, is not recorded until after he has conveyed to someone else. Suppose that P finds the same three conveyances as in the preceding example. If in 1930 B conveyed to X, who did not record until 1940, and in 1938 B conveyed to C, who recorded in 1939, P would not find X’s deed, because the search of B’s name would stop at 1939, when C recorded. Suppose that C, however, was chargeable with notice of X’s deed when he took his deed in 1938. Again, under a literal interpretation of the recording acts X would prevail, because the acts purport simply to void unrecorded deeds in favor of bona fide purchasers. C was not a bona fide purchaser, and even if P is, X’s deed was recorded before the grant to P was made. Nevertheless, a number of jurisdictions would deem X’s deed “unrecorded” as against P because P would not discover it upon a reasonable search. 20

Many jurisdictions accord the same treatment to “wild” or “interloping” deeds, because they would not be indexed under any name in the purchaser’s chain of title. Since a purchaser making a title search by means of a grantor-grantee index alone would have no means of finding them, either in the grantor or grantee index, they are deemed “unrecorded” as against him. 21

In all the situations just discussed, the senior grant should be protected by the recording acts if there were an official tract index, or if P had made use of a reliable abstractor. In the former case, all the senior grants described in the examples would be within a reasonable search, and in the latter case, P would have actual notice of them. Unfortunately, official tract indexes are not provided for in most states, and even where they are provided for, they are usually limited to a few populous urban counties. 22 Although abstracts are used almost universally in a number of states, they are merely an unofficial adjunct of the system. Apparently, no court has ever held that a reasonable search of title must include the purchase and examination of an abstract. 23

LAND TITLES §§ 70, 219 (2d ed. 1957). Cross, supra note 18, at 796-97, lists 12 jurisdictions to the contrary. 20 § AMERICAN LAW OF PROPERTY § 17.22 (A. J. Casner ed. 1952). The case most commonly cited for this position is Morse v. Curtis, 140 Mass. 112, 2 N.E. 929 (1885). Cross, supra note 18, at 796-97, lists 10 jurisdictions that hold the contrary. 21 See, e.g., Board of Educ. v. Hughes, 118 Minn. 404, 136 N.W. 1095 (1912). 22 In two of the states whose acts are discussed in this article—Utah and North Dakota—official tract indexes are provided. 23 Johnson, supra note 1, at 239-40, argues that the availability and customary use of
MARKETABLE TITLE ACTS TO THE RECORDING ACTS

Marketable title acts are intended to operate in conjunction with, rather than as a substitute for, the recording acts. They seek to extinguish old title defects automatically with the passage of time. The acts provide that if a person has an unbroken chain of title from the present back to his "root of title," then he has the sort of title in favor of which their extinguishment feature will operate.24 His "root of title" is the most recent transaction in his chain of title that has been of record25 at least forty years.26 With certain specified exceptions, claims and interests that depend on matters antedating the root of title are declared null and void.27 The acts seek to avoid the constitutional

24 "Root of title" is defined in section 8(e) of the Model Act and is used throughout. It also figures prominently in the statutes based on the Model Act. The Michigan act (MICH. STAT. ANN. §§ 25.1271-79 (1953, Supp. 1965)) contains no such concept, but has been interpreted by the Michigan bar to operate in exactly the same fashion as the Model Act. See Jossman, supra note 6, at 427-28. The Nebraska, North Dakota, and South Dakota acts use the term, "deed of conveyance under which title is claimed," rather than "root of title," but the meaning of the term and the mode of operation of the acts seem to be the same as those of the Model Act. Neb. Rev. Stat. § 76-290 (1958); N.D. Cent. Code § 47-19A-03 (1960); S.D. Code § 51.16B03 (Supp. 1960).

25 The Model Act and all those statutes based on it provide specifically that the effective date of the root of title is the date on which it was recorded. The Nebraska and South Dakota acts, by providing that notices of claim must be filed within a certain period after "the date of recording of deed of conveyance under which title is claimed," seem to have adopted the same idea. The Michigan act does not define this crucial date explicitly. The only relevant provision reads: "For the purpose of recording notices of claim for homestead interests the date from which the 40 year period shall run shall be the date of recording of the instrument, non-joinder in which is the basis for such claim." Mich. Stat. Ann. § 25.1273 (1953). None of the acts, however, define "recording." Presumably its meaning must be determined in light of the interpretation given the recording act in that jurisdiction. In other words, in one state the root may be deemed recorded at the time it is filed for record, in another, at the time it is actually transcribed upon the records, and in a third, at the time it is indexed.

26 The 40-year period is most common, and is the one used for illustrative purposes throughout this article. For the variations, see note 125 infra.

27 See §§ 1, 8(a), and 3 of the Model Act. The Nebraska, North Dakota, and South Dakota acts declare that such claims and interests "shall be barred and not enforceable at law or equity." Neb. Rev. Stat. § 76-290 (1958); N.D. Cent. Code § 47-19A-03 (1960); S.D. Code § 51.16B03 (Supp. 1960). The provisions of the other acts accomplish exactly the same result, except that of Florida, which seems to extinguish all claims and interests outside the exceptions, regardless of whether or not they depend on matters antedating the root of title. See note 48 infra.
problems of an outright extinguishment of property interests by providing, in one of the specified exceptions, that the holders of old interests and claims may preserve them by recording a notice of claim.28

The acts do not require a person seeking their benefits to be a bona fide purchaser. In fact, although the acts refer to "the time when marketability is being determined,"29 no "purchase" or other transaction affecting the land need occur to trigger the extinguishment of old defects and interests.

The following example illustrates the intended operation of a marketable title act. Suppose that in 1889 O, the owner of Blackacre, gives X a ninety-nine-year lease, which is recorded that same year. In 1890, O conveys to A, the deed reciting that it is subject to the recorded lease to X. In 1920 A conveys to B the deed making no mention of the lease. In 1941, B conveys to C, the deed making no mention of the lease. All these deeds were recorded when executed. Under a forty-year marketable title act such as the Model Act, C's title to Blackacre would be free and clear of the ninety-nine-year lease as of 1960, when the 1920 deed from A to B had been of record for forty years.30 This result assumes that the lessee, X, is not in possession.31 It is immaterial that the recorded lease gave constructive notice to both B and C, or that both had actual knowledge of its existence. It is likewise immaterial that no transaction affecting the land has taken place between 1941 and the present. The lease is still extinguished in 1960 if X has not filed a notice of claim. C's root of title is the 1920 deed from A to B,

28 Model Act §§ 4(a), 2(b); FLA. STAT. ANN. § 712.05 (Supp. 1966); ILL. ANN. STAT. ch. 83, 12.1 (Smith-Hurd 1966); IND. ANN. STAT. § 56-1104 (Supp. 1967); IOWA CODE ANN. § 614.17 (Supp. 1966); MICH. STAT. ANN. § 25.1273 (1953); MINN. STAT. ANN. § 541.023 (Supp. 1967); NEB. REV. STAT. § 75-290 (1958); N.D. CENT. CODE § 47-19A-03 (1960); OHIO REV. CODE ANN. § 5301.51 (Page Supp. 1966); OKLA. STAT. ANN. tit. 16, § 74 (Supp. 1966); S.D. CODE § 51.16B03 (Supp. 1960); UTAH CODE ANN. § 57-9-4 (1963); WIS. STAT. ANN. § 893.15(1) (1966).


30 The same result would obtain under all of the acts discussed in this article, with the exception of Indiana, Michigan, and Ohio. IND. ANN. STAT. § 56-1106 (Supp. 1967); MICH. STAT. ANN. § 26.1274 (Supp. 1965); OHIO REV. CODE ANN. § 5301.53 (Page Supp. 1966). These 3 rather unaccountably except from extinguishment the rights of lessees and their successors. Perhaps the provisions reflect the legislatures' desire to avoid the appearance of favoring lessors, whose reversionary rights were excepted.

31 This result may also obtain even when the lessee, X, is in possession. It depends on how extensively the rights of possessors are protected from extinguishment by the specific exceptions in each act. See p. 60 infra. The result indicated in the text probably also depends on X's having continued to make all rental payments to O (or A and B) since acceptance of rental payments by C might well estop him to claim extinguishment of X's lease.
and he has an unbroken chain of title for at least forty years since it was recorded. In 1981, C or his successor will have a new root of title—the 1941 deed from B to C—and any claims or interests antedating its recording will be extinguished. Thus, title to Blackacre undergoes an automatic "cleansing" whenever forty years elapse from the recording of a transaction that is capable of serving as a root of title. If one asks why the 1890 deed from O to A did not serve to extinguish the lease in 1930, the answer is that, although the 1890 deed is the root of title from 1930 to 1960, its reference to the lease preserves the lease from extinguishment, under one of the act's specified exceptions. If the 1920 deed had made a similar reference to the lease, it would not have been extinguished in 1960. C would have had to wait until 1981, when he could show a chain of title from a root at least forty years old, with neither the root nor any subsequent instrument in the chain referring specifically to the lease.

To ensure that his leasehold is preserved from extinction, X must file a notice of claim under the act every forty years after the date of his lease. Otherwise, he runs the risk that some recorded transaction will fail to refer to his lease and thus, forty years later, become a root of title that will cut off his rights. Actually, X could protect himself in the example given simply by filing one notice of claim in 1960, just before the 1920 deed from A to B has been of record forty years. But X may not know whether or when such transactions have occurred, unless he periodically secures an abstract of title. Regularly filing a notice of claim is his surest protection.

Besides allowing a lesser interest in land to be cut off in favor of the holder of the fee, the acts may also operate to resolve a conflict over the fee itself. The problem of the two competing chains illustrates most clearly the contrast between results under marketable title acts and those under recording acts alone.

Suppose that in 1920 O conveys Blackacre to A who records that year. In 1921 O conveys to X, who records immediately. At common law, A, the senior grantee, would have prevailed over X, even if X were a bona fide purchaser without notice of the deed to A. Under the recording acts, whether notice or notice-race, A still prevails over X, not because X in 1921 had constructive notice of A's recorded deed, but because the recording acts nullify unrecorded instruments and A's deed was recorded within X's chain at the time X took his deed. Under a marketable title act, however, if no other transactions occur, X can

32 Model Act § 2(a).
successfully assert in 1961 that he has a marketable record title to Blackacre, free and clear of A's interest, because A's interest depends on a transaction that occurred prior to the effective date of X's root of title. Why could not a purchaser from A in 1967 claim that the act cut off X's interest? We have already seen that a reasonable search made by such a purchaser through the grantor-grantee index would not turn up the 1921 deed to X. Hence, he would appear deserving of the law's protection. But since the act only cuts off interests antedating his root of title (the 1920 deed to A), the junior chain, represented by X, is protected even at the expense of a bona fide purchaser of the senior chain.

To complicate the example slightly, suppose that A had made a conveyance to B in 1941, recorded the same year. Would this prevent the extinguishment of the A-B chain in favor of X? The answer is in doubt. Since B's interest depends on a transaction that occurred prior to the effective date of X's root, i.e., on the 1920 conveyance from O to A, that interest would be extinguished unless one of the exceptions set up by the act is applicable. Section 2(d) of the Model Act might apply; it excepts "[a]ny interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title . . . ." But does B's interest arise out of the 1941 deed from A to B, or out of the 1920 deed from O to A? Simes and Taylor, evidently opting for the former, deduce that the act will cut off a senior in favor of a junior chain only if there have been no recorded transactions in the senior chain in the forty-year period since the effective date of the root of the junior chain. The terminology of the act, however, is ambiguous. Further, under the interpretation of Simes and Taylor, an examiner working through a grantor-grantee index would have to search the title beyond his client's root all the way back to the sovereign and then forward to the present in the usual way, before he could be sure that there is no competing senior chain in which a transaction may have been recorded in the forty years since his client's root of title. Consequently, if section 2(d) means what Simes and Taylor seem

33 See note 27 supra.
34 See Model Act § 3.
35 See Simes & Taylor 15. In discussing the exception found in Model Act § 4(b), they observe:
Moreover, this possession has significance only if we also find a period of forty years in the record chain of title of such person, during which there are no title transactions. Otherwise, the interest or claim of the possessor would be preserved by the appearance of record of the recorded title transactions.
See also id. at 13-14.
to say, the act fails to achieve its purpose of shortening title examinations made by means of grantor-grantee indexes.\textsuperscript{36}

To take another example, suppose that \( O \) conveyed to \( A \) in 1920, but \( A \) did not record his deed until 1922. Meanwhile, \( O \) conveyed to \( X \), who purchased in 1921 without notice of the prior deed to \( A \) and recorded his deed immediately. There have been no transactions since. The recording acts, whether notice or notice-race, would protect \( X \), because \( A \)'s deed was unrecorded when \( X \) took as a subsequent bona fide purchaser and \( X \) recorded first. Under a marketable title act, however, \( X \)'s interest apparently would be cut off in favor of \( A \) in 1962, when \( A \)'s deed has been of record for forty years. Since \( X \)'s interest depends on a transaction that occurred before the effective date of \( A \)'s root of title (1922),\textsuperscript{37} it is cut off by section 3 of the Model Act. Of course, it is also true that \( A \)'s interest depends on a transaction that occurred prior to the effective date of \( X \)'s root of title; but \( A \)'s interest appears to be preserved under section 2(d) by, of all things, \textit{his late recording}.

Suppose now that \( O \) conveyed to \( A \) in 1920, and \( A \) failed to record until 1922. Meanwhile, \( O \) conveyed to \( X \) in 1921, but \( X \) did not record until 1923. \( X \) is a bona fide purchaser without notice of the prior deed to \( A \). Suppose that in 1967 \( A \) sells to \( B \), who is without actual notice of \( X \)'s interest. Under a notice recording act, \( X \) would prevail over \( A \), because \( X \) took without notice at a time when \( A \)'s deed was unrecorded. But \( B \), who also takes without actual notice, may well prevail over \( X \),

\textsuperscript{36} Of course, if a tract index is available, or a reliable abstract is used, all instruments recorded since the root will be found without searching behind the root.

Actually, no marketable title act—not even the Model Act—is designed to dispense with all examination of the title behind the root. Concededly, it is necessary to go behind the root to find those particular \textit{types} of interests that are specifically excepted, such as easements, lessors' reversions, and rights reserved by the sovereign. The point is that, under the Simes and Taylor interpretation of \( \S 2(d) \), examiners working through a grantor-grantee index must look behind the root for \textit{any} interest that might be the subject of a transfer recorded since the root and then trace any such interest down to the present to make certain there has been no such transfer. The enacted statutes, except those of Michigan, Nebraska, North Dakota, South Dakota, and Oklahoma, contain an exception substantially similar to Model Act \( \S 2(d) \). The Nebraska, North Dakota, South Dakota, and Oklahoma acts appear clearly to resolve the ambiguity in favor of the Simes and Taylor interpretation. The Oklahoma act excepts "\[a\]ny interest relating to a title transaction which has been recorded subsequent to the effective date of the root of title." OKLA. STAT. ANN. tit. 16, \( \S 72(d) \) (Supp. 1966) (emphasis added). Nebraska, North Dakota, and South Dakota simply except "\textquote{instruments which have been recorded}'' for less than the period of the act. NEB. REV. STAT. \( \S 76-238 \) (1958); N.D. CENT. CODE \( \S 47-19A-01 \) (1960); S.D. CODE \( \S 51.16B01 \) (Supp. 1960). Michigan has no exception comparable to Model Act \( \S 2(d) \), probably because it was thought unnecessary.

\textsuperscript{37} See note 25 \textit{supra}.
because X's deed is outside a reasonable search of B's chain of title. Under a notice-race recording act, A would prevail over X in the first place, because X was not the first to record. Thus, A's grantee, B, would also prevail over X. Under a marketable title act, however, X would prevail over both A and B, because their interests depend on a transaction—the 1920 deed from O to A—that occurred before 1923, the effective date of X's root. Since A's interest would be extinguished in 1963, it could not be preserved under section 2(d) by the recording of the 1967 deed from A to B.

These examples show that marketable title acts tend to protect not only a junior grant against a competing senior grant, but also whichever of them was recorded last! A more complete reversal of the philosophy of the common-law rule and of the recording acts is difficult to imagine.

Moreover, the marketable title acts appear capable of divesting the title of a record owner in favor of a grantee who holds a purely "wild" deed. Suppose that O is the record owner of Blackacre in 1920 and there are no competing claimants to the land. In that year, X, a con man, manages to part Y from a fair sum of money in return for a deed purportedly conveying Blackacre from X to Y. Y does not examine the title, but does record his deed immediately. In 1960, Y apparently can claim he has a "marketable record title" to Blackacre, which is free and clear of any claim or interest on the part of O. This astonishing result could not possibly occur under the recording acts alone. 38 But since the purpose of the marketable title statutes is to eliminate the need for searching back to the sovereign, such statutes are not concerned with the quality of the title conveyed by the root. So long as the instrument serving as the root of title purports to convey an interest, it is effective to extinguish prior claims and interests. Thus, it is possible even for the grantee of a complete stranger to divest the title of the record owner. 39

38 Under the recording acts, the only significance of wild deeds for the title examiner is that, if discovered, they will give notice of possible unrecorded rights of the parties thereto, which might prevail over a purchaser in the regular chain. The only unrecorded rights which could prevail, however, are (1) a senior unrecorded conveyance from an owner in the regular chain, of which subsequent takers in the regular chain had actual notice, (2) an involuntary conveyance of the owner's interest, such as a deed under a tax lien foreclosure, or (3) a matured adverse possession title. Thus, a wild deed having no connection with anyone in the regular chain or with adverse possession could not possibly divest the title of a purchaser of the regular chain, though it might continue to cloud his title until removed by quitclaim or quiet title action. 2 R. & C. Patton, Land Titles § 596 (2d ed. 1957).

39 This assumes, of course, that the stranger's grantee is the last to record and that
Y's success in the preceding example does not depend on his being a bona fide purchaser. Even if he actually knew of O's claim when he took his deed in 1920, he could still prevail. The reason behind this departure from the philosophy of the recording acts is that marketable title acts are designed to simplify title examination, and this design can be accomplished only by eliminating from their operation as much as possible all matters extraneous to the records and thus subject to being proved in court, such as the bona fides of any particular individual. Since most of the defects and interests that a marketable title act seeks to remove are obvious ones in the chain of record title, any holder or taker of that title has, ipso facto, constructive notice of them anyway.

One can argue that the possibility that this rather "mechanical" operation of marketable title acts will ever cut off a "true owner's" fee simple title should not be taken very seriously, in view of the rarity with which situations like those described above actually occur. It is rare that an owner deliberately sells the same parcel of land twice, or that a defrauder dupes someone into buying from him land he does not own. But competing senior and junior chains often result from overlapping land descriptions in deeds from a common grantor covering adjacent parcels. Competing chains may also result when an owner, after conveying by warranty deed to one person, is persuaded to give a quitclaim deed to the same tract to someone else. Most marketable title acts do not disqualify quitclaim deeds from serving as the root of title. Finally, "wild" deeds are relatively common, though they usually result from mistakes in land descriptions.

his wild deed has been of record at least 40 years. Again, it is worth a reminder that present possession by the record owner may not suffice to protect his interest from extinguishment. See pp. 60-64 infra.

See Model Act §§ 8(e)-(f). Actually, a bare quitclaim of "all grantor's right, title, and interest in and to Blackacre" probably could not serve as a root of title to Blackacre, because under Model Act § 8(e) the root of title must "purport to create the interest claimed" by the marketable record title holder. A bare quitclaim does not purport to create any specific interest in the grantee. Smith v. Berberich, 168 Neb. 142, 95 N.W.2d 325 (1959). The mere absence of warranty covenants, however, should not prevent a quitclaim deed from serving as a root of title when it evidences an intent to convey the land. For example, some jurisdictions hold that an after-acquired title will inure to the benefit of the grantee of such a quitclaim deed. See Daniel v. Sherrill, 48 So. 2d 736 (Fla. 1950); Tucker v. Cole, 148 Fla. 214, 3 So. 2d 875 (1941); Groover v. Simonhoff, 157 So. 2d 541 (Fla. Dist. Ct. App. 1963). Similarly, although a judicial determination of heirship and a probate of a will are title transactions within the meaning of the acts, neither could serve as a root of title if it did not purport to establish an interest in the specific land in question. A will, however, might well contain a specific devise of particular land; and thus 40 years after probate the devisee would obtain protection, unavailable to him through the recording acts, against prior unrecorded grants from the testator.
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Since most "live" senior chains today will have at least one transfer every forty years, section 2(d) of the Model Act may save them from extinguishment. But even if the ambiguous language of section 2(d) is corrected or interpreted to assure this result, there will always be some senior grantees who make no transfer of their land for forty years. It is also likely that few competing junior chains will survive of record long enough to prevail under the marketable title act. The conflict will usually be resolved in favor of the senior "owner" by court battle or private settlement long before the junior chain is itself forty years old, especially if the holder of the junior chain begins pressing his claim by acts of dominion on the land, thus apprising the senior "owner" of the competing claim's existence. Nevertheless, the possibility, though slim, that a "true owner's" title will be cut off still exists, and looms larger wherever there are significant areas of undeveloped, unoccupied land in private ownership.

The drafters of marketable title acts have been aware of the possibility that even "owners" might have to file a notice of claim in order to protect their interests. For example, the Florida act contains the enigmatic provision that "it shall not be necessary for the owner of the marketable record title, as herein defined, to file a notice to protect his marketable record title." The Florida act also attempts to protect the "true owner" from being cut off by: excepting from extinguishment the "[r]ights of any person in whose name the land is assessed on the county tax rolls" for as long as it is so assessed and for three years

\[41\text{ FLA. STAT. ANN. § 712.05(2) (Supp. 1966). The proviso to § 2(d) of the Model Act may be designed to prevent the shifting of "marketable record title" back and forth between two conflicting chains, once one had extinguished the other. Perhaps the quoted provision of the Florida act, which omits this "anti-shifting" proviso, is intended to accomplish the same result. Suppose that } O \text{ conveys to } A \text{ in 1920, recorded in 1920. Then } O \text{ conveys to } X \text{ in 1921, recorded in 1921. In 1961, } X \text{ has a marketable record title which extinguishes } A's \text{ interest. If, in 1965, } A \text{ conveys to } B \text{, recorded in 1965, the proviso to } § 2(d) \text{ of the Model Act would presumably keep } B \text{ from having a marketable record title in 2005 that will extinguish } X's \text{ interest. The interest, whether in } A's \text{ or } B's \text{ hands, is the same interest, and once extinguished it cannot be revived. The trouble with applying } § 2(d) \text{ in this manner is that an examiner for a purchaser from } B \text{ in 2005 cannot rely on } B's \text{ 40-year record chain of title. Moreover, if } B's \text{ grantor in the 1965 deed had been not } A \text{ but a complete stranger to the title, } B \text{ would have a marketable record title in 2005 that would extinguish } X's \text{ interest. If, on the other hand, } § 2(d) \text{ is not applied in the manner indicated, it is possible, though not very likely, that the "title" will shift back and forth between two competing chains approximately every 40 years. This weird possibility further illustrates how difficult it is to base the ultimate question of ownership on a constantly changing factor in the records, namely, the "most recent [title transaction] to be recorded as of a date forty years prior to the time when marketability is being determined." Model Act § 8(e).} \]}
thereafter. Section 4(b) of the Model Act provides that if the same record owner of any possessory interest in land has been in continuous possession for forty years or more, and if such possession has continued to the time when marketability is being determined, then such possession will be equivalent to filing a notice of claim. It seems rather absurd, however, to require a senior grantee to show such possession in order to protect his interest from extinguishment by a junior grant, especially since the Model Act does not require the junior grantee ever to have been in possession! Although senior grantees will probably never need to rely on this exception, it does reveal the great extent to which the Model Act has altered the traditional incidents and implications of possession.

III

The Relevance of Possession Under Marketable Title Acts

In the absence of marketable title acts, possession of land is of major importance in the context of land title security for two reasons: (1) in all states, possession may ripen into, or cure, title under "adverse possession" statutes; (2) in many states, possession inconsistent with the record title gives a purchaser constructive notice of any unrecorded rights of the possessor, thus preventing him from cutting off those rights as a bona fide purchaser under the recording acts. We have already noted that, under marketable title acts, it is immaterial that the person claiming a marketable record title to land has constructive or even actual notice of the interest he wishes to extinguish. It is likewise immaterial that any purchaser from him has notice of the interest. Consequently, the constructive notice that possession gives does not itself prevent the possessor's interest from being extinguished. If the interest depends on events prior to the recording of the root of title, it may be extinguished even though its holder had possession when forty years passed from the recording of the root and also is in possession when marketability is being determined. His only hope of preserving his interest lies in bringing it within one of the exceptions provided by the marketable title act.

43 In other words, the possession must begin before the recording of the root of title of the person claiming marketable record title, and continue to the time when the latter's title is being examined, that is, to the "present." This apparently is the only exception in the Model Act that would protect possessors not claiming full ownership, e.g., lessees and life tenants. See p. 78 & notes 97-99 infra.
Two exceptions in the Model Act may extend protection to the possessor. The section 4(b) exception, discussed above, applies only where there has been continuous possession for at least forty years prior to the time the interest could otherwise be extinguished and such possession has continued to the time marketability is being determined. The other exception protects "the rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title." The intention of the draftsmen was to leave undisturbed the operation of any statute of limitations. The latter exception thus appears to protect any "owner" under a senior chain from extinguishment of his interest by a junior chain, as long as he can prove continuous possession sufficient for an adverse possession title, some portion of the possession having occurred after the recording of the junior chain's root. If an "owner" relies on the adverse possession rather than the forty-year exception, however, the act would still extinguish his "record" title, leaving only his unrecorded adverse possession title intact. Many cases might arise, however, in which the present possessor would be unable to bring himself within either exception, because of his inability to prove continuous possession for either length of time.

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44 See p. 60 & note 43 supra.
45 Model Act § 2(c).
46 See Model Act § 7; Simes & Taylor 13.
47 Unfortunately, the Model Act does not state where the burden of proof lies. Burden of proof could be important both in a suit by the holder of the 40-year record title to oust the possessor and in a suit by the holder to compel a contract vendee to accept his title as marketable in spite of possession by another. Must the possessor (or the contract vendee) prove that the possession was of such character and duration as to bring the possessor's right within one or the other of the exceptions, or must the holder of the 40-year record title prove that the possession is not within either exception? Under the usual principle that the burden should be on the one in whose knowledge the proof peculiarly lies, the possessor presumably would have the burden. Likewise, the vendee might get the burden if the principle is applied that one should never be required to prove the negative of any fact. (This assumes that continuous possession for a certain length of time is easier to prove than the lack of it.)

These results appear to be in line with the purpose and language of the acts. But such results would be disastrous and unnecessary as well. In the case of the contract vendee, marketability is suspect if, at the time of the transaction, a third person is in possession under claim of right inconsistent with the title claimed by the vendor. Since marketable title acts (despite their misleading titles) were never intended to change the rule that a vendee cannot be compelled to buy a lawsuit, the vendee should be excused from his contract whenever such a possession is brought to light. It would be wrong not only to require the vendee to prove one or the other exception applicable, but also to permit the vendor to hold the vendee to his contract by proving both exceptions inapplicable.

If suit is against the possessor, the most desirable solution is to require the possessor
Another result of the adverse possession exception is that the Model Act only partially solves the problem of the "absent adverse possessor." Suppose X takes possession of O's land in 1900, and continues in possession until the statutory period has run, say 1910. Under most adverse possession statutes, X has become the owner and O's title is extinguished, even though no court action has been brought by either. X's title is not marketable, of course, until proven in court, but this can be done at any later time as long as the testimony showing adverse possession is still available. Now, suppose X goes out of possession in 1911. Subsequent conveyances from O to bona fide purchasers cannot cut off X's title under the recording acts; those acts nullify only instruments that are unrecorded or deemed so, whereas his title is not based on any written instrument. Yet, nothing on the land or in the records gives notice of X's interest to subsequent purchasers from O. Under the model marketable title act, however, if O conveys to A in 1915 and the deed is recorded the same year, A will extinguish X's title in 1955, assuming that X has not brought suit or filed a notice of claim in the meantime. But if any part of the period of adverse possession has taken place since the effective date of the root of title (in our example, if O had conveyed to A in 1909 rather than in 1915), then the Model Act would not eliminate X's interest.

The Florida act eliminates this problem completely, though perhaps unwittingly. It is worded in such a way as to extinguish all claims and interests in favor of the "marketable record title" unless they fall within the specified exceptions, whereas the Model Act extinguishes only those interests that depend on transactions and events occurring prior to the recording of the root of title.48 The only relevant excep-

to prove his record ownership of a possessory interest in the land and a present possession openly and notoriously inconsistent with the 40-year record title. This should suffice to show, prima facie, the applicability of § 4(b). The holder of the 40-year record title should then have to prove that the possession so claimed is not within the exception of § 4(b). If the latter is not proved, the only result would be that the marketable title act would not itself extinguish any rights the possessor may have; the contest would be determined without reference to the act. If, on the other hand, the possessor fails to make such a prima facie case for the protection of § 4(b), or the holder of the 40-year record title succeeds in demonstrating it to be inapplicable, then the possessor ought to have the full burden of proving an adverse possession title that has matured since the effective date of the root of title. (We are assuming, of course, that the records extending back to the root of title show no rights in the possessor.) For a discussion of the somewhat similar problem of the burden of proof of "notice" under the recording acts, see Johnson, supra note 1, at 237-38.

48 The Florida act has a provision like § 8 of the Model Act, purporting simply to free the "marketable record title" of all claims and charges the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of
tion in the Florida act protects "[r]ights of any person in possession of the lands, so long as such person is in such possession." Thus, even an adverse possessor whose period of possession is wholly subsequent to the root of title can be cut off if he fails to remain in possession.

The exception in the Florida act also succeeds in protecting the record title of a senior grantee in possession from being cut off by a junior grantee not in possession. The senior grantee's possession need only commence just before his record title would be extinguished, i.e., before the root of title of the junior chain has been of record forty years. But the possession must continue uninterrupted thereafter, for otherwise the act would extinguish his interest. A provision in the Michigan act, though somewhat ambiguous, appears to have the same effect. It provides 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." This provision, whenever applicable, seems rather unnecessarily to extend its protection beyond the hostile possessor's interest and to shield all interests from being cut off by the act.

None of the provisions so far noted would protect a senior grantee out of possession from being cut off by a junior grantee who is also out of possession. Some state legislatures apparently were unable to accept a result so contrary to our traditional notions of justice, and have required that the person claiming a marketable record title be in possession to obtain the extinguishment benefits of the act.

One major problem with importing the question of possession into the acts is that "possession" is a fact extraneous to the records. If

the root of title. FLA. STAT. ANN. § 712.04 (Supp. 1966). The provision of the Florida act comparable to § 1 of the Model Act, however, states that "any person ... shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability ...." Id. § 712.02 (emphasis added). This language clearly appears to free the title of matters subsequent to the root, unless they are protected by one or another of the specific exceptions made by the act. Thus, in the Florida act, the extent of coverage of the exceptions takes on an added significance.

49 Id. § 712.03(3).
51 The Michigan provision also gives rise to other absurdities. For an example, see Jossman, supra note 6, at 429.
52 These states are Nebraska, North Dakota, and South Dakota. NEB. REV. STAT. § 76-288 (1958); N.D. CENT. CODE § 47-19A-01 (1960); S.D. CODE § 51.16B01 (Supp. 1960). The North Dakota provision received a rather strict interpretation in Northern Pac. Ry. v. Advance Realty Co., 78 N.W.2d 705 (N.D. 1956), in which the court held that possession of the surface did not constitute possession of the minerals, and hence the act would not cut off an outstanding mineral interest.
a title examiner cannot determine from the records alone whether an interest has been extinguished, the usefulness of the acts is diminished. The difficulties are even further compounded if, under the provisions of the act, the crucial possession may have taken place sometime in the past. The acts that require possession by the person claiming marketable record title attempt to solve this problem by specifying that he may place the fact of his possession on record by means of affidavit. This is small help to the title examiner, because presumably possession still must be proved in court if disputed. The acts providing that possession by the holder of an interest prevents the extinguishment of the interest should require that such possession continue to the time marketability is being determined. In this way, the title examiner would be freed of the task of ascertaining past possession.

IV

WHO MAY CLAIM A MARKETABLE RECORD TITLE?

We have already noted that the person claiming a marketable record title need not be a bona fide purchaser. Indeed, notice of outstanding interests is always irrelevant to the extinguishment feature of the acts. We have also noted that, under the Model Act and the majority of the enacted versions, the person claiming a marketable record title need not have been in possession at any time.

The next most important fact to note is that a person may obtain the benefits of a marketable title act even though he is not claiming a fee simple. The Model Act and most of those based on it say that "[a]ny person . . . who has an unbroken chain of title of record to any interest in land for forty years or more, shall be deemed to have a marketable record title to such interest . . . ." Thus, the holder of any type of interest in land who can trace his interest back of record to a root at least forty years old can claim the benefit of the act. It is reasonably clear that the act would cut off only those interests prior to the root which are inconsistent with the interest to which a marketable record title is claimed; so benefits reaped by interests less than a fee simple would be rare. For example, the holder of an easement of record for forty years could hardly claim to cut off a holder of the fee simple whose deed is even older, because the former interest does not purport to in-

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53 For an interesting case in which the court had to decide what character of possession was required under a marketable title act to preserve an interest from extinguishment, see B.W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 59 N.W.2d 813 (1953).

54 Model Act § 1 (emphasis added).
clude the latter. The act might, however, have the effect of subjecting the fee to some such lesser interest to which it would not otherwise have been subject. On the other hand, suppose that in 1915 O, the owner of Blackacre, executes to A a mineral deed covering one-fourth of all oil, gas, and minerals in Blackacre. Then in 1925 O executes to X a deed purporting to convey ownership of all oil, gas, and minerals in Blackacre. There is no apparent reason why X, in 1965, could not claim the benefit of the act to extinguish any interest of A, thus giving X a marketable record title to the full mineral interest in Blackacre.

If the main purpose of the acts is to clear the titles of fee simple claimants, one may ask why its effect was not thus limited by the drafters. Simes and Taylor plead that they found insurmountable difficulties in attempting to define the “fees simple” in favor of which the act would operate. The Florida act apparently is the only one that clearly limits the types of interests that may benefit under the act. It provides that “[a]ny person . . . who . . . has been vested with any estate in land of record for thirty years or more, shall have a marketable record title to such estate in said land . . .” Thus, an interest that has never been regarded as “an estate in land” could not qualify for benefits under the Florida act.

All the acts require that the person claiming a marketable record title have “an unbroken chain of title of record” from the root of title. Thus, until all gaps in the post-root chain are filled by recorded quit-claim deeds or other recorded curative instruments or proceedings, the extinguishment feature of the acts will not operate. If one of the gaps is caused by an owner’s death intestate, the extinguishment feature of the acts probably will not operate until there has been some type of judicial determination of heirship. Affidavits of heirship will probably be held insufficient to fill such a gap.

A related problem is whether all the links in the post-root chain must effectively have transferred the interest down to the person claiming a marketable record title. The Model Act provides that A person shall be deemed to have such an unbroken chain of title when the official public records disclose a . . . title transaction,
record not less than forty years . . . which . . . purports to create such interest, either in (a) the person claiming such interest, or (b) some other person from whom, by one or more . . . title transactions of record, such purported interest has become vested in the person claiming such interest . . . .

Suppose the root of title is a deed from O to A, recorded in 1915. The records then show a deed from A to B, recorded in 1960; but at the time of its execution A was under an adjudication of incompetency by a court in another county. Finally, the records show a deed from B to C in 1965. C is selling to P in 1967, and neither they nor the title examiner for the transaction are aware that the deed from A to B was ineffective. May the examiner safely rely on the act to extinguish interests prior to the 1915 deed? Obviously, the act will not cut off A's interest. But the real problem is whether the extinguishment feature of the act will operate at all in light of the fact that, because of A's unknown incapacity, the interest created in A by the 1915 root of title has not "become vested" in C. In any event, P's title will be worthless unless he can get a proper deed from A's guardian, at which time the extinguishment feature of the acts presumably will operate. But if holders of interests prior to the root have this additional period in which to file a notice of claim to preserve their interests, title examination may be especially hazardous. The simple solution to the entire problem would have been for the act to use the phrase, "appears to have become vested," instead of "has become vested."

59 Model Act § 1 (emphasis added).
60 It is just such "hidden" post-root defects against which title insurance will continue to be needed.
61 Whether holders of pre-root interests do have this additional period is debatable. Section 4(a) of the Model Act states that they must file within 40 years after the effective date of the root of title, but qualifies the requirement by adding that it is the "root of title of the person whose record title would otherwise be marketable." (Emphasis added.) These italicized words, when coupled with the provisions of § 1 of the Model Act, raise the doubt.

No such time limit appears to exist with respect to the filing of a suit on a pre-root claim or interest. As long as the post-root chain remains infirm, and the extinguishment feature of the act inoperative, a suit can be filed to preserve the pre-root claim even if a notice of claim could not preserve it.

62 Relying on the apparent adequacy of the post-root chain of title, the examiner might disregard many pre-root interests, believing them to be cut off by the act, and concentrate on root and post-root interests. Even where there is a gap in the post-root chain, he might well disregard pre-root matters, on the ground that they will be cut off as soon as the gap is closed. Thus, unless he obtains a supplemental abstract covering the period through the final recording of all curative material, or checks for notices himself up to that point, he may overlook a notice of claim filed in this period.
 Aside from the exception covering interests for which a notice of claim is filed, two exceptions in the Model Act relate to interests that tie into the records subsequent to the root of title—subsections (a) and (d) of section 2. The first of these makes the marketable record title subject to:

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

This exception apparently protects only those interests or claims disclosed by, or based on defects inherent in, the recorded transactions that form the links in the chain of title of the person claiming a marketable record title. The provision means only those links subsequent to and including the root of title itself, although this is not as obvious in the Model Act as in the Florida and Indiana acts. For example, if the root of title is itself a forged deed, the act will not extinguish the interest of the person whose name appears as grantor therein, even though his interest "depends upon [a] . . . transaction . . . that occurred prior to the effective date of the root of title" and is thus otherwise subject to extinguishment under section 3 of the Model Act. Similarly, the act will not eliminate the problem of forgeries in any link subsequent to the root of title, although it will extinguish the rights of owners whose names were forged to links in the chain of title prior to the root. The same is true of deeds ineffective for lack of delivery or incapacity of the grantor. Thus, the acts do not make any record title either commercially or legally marketable, because, for one thing, they do not free it from defects and interests in the chain of title.

63 The comparable exception in the Florida act reads: "Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title . . . ." Fla. Stat. Ann. § 712.03(1) (Supp. 1966) (emphasis added). Although the comparable exception in the Indiana acts reads the same as in the Model Act, the definitions section defines "muniments" as "the records of title transactions in the chain of title of a person . . . commencing with the root of title and including all subsequent transactions." Ind. Ann. Stat. § 56-1108(b) (Supp. 1967).
beginning with the root. Such defects still may result in loss of the title, whether they are discoverable from the records or not.

The exception also protects from extinguishment any interest dependent on a transaction recorded prior to the root of title, if a specific reference to it is made in any recorded instrument forming a link in the chain beginning with the root. Herein lies a host of problems for the title examiner. Suppose that in 1900 O conveys Blackacre to A, reserving a possibility of reverter if the land is ever used for a tavern. In 1920, A conveys to B, the deed reciting that it is "subject to all reservations, limitations, and conditions of record." In 1955, B conveys to C, the deed reciting that it is "subject to the certain possibility of reverter reserved in a deed from O to A, dated 1900, and recorded in the public records of the county." Is the possibility of reverter extinguished in 1960? The root of title—the 1920 deed from A to B—makes only a general reference to the interest. Under the language of the Model Act's exception, such a reference would not suffice to preserve the interest. The reference in the 1955 deed can hardly be characterized as a "general" reference, but does it contain a specific identification of the recorded transaction creating such right? The Florida act states clearly that "specific identification" means giving the book and page of the records. Unfortunately, however, this requirement, like that in the Model Act, is imposed only on "a general reference;" there appears to be no specific identification requirement where the reference itself is specific.

Another curious problem of interpretation would arise if, in the preceding example, the 1955 deed from B to C had simply repeated the same general language of the 1920 deed from A to B. In other words, none of the deeds in the chain of title with the root would contain a reference to the reverter right sufficient to preserve it from extinguishment. Suppose also, however, that in 1930 a mortgage from B to M was recorded and that it recited that it was subject to O's possibility of reverter. The mortgage specifically identified the 1900 deed by book and page of the records, but since it was subsequently released of record in 1940, it does not form a link in C's chain of title. The question then

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64 The discussion in this paragraph in the text uses the term "chain of title" and "links in the chain of title" in the sense of the actual deeds or other title transactions by which an interest has been transferred to the person claiming marketable record title, not in the sense used earlier in describing what constitutes a reasonable search under the recording acts. Thus, an instrument may be recorded within the "chain of title" in the latter sense, and yet be outside the protection of this exception (§ 2(a) of the Model Act).

65 FLA. STAT. ANN. § 712.03(1) (Supp. 1966).
arises whether the mortgage constitutes one of the "muniments of which [C's] ... chain of record title is formed;" if it does, its specific reference to the reverter right would preserve the interest under section 2(a). The writer believes the answer to the question would be "no," though the reverter right will obviously be discovered by every title examination of the post-root chain regardless of the method of search. Yet, unless the reference preserves the reverter right under section 2(a), the right will not be preserved at all, since it does not "arise out of" the mortgage and is therefore not preserved by section 2(d).

A final problem with section 2(a) is that it may well preserve pre-root interests created by unrecorded instruments if specific reference to such an interest appears in the root of title or any subsequent link in the chain of title. Such references in the record to unrecorded interests have created serious problems for title examiners in the past, because the notice imparted by them prevents the recording acts from extinguishing those interests.

The second exception, section 2(d), provides that marketable record title is subject to:

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

The question is whether an interest is to be deemed to "arise out of" any transaction transferring it, or merely out of the initial transaction by which it was created as an offshoot from the original chain of fee simple ownership. If the language of the exception is given its natural meaning, the latter interpretation would be favored, though apparently the former was intended. Under the natural interpretation the exception would protect relatively few interests, i.e., only those created by a title transaction that occurred before the recording of the root of title but was recorded within forty years after it. Those created by title transactions occurring after the recording of the root of title have no need of protection because they are outside the scope of the extinguishment feature of the act in the first place. Their existence does not depend "upon any act, transaction, event or omission that occurred

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66 See p. 55 supra.
67 This is not true of the Florida act. See note 48 supra. Consequently, this exception is of tremendous significance even when given its natural meaning.
prior to the effective date of the root of title' except in the same sense that all interests in the land do.

Some interests prior to the root of title are excepted from extinguishment even though they are neither inherent in, nor disclosed by, the root or any recorded transaction since the root. Such exceptions, of course, force the title examiner to check the records behind the root of title in order to ascertain whether any such interest is outstanding. To that extent, one of the central purposes of the acts—to shorten title examinations—is thwarted. Of course, even if this type of exception covered all interests created by express language in recorded instruments, the title examiner's job in checking the records behind the root of title would still be far simpler and easier than if there were no marketable title act at all. But none of the marketable title acts discussed in this article makes any such broad exception; they limit exceptions of this type to specific kinds of interests. Subject to this general observation, differences among the acts are great. For example, the Model Act excepts only the reversionary rights of lessors, the rights of the United States, and certain easements. On the other hand, the Nebraska act excepts not only lessors' reversions and rights of the United States, but also rights of any remainderman upon the expiration of any life estate or trust created before the recording of the root, rights founded upon any mortgage, trust deed, or contract for sale of lands that is not barred by the statute of limitations, conditions subsequent contained in any deed, rights of the state of Nebraska, and any encumbrances of record not barred by the statute of limitations.

A. Mortgages

Suppose that in 1925 O gives M a mortgage on Blackacre to secure a note repayable over a forty-five-year period. Under the Model Act, it would be wise for M to file a notice of claim against Blackacre in 1965, before his mortgage has been of record forty years. Otherwise, if in 1925, shortly after the mortgage was recorded, O conveys to A by deed that does not mention the mortgage, and if A records his deed that year, it will serve as a root of title to cut off the mortgage lien in 1965, five years before the note is completely due. There is no provision in the act which would protect the mortgage lien from being cut off, even if A continues to make the payments due from O on the note. It may be that a court of equity would hold A estopped by his

68 Model Act §§ 2(e), 6.
70 The Minnesota Supreme Court refused to reach such a result under that state's
payments to deny M’s rights, but if A has conveyed to B in 1966 and B has made no payments, how could B be estopped to claim the benefits of the marketable title act? Since most mortgages are repayable over periods of thirty-five years or less, the Model Act does not create much of a hazard for mortgagees; they normally would have at least an additional five years to foreclose in the event of a delinquency on the final payments. But to the extent that either the repayment period for any mortgage exceeds thirty-five years or the period prescribed by the act in question is shorter than forty years, there is a real danger. For example, the period of the Florida act is thirty years; yet it has no exception protecting mortgage liens from extinguishment other than the general provision for filing a notice of claim. Before passage of the Florida act, Florida law did not bar the lien of a recorded mortgage until twenty years had passed since the due date of the indebtedness, if that date appeared in the record of the mortgage, and if not, then the period was twenty years from the date of the mortgage itself. If an extension agreement had been filed for record, the mortgage lien was not barred until twenty years from the new due date expressed in that instrument.

Presumably, an extension agreement, or an assignment of mortgage recorded within the forty years since the root of title, ought to prevent the extinguishment of a mortgage recorded prior to the root. But it is difficult to bring the mortgage lien within either of the two relevant exceptions in the Model Act. The right subject to extinguishment—the mortgage lien—does not “arise out of” the extension agreement or assignment. Nor can the extension agreement or the assignment constitute one of the “muniments of which [the owner’s] chain of record title is formed” until the mortgage is foreclosed. A marketable title act, but had to engage in some judicial amendment of the act to avoid it. See Wichelman v. Messner, 250 Minn. 88, 104-05, 83 N.W.2d 800, 814-15 (1957) (dictum). An even more peculiar result may be the consequence where a purchase-money mortgage is recorded before the recording of the deed by which the mortgagor acquired his title. In Miami, Florida, and possibly in other areas, it is the practice of some institutional mortgagees to require execution of the mortgage by the borrowing purchaser before the sale is closed, so that the mortgage may be recorded and a supplemental abstract prepared to apprise the mortgagee, before it disburses the loan, of any liens outstanding against the borrower personally. Thus, even a mortgage that is part and parcel of the same transaction as the deed serving as the “root of title” can be cut off 40 years later because it was recorded before the deed.

71 FLA. STAT. ANN. §§ 95.28, 95.30 (1960).
72 Id. § 95.29.
73 See Model Act § 2(d).
74 See Model Act § 2(a).
fortiori; the recording of a subordination agreement of the mortgagee within the period since the root would not preserve his lien.

In several states the mortgagees' lobby apparently succeeded in getting an exception for mortgages written into the marketable title acts, thereby avoiding the problem of having to file notices of claim.

A word should be said about the vendee under an installment land contract that extends beyond the period of the act. To protect himself against the possibility of being cut off by his vendor's having conveyed to someone else after the date of the contract, he should file a notice of claim within forty years from the date of the contract, regardless of whether the contract was recorded. Only Nebraska, North Dakota, and South Dakota provide an exception for contracts of sale. Where the vendee under an installment land contract takes possession, however, he may be entitled to the shelter of section 2(b) or (c) of the Model Act.

B. Easements

Unlike mortgages, easements are interests in land that are usually intended to remain permanently outstanding. Easements are so important that courts have preserved them even when they were not discoverable from the records and hence a serious impediment to land title security, as in the case of easements by implication and prescription. Many public utilities rely on easements to provide indispensable services. It is, therefore, hardly surprising that every marketable title act carries some exception for easements.

The Model Act restricts its exception to "any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use." None of the enacted versions is so restrictive. Although the Michigan, Ohio, and Utah acts copy the


77 The vendee can, of course, protect himself by examining his vendor's title periodically during the life of the installment land contract, a procedure which he should probably follow anyway just to protect his interests under the recording acts. See Alexander v. Andrews, 135 W. Va. 403, 415-18, 64 S.E.2d 487, 494-95 (1951).

78 Model Act § 6. The exception clearly applies to easements by implication and prescription and others undiscoverable from the records, such as a "way of necessity," as well as to recorded easements.
Model Act provision, each of them adds at least one other less stringent exception covering easements. Utah and Ohio flatly except easements created or held for any railroad or public utility purpose, Utah including pipeline and highway purposes as well. The Michigan, Ohio, and Indiana acts except any easement the existence of which is evidenced by the location of any physical facility beneath, upon, or above any part of the land described in the instrument creating the easement, whether or not the existence of the facility is observable. Although this exception is thus restricted to easements created by written instrument, the protected easements will not necessarily appear of record. Even if easements created by unrecorded instruments may be nullified by the recording acts, so that it is superfluous to require (as the Michigan exception does) that the instrument be recorded, courts will probably find it a simple matter to construe the exception as protecting easements by implication. The Oklahoma act simply excepts easements from extinguishment altogether. Under the Nebraska, North Dakota, and South Dakota acts, which except any “encumbrances of record not barred by the statute of limitations,” presumably all recorded easements will be protected. The North Dakota act also specifies that it will not be “applied to the right, title or interest of any railroad.” The Utah act appears to except prescriptive easements if the use has continued to any time subsequent to the root of title.

The Florida act excepts recorded and unrecorded easements “so long as the same are used and the use of any part thereof shall except from the operation [of the act] . . . the right to the entire use thereof.”

80 The wording of this exception in the acts mentioned appears to preserve the right of contribution arising from a recorded agreement for joint maintenance of a party wall, because it covers not only the easement for the wall itself but also “any rights appurtenant thereto granted, excepted or reserved by the instrument creating such easement.” Ind. Ann. Stat. § 56.1106 (Supp. 1957); Mich. Stat. Ann. § 26.1274(4) (Supp. 1965); Ohio Rev. Code Ann. § 5301.53(c) (Page Supp. 1966). The Model Act, however, does not seem to preserve such a right of contribution. The Minnesota court managed to include party wall agreements, and even easements generally, under an exception for the rights of “persons in possession of real estate.” Wichelman v. Messner, 250 Minn. 88, 103, 83 N.W.2d 800, 814 (1957) (dictum). For a case in which that interpretation was of no avail to the easement holder, see United Parking Stations, Inc. v. Calvary Temple, 257 Minn. 273, 101 N.W.2d 208 (1960).
Under the Florida act it is not necessary that the use be observable, just as the existence of the physical facility need not be observable under the somewhat similar provision of the Michigan, Ohio, and Indiana acts. Although these four provisions do not have the advantage of the Model Act's provision that the easement must be "clearly observable," the requirement of use or of the existence of a physical facility does appear at first glance to provide some possibility of notice of the outstanding easement to a prospective purchaser. Although he may have to dig up the entire tract to discover an underground pipeline, means are theoretically available to him for discovering the easement's existence. Suppose, however, that in 1920 the owner of a quarter section of land grants to XYZ Pipeline Company an easement for an underground pipeline extending along the entire western boundary of the quarter section. The instrument granting this easement is recorded that same year. But the Company decides to use immediately only the most southerly hundred feet of the easement. In 1924 the owner of the quarter section conveys it to a developer who subdivides it into a large number of residential lots. Neither the 1924 deed nor any of the subsequent deeds to the individual lots specifically identifies this easement. In 1964 can the owners of lots along the western edge of the quarter section, outside that portion of the easement which is actually being used, claim that their titles are free of the easement? In other words, does the fact that a portion of the easement as originally granted is still in use preserve the entire easement from extinguishment under the Florida act? Or, under the Michigan, Ohio, and Indiana acts, does the continued existence of a physical facility on a part of the whole tract described in the instrument granting the easement preserve that easement on other parts which in the meantime have been severed from the tract? If the entire easement is preserved, the problems of title examiners will be complicated; old easements will be capable of being preserved by phenomena on lots other than that under examination. On the other hand, if the entire easement is not preserved, utility companies will have to file notices of claim every forty years to protect those portions of recorded easements not in current use.

C. Restrictive Covenants

Since those rights that are variously called real covenants, negative easements, and equitable servitudes are perhaps still the principal device for assuring that residential subdivisions will retain their uniform character, and since they have generally been looked upon with favor by the courts, serious consideration must be given to their
status under a marketable title act. Simes and Taylor appear to take
the position that such rights usually lose their social utility after the
subdivision is forty years old, and since the Model Act could not cut
them off before that time, there is little danger that they will be ex-
tinguished before they have outlived their usefulness.\textsuperscript{85} The writer has
serious reservations about the matter.

In 1965 the writer purchased a house in an exclusively residential
area on the outskirts of Miami, Florida. Title examination showed
that the subdivision was platted and the sale of lots commenced in
1937, restrictive covenants being inserted only in the deeds to the
individual lots as they were sold. Yet the writer's house was not built
until 1952, and a number of homes were built even more recently.
Under the Florida act, which provides for a thirty-year period and
contains no exception for restrictive covenants, the covenants burden-
ing a lot sold in 1937 might be extinguished in 1967, unless some owner
in the subdivision filed a notice of claim before then. Such a possibility
would become reality if a purchaser in 1937 conveyed the same year
without specifically identifying the deed to him, which contained the
restrictions; in 1967 his conveyance would cut off those restrictions.
The unburdening of one lot in the subdivision might cause the re-
strictions to become unenforceable \textit{throughout} the subdivision, be-
cause the entire subdivision would no longer be burdened uniformly.

If the restrictions appear on the plat, presumably such a "disaster"
cannot occur, since each successive conveyance of a lot must identify
the plat in order to describe the land conveyed; thus, they are pre-
served by the exception for "interests and defects which are inherent
in the muniments of which [the owner's] \ldots chain of record title is
formed." So, of two methods traditionally used to impose restrictive
covenants on a subdivision, one rather accidentally preserves the
covenants from extinguishment, while the other does not. This is one
example of how the mechanical operation of marketable title acts may
extinguish one interest and preserve another of the very same kind,
though justice demands the same treatment for both.

The standard answer, of course, is that any interest can be pre-
served from extinguishment by filing a notice of claim. In the case of
restrictive covenants, however, the answer is hardly practical. Each
lot owner possesses a right or interest in the land of every other lot
owner in the subdivision. Let us indulge the rather fanciful assump-
tion that the owner of Lot 1 knows about the marketable title act in

\textsuperscript{85} \textit{Simes \& Taylor}, 224-29.
his state. If he wishes to protect his interest in the other lots, appar-
ently he must draw up a notice of claim covering each of the other lots
in the subdivision and file all of them for record. And he must act
before the period specified in the marketable title act has elapsed from
the platting of the subdivision, to ensure that no root of title to any
lot could reach the age required to extinguish the restrictions on that
lot. In Florida his problems are further complicated, since the act
requires each notice of claim to state not only the claimant's name, but
also the name and post office address of the "owner" against whose land
the claim is filed. Fortunately, that act allows him to insert the name of
the person in whose name the land has been last assessed for taxes, as
though such person were the "owner." Nonetheless, in a large sub-
division his task obviously is complex.

Even after the completion of such herculean labors, can the owner
of Lot 1 be sure that his subdivision is adequately protected from the
menace of the marketable title act? It is doubtful that the filing of his
notice of claim on Lot 2, for example, will preserve the interest of the
owner of Lot 3 in the restrictions on Lot 2. And if none of the other
lot owners ever files a notice of claim against Lot 1, the restrictions
on that lot may be extinguished while those on the other lots are
preserved. But if any lot in the subdivision ceases to be uniformly
burdened in favor of every other lot, the restriction scheme may be-
come unenforceable altogether.

Simes and Taylor suggest a possible draft provision that could be
inserted in a marketable title act to permit the filing of one notice of
claim to preserve the restrictions throughout an entire subdivision. Such a provision was included in the Indiana act. But it applies only
where subdivision plans provide for an association or group empow-
ered to determine whether the restrictions are to be terminated or
continued at the expiration of a stated period of time not to exceed
the period of the marketable title act. Only the officer or other repre-
sentative of the group may file the notice of claim on behalf of all
owners in the subdivision.

86 FLA. STAT. ANN. § 712.06(1-2) (Supp. 1966).
87 Simes & Taylor 228-29. They also suggest that the Model Act's exception for "observable" easements might be construed to protect a negative easement or equitable
servitude. Id. at 224. Such an interpretation seems, at best, rather doubtful; but, in order
to avoid it, Indiana expressly excluded the latter type of interest from its exception for
easements. IND. ANN. STAT. § 56-1104(3c).
88 Id. § 56-1104(3c).
The Oklahoma act simply excepts from its operation all "use restrictions or area agreement which are part of a plan for subdivision development." 80

D. Sovereign Rights

Although a state statute probably cannot affect any right, title, or interest of the United States, 90 the Model Act and all of the enacted statutes except that of Indiana provide that they do not affect such rights. The Florida, Michigan, Ohio, Nebraska, North Dakota, and South Dakota acts go further and except from their operation all interests of the state itself. Without such an exception, those interests would be subject to extinguishment, particularly since the acts specifically make it immaterial whether the holder is "natural or corporate, . . . private or governmental." 91 In these six states, then, it is necessary to search the records back of the root of title to determine: (1) that a patent or other deed out from the state is of record covering the land (if the state is or may be the source of private title for land in that area), (2) that such instrument reserved no interests or other rights in the land, and (3) that no subsequent transaction or proceeding vested any interest in the state that has not since passed back into private ownership. 92 For instance, in Florida the original deed out from the state commonly reserved mineral rights or the right to construct canals and dikes for drainage; also, deeds executed by the state following forfeiture for delinquent taxes often reserved highway easements and similar interests. 93 Although such interests are older than the root of title and are not disclosed in the records subsequent to the root, they would not be extinguished in the six states mentioned. Consequently, title examiners must search for them back of the root.

E. Mineral and Water Rights

Mineral and water rights are of great importance in a number of states. Yet they, too, are often interests in particular land which are permanently outstanding in someone other than the owner of such land. Unless some exception is made for them, such interests are sub-

80 See Simes & Taylor 357.
81 See Model Act § 3.
82 Of course, in all jurisdictions a similar investigation must be made for possible interests of the United States.
ject to extinguishment to the extent they fit that description. Of course, the owner of the surface could not extinguish a mineral interest if his root or any subsequent link in his chain purports simply to be a conveyance of the surface. In such case, his interest would not purport to include the minerals and hence would not be “freed” by the act from outstanding rights in them. If, however, the surface owners have uniformly transferred their interest by deeds that purport to convey the land, their chain could cut off outstanding interests in the minerals. To say that such a recorded chain could not cut them off for the simple reason that the mineral estate had already been “severed” from the surface estate,94 is to misunderstand completely the purpose and mode of operation of a marketable title act.95

If minerals are being produced or water taken from the land by the holders of such rights during the period since the root, the rights may come within the protection afforded by sections 2(c) or 4(b) of the Model Act.

The Ohio, Oklahoma, and Utah acts provide exceptions for interests in minerals; and Utah excepts water rights.96

F. Other Interests

The Model Act and most of the other acts provide an exception for the reversionary right of a lessor on the expiration of a lease.97 Without such an exception, a long-term lessee might, without the knowledge of his lessor, give an absolute deed to his transferee rather than merely an assignment of the leasehold estate and, after the deed had been of record forty years, thereby cut off the lessor’s title. The justification offered by Simes and Taylor is that a lessor, being out of possession, might reasonably overlook the requirement for filing a notice of claim.98 To some extent the same justification could be offered for an exception covering the interests of reversioners and remaindersmen following a life estate. Yet neither the Model Act nor most of the enacted versions make any exception for reversions or remainders following a life estate or, indeed, for future interests of any kind.99

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94 Wichelman v. Messner, 250 Minn. 88, 103-04, 83 N.W.2d 800, 814 (1957).
95 For a case recognizing that a marketable title act can cut off a severed mineral estate, see the opinion of the Ontario Court of Appeal in In re Algoma Ore Properties, Ltd., [1953] Ont. 634.
97 Model Act §§ 2(c), 6.
98 Simes & Taylor 357.

MARKETABLE TITLE ACTS

Similar problems can arise with respect to all of the various types of co-ownership: tenancies in common, joint tenancies, tenancies by the entirety, community property. If one of the co-owners makes a conveyance purporting to transfer the entire interest belonging to the co-owners, and the other co-owners bring no action to have it set aside, file no notice of claim, and are not themselves in possession, their interests may be extinguished when the conveyance has been of record forty years. Such a conveyance might be held not to result in extinguishment of the other co-owners’ interests where the grantee is in fact a “straw man” who later proceeds to reconvey to the one co-owner who was his grantor. Unfortunately, a title examiner forty years later would be unable to discover such a situation unless he goes behind the root of title, which is the “straw man” conveyance, to check whether a grantee in the post-root chain appeared in the pre-root chain. If the title examiner fails to make such a precautionary examination of the pre-root chain, he runs the risk that the root of title will be held to be a “defective” conveyance and that the interests of the other co-owners are preserved by the exception found in section 2(a) of the Model Act. The equities in favor of such a result might be particularly strong if the dishonest co-owner has remained in possession all along, since nothing on the land itself would ever give notice to the other co-owners of a scheme to deprive them of their interests.

(1960); S.D. Code § 51.16B10 (Supp. 1960). Actually, a lessor’s reversion is probably in less need of protection by specific exception than a reversion following a life estate, because presumably the lessor will evict as soon as he ceases to receive rent, and any transferee of the lessee who continues to pay the rent will doubtless be held estopped to assert the marketable title act in denial of the lessor’s rights even though he holds an absolute deed in fee simple from the lessee. (A subsequent transfer by deed in fee simple, taking place after the first transferee’s deed had been of record 40 years, would, however, alter the picture completely, assuming this second transferee never paid any rent or in any other way “recognized” the landlord’s rights.) The reversioner following a life estate, on the other hand, has no such built-in device (rent) to warn him that a transferee of the life tenant is claiming full ownership, and similarly no basis for invoking an estoppel.

100 Conceivably, if the type of co-ownership is one in which the interest of one co-owner is held to be inalienable without the joinder of the other, a deed from the one may be held “defective” as a root of title even though the grantee was actually a purchaser and not a “straw man” at all. Tenancies by the entirety are a good example; community property may be another. Although “homestead” and dower rights are not, strictly speaking, forms of co-ownership, non-joinder of one of the spouses may be held to give rise to the same sort of problem—a root of title with an “inherent” defect that may be discoverable from the records only by going behind the root.

101 A court might even be tempted to hold that the possession of the one cotenant “inured” to the benefit of the others, so that their interests would be preserved under § 4(b) of the Model Act. Such a holding would be just one step beyond the traditional doctrine that possession by one cotenant is not adverse to the others until they receive notice of his exclusive claim.
Another possible nightmare for the title examiner can occur when X, Y, and Z are cotenants of Blackacre, and X is in possession. If X fails to pay the taxes on the land, and the land is forfeited to the state, X might buy in at the state’s sale. Is the tax deed to X an adequate root of title, so that forty years later the interests of Y and Z are extinguished? Marketable title acts usually provide that a tax deed is a “title transaction” and may therefore serve as a root of title. Yet the courts have generally held that if one of the cotenants whose land was forfeited for nonpayment of taxes buys in at the sale, his tax title inures to the benefit of his fellow cotenants. By this doctrine the courts might find that the interests of the other cotenants are “inherent” in the tax title acquired by the one cotenant and are thus preserved by the exception. Again, the title examiner has no way of discovering such a possibility without investigating the state of the title prior to the root, the tax deed.

It may be well for a title examiner always to make such an investigation if the root of title is a tax deed, just to be sure that the grantee of the tax deed or his successors in the chain were not the prior owners. Many courts have held that an owner cannot “cleanse” his title of outstanding rights and interests by passing it through the filter of a tax sale, even in jurisdictions which regard a tax title as new and original rather than derivative. Thus, the courts may well hold that these outstanding rights and interests are “inherent” in the tax title if it is purchased by the former owner who had held subject to them.

102 See, e.g., Model Act § 8(f). Only the Florida and Michigan acts, among those discussed in this article, do not expressly so provide. See also Benner v. Crisman, 80 S.D. 532, 540, 127 N.W.2d 717, 721 (1964).

103 See Andrews v. Andrews, 155 Fla. 654, 21 So. 2d 205 (1945), which involved a tax deed, under Florida’s so-called Murphy Act, to one of two tenants by the entirety whose land had been forfeited for nonpayment of taxes. The case is particularly interesting, not only because Florida generally regards tax titles as a new and original title from the state, but also because the Murphy Act is such a drastic example of a tax forfeiture statute that seeks to extinguish all prior claims and interests in the land. If such an act failed to cut off the other tenant’s interest, is it likely that a marketable title act would fare any better?

104 It may be that this doctrine is applied to protect only those outstanding rights or interests with respect to which the former owner was under a “duty” to pay the taxes. See 2 R. & C. Patton, Land Titles § 486 (2d ed. 1957).

105 A somewhat similar problem is posed if a statute prescribes that certain types of interests, such as easements and restrictive covenants, always survive a tax sale. Does such a statute convert those rights into “interests inherent in” the tax deed, so that, as long as the tax deed remains the root of title, the marketable title act will not cut them off? Or do they survive only until the tax deed becomes the root of title, i.e., for only 40 years after the tax sale?
A number of states still provide that a wife may, upon the death of her husband, claim dower in all lands he owned at any time during coverture. In such states, a marketable title act probably has the effect of limiting her dower claim to those lands conveyed away by her husband within the forty years immediately preceding the bringing of her action, unless she has filed a notice of claim. Since dower rights "depend" on events prior to the recording of the conveyance from the husband, i.e., the coincidence of the marriage relationship and the husband's ownership, and since the husband's conveyance would never make reference to such rights, the rights would appear extinguished when the husband's conveyance has been of record forty years. If the wife has filed no notice of claim, her only hope of preserving the right is to argue that her failure to join in the husband's conveyance results in a "defect inherent in" the muniments of which his grantee's chain of record title is formed.\[^{106}\] If a court so holds, then the wife may assert her dower right against lands conveyed away by her husband more than forty years before.\[^{107}\]

VI
INDEXING THE NOTICE OF CLAIM

A major reason for permitting the preservation of old interests by the filing of a notice of claim is that they will thereby be disclosed in the records subsequent to the root of title. If, then, notices are indexed in such a way that they cannot be found readily, a search covering the period since the root is likely to be unreliable, and the purpose of the acts will thus be thwarted.

The Model Act and some of the enacted statutes provide that notices are to be indexed in the grantee index under the name of the claimant and also in a special tract index established solely for such notices.\[^{108}\] Indexing in the grantee index is virtually worthless by itself unless the law is to presuppose the use of a private abstractor; a title examiner working back through a grantee index would never find the notice, because it would not be indexed under any name in his client's

\[^{106}\] See Florida Title Standard 17.4, which apparently assumes such a result. Fla. Stat. Ann. ch. 689 app. (Supp. 1965). This title standard does, of course, take the position that the dower rights of wives who failed to join in any deed prior to the root would be barred.

\[^{107}\] This would not be true where a conveyance from the husband's grantee has been of record at least 40 years.

\[^{108}\] Model Act § 5.

The Indiana act provides for indexing such notices only in the special tract index set up for that purpose. It is the only act that requires a notice to be recorded \textit{and correctly indexed} before it is effective to preserve an interest.\footnote{Ind. Ann. Stat. § 56-1105 (Supp. 1967).}

The South Dakota act simply specifies that such notices should be indexed in the same manner as notices of \textit{lis pendens}.\footnote{S.D. Code § 56.16B06 (Supp. 1960).} If notices of \textit{lis pendens} are indexed merely in the grantor-grantee index, it is difficult to imagine how notices of claim could be indexed there otherwise than in the grantee index under the claimant's name, as in Michigan and Oklahoma. Unlike a notice of \textit{lis pendens}, no name of an "opposite" party need appear in a notice of claim except in Florida.

The Nebraska act does not seem to specify how notices of claim are to be indexed, but in North Dakota, which provides for tract indexes, the notices are to be indexed "against the real estate."\footnote{Neb. Rev. Stat. § 76.293 (1958); N.D. Cent. Code § 47-19A-06 (1960).} Although Utah also has tract indexes, it erroneously copied the Model Act's provision, which was designed for states without tract indexes.\footnote{Utah Code Ann. § 57-9-5 (Supp. 1965).}

The Florida act has the most elaborate provisions. It apparently seeks to avoid establishing a special tract index in each county by requiring the notice to contain a name under which the notice can be indexed in the \textit{grantor} index, as well as a name under which it can be indexed in the grantee index. The former name is that of the current "owner"; but if his name is not known, the claimant may insert in its stead the person's name under which the property was last assessed for taxes.\footnote{Fla. Stat. Ann. § 712.06 (Supp. 1966).} Thus, without requiring a claimant to search the title to determine who in fact is the record owner, the act will usually make notices of claim accessible to a title examiner for any client purchasing from the record owner, even though he uses only the grantor-grantee indexes. Of course, in those Florida counties maintaining a tract index, the notices will also be indexed under the land description.

One consequence of the Florida provision is that a title examiner using only the grantor-grantee indexes, besides checking the grantor

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index under each name in his client’s chain of title for the period of
that person’s ownership, must also list all the names in which the land
was assessed for taxes and then check the grantor index for notices
filed against those names during the period the land was so assessed.
Since in most cases the names on the tax rolls and the periods of their
listing there will correspond to the names in the chain of title and
the periods of their ownership, the same search of the grantor index
will often suffice for both purposes.

How far back in time must a title examiner search for notices
of claim under the various marketable title acts? In other words, how
long will the filing of such a notice preserve an outstanding interest
from extinguishment? Though the Model Act and most of the enacted
versions do not specifically answer the question, it seems clear that
under their provisions the interest will be preserved until some title
transaction recorded subsequent to the filing reaches the age of forty
years and thus becomes the new root of title. Hence, under these acts
a title examiner must always search for such notices back to the root
of title. The Florida act, on the other hand, specifies that a filing will
preserve the interest for only thirty years—the period of the Florida
act—at which time a refiling is required. Thus, in Florida a title
examiner need search only for notices of claim filed within the last
thirty years. Under all of the acts, the person desiring to keep his claim
or interest alive ought to follow the refiling requirement of the Florida
act, i.e., refile within the period of the act, because usually he will not
know how soon after his initial filing a title transaction that will
mature into a new root of title may have been recorded.

Only the Florida act requires the sending of a copy of the notice
to the “owner” against whom it is filed; failure to receive the copy,
however, does not vitiate the effect of the filing.

VII

Conclusions

Before marketable title acts came along, a grantee by conveyance
from the record owner could virtually rest assured that his interest
was indefeasible, provided he recorded his instrument immediately.
The only possibilities of loss from future events, apart from his own
actions, lay in the government’s powers of taxation and eminent do-
main and in the effect of adverse possession or user. The same was
true of interests created by will, agreement, reservation, or exception.

115 Id.
All that was necessary to protect the interest was to make certain that the transaction would be recorded within the chain of title of any subsequent purchaser of the affected land. This article has sought to show how marketable title acts, by reversing the priorities that obtained under the recording acts, and indeed, by favoring the grantee under any title transaction that was the last to be recorded at least forty years ago, have destroyed this assurance, even in the case of a fee simple owner who is in possession. Under a marketable title act, all holders of interests in land, to be safe, must file a notice of claim every forty years after the recording of their instruments of acquisition. Estate plans should make provision for someone to file such notices on behalf of unborn or unascertained persons who are designated to take future interests.

Under a marketable title act, abstracts become an essential part of the conveyancing system in counties where no official tract index is maintained. This may not be obvious at first glance, because the Model Act seems to adopt the chain of title concept. But the exception for "any interest arising out of a title transaction . . . recorded subsequent to the . . . root of title" is not expressly restricted to interests "arising out of" the chain of title of the person claiming marketable record title. If it is given a more inclusive meaning, a title examiner can find the excepted interests only by means of a tract index, official or unofficial. Of course, an interest protected from extinguishment by the marketable title act is not necessarily protected from extinguishment by the recording acts. If recorded "outside the chain of title," an interest may still be rendered ineffective against a subsequent bona fide purchaser by the recording acts. But this is not the whole story. A wild deed can, under the marketable title acts, form a root of title which may cut off the interest of the record owner. This is a much more serious matter than merely preserving from extinguishment any rights that the parties to a wild deed might otherwise have under the recording acts.

One of the major advantages of the marketable title acts is that they completely eliminate the problem of defects in the pre-

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116 In view of the examples given earlier in this article, contrasting the different results that would obtain under the recording acts and under a marketable title act, it is obvious that the latter will affect the operation of the former. Model Act § 7 provides that "except as herein specifically provided" nothing contained in the act shall be construed to affect the operation of the recording acts. (Emphasis added.) The Florida, Michigan, Nebraska, North Dakota, and South Dakota acts, on the other hand, just state flatly that nothing contained in them shall be construed to affect the operation of a recording act.
root chain of the person claiming marketable record title. Such defects, ranging from absence of seals on acknowledgments to lack of delivery and forgery, are so common that there is hardly a single land title wholly free of them. In most states, curative acts eliminate some of the obvious defects after a stated period of time. The advantage of marketable title acts is that they eliminate all defects, including those that do not appear on the records, against which there is otherwise no protection aside from title insurance.

A marketable title act also eliminates the problem of a gap in the chain prior to the root of title. Such gaps usually result from the failure of a grantee to record his deed, or the failure of an intestate's heirs to have their heirship placed of record. Thus, a break in the chain normally will not result in a loss of the title, especially if it is over forty years old. But a title examiner will usually require a quiet title suit as a curative measure, on the chance that the person appearing as the grantor in the deed immediately after the gap did not in fact succeed to the previous grantee's interest. Breaks in the chain of title are cured if the persons appearing subsequently in the chain have been in continuous adverse possession for a period long enough to satisfy the statute of limitations that is effective even against persons under disabilities, but "adverse possession" must ultimately be proved in court. The cure offered by a marketable title act seems preferable, since it requires no litigation. But suppose that one of the links in the chain prior to the root is a forgery, or is missing simply because the grantee in the previous link has never transferred his interest. Under a marketable title act, the interest of the person whose name was forged or who has never conveyed it away may be cut off automatically without any notice that there is so much as an adverse claim to his land. The recording of the subsequent links in the chain can hardly be expected to give him notice, except that, in the case of a forgery, he would probably cease to receive notices for taxes due against the land. Since the persons in the subsequent chain whose title will extinguish his need not be in possession, there is no assurance that the situation of the land will apprise him of an adverse claim. There is not even that minimum effort to notify which litigation requires—notice by publication. Finally, unlike title registration acts, a marketable title act makes no provision for any indemnity fund to recompense persons wrongfully deprived of their interests as a result of the mechanical operation of the act.

Throughout the literature on marketable title acts, one continually encounters the premise that ultimate questions of ownership ought
to be based on the records alone. So why not on the most recent records? No doubt this is a laudable objective, if the records are worthy of our trust. But the infallibility of the records falls far short of the Scriptures'. If it were only a question of the incompleteness of the records, their failure to show all transactions, the problem would not be so serious. Considering, however, that there is virtually no supervision over what goes into the records, they may contain mistaken or even deliberately false and misleading instruments. The story is told that, in some counties across America, a clerk would record a recipe if it were acknowledged!

Another problem Marketable title acts are supposed to solve is that posed by old recorded interests less than a fee simple, to which the title of the fee simple owner is subject. These are interests which have been carved out of the unencumbered fee simple absolute from time to time, by express reservation, exception, agreement, or conveyance. Easements, equitable servitudes, liens, mineral rights, leases, possibilities of reverter, and powers of termination are typical examples. If the objective is to ease the burden of title examination, no really sound argument can be made for cutting off some of these interests disclosed only in the pre-root chain, unless all so situated are cut off. If the Marketable title act makes even one exception for an interest of this type (as do all the statutes considered in this article), then a title examiner must check, at least cursorily, all recorded transactions back to the sovereign, to be sure that no interest of the type so excepted is outstanding of record against the title. And if, for example, he must check pre-root transactions for outstanding easements, his burden would not be greatly increased if he were also required to note any outstanding possibility of reverter.117

What justification, then, can be offered for extinguishing some types of pre-root interests and not others? In the example just mentioned, the argument is that easements generally have social utility far in excess of forty years, whereas it is doubtful that possibilities of

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117 Professor Simes has suggested that if only a few types of interests are excepted by the acts, there will be no need for lawyers to look at all the recorded transactions prior to the root. Instead, they can simply rely on abstractors to cull out the pre-root transactions that create such interests and include them in the abstract, leaving out the rest. See Simes, supra note 6, at 2361. This suggestion will probably send shivers down the spine of members of the conveyancing bar who are already worried about letting the abstractors "practice a little law." I refer to the fact that in some states abstractors simply show the "important" provisions of each recorded instrument. In other states, such as Texas, lawyers traditionally have demanded that abstracts show the full instrument verbatim.
reverter over forty years old are good for anything but making titles unmarketable. Unfortunately, such general statements about the social utility of various types of interests do not stand up under examination. It may be true, for example, that, compared to restrictive covenants, reverters are a much less socially desirable means of controlling the use of a tract conveyed, to benefit a tract retained. But reverters are also extensively used to make limited gifts of land to governmental or charitable institutions. To say that reverters in the latter context ought not to endure beyond forty years makes very little sense indeed. If the recipient institution accepted a gift so limited to a particular use, it ought to be willing to see the land revert to the donor when the use is discontinued. Yet, a marketable title act will extinguish such a reverter right, if there has been at least one transfer of the land, perhaps to a successor institution, which is forty years old and which does not refer specifically to the limitation.118

Even if one could validly make general observations on how long a particular type of interest retains its social utility, a marketable title act will not necessarily cause the interest to be extinguished when it has outlived its usefulness. The holder of any interest can preserve it ad infinitum by periodically filing a notice of claim. But disregarding that fact, one can easily demonstrate that the acts will cut off or pre-

118 In Florida there exists side-by-side with the marketable title act a statute, enacted more than a decade before it, which restricts possibilities of reverter and powers of termination to 21 years. Fla. Stat. Ann. § 689.18 (Supp. 1966). But this statute excepts from its coverage all “conveyances heretofore or hereafter made to any governmental, educational, literary, scientific, religious, public utility, public transportation, charitable or non-profit corporation or association.” Since the attempt of the statute to restrict the life of reverter rights created before its passage was held unconstitutional in Biltmore Village v. Royal, 71 So. 2d 727 (Fla. 1954), some additional legislation was needed to restrict the effect of old reverter rights on land in commercial circulation. But one wonders whether a marketable title act was the best choice, since it does not preserve the older policy of excepting reverters contained in deeds to public and charitable institutions. Actually, under most marketable title acts lawyers will be able to accomplish the same type of limited gift to a charitable institution as was previously accomplished by a fee simple determinable or fee simple subject to condition subsequent, without subjecting the limitation to the hazard of extinguishment. They need merely cast the transaction in the form of a lease for, say, 999 years, with a power of termination in the event the land ceases to be used for the stated purpose. Since most marketable title acts contain an exception for lessors’ reversions, there would never be any need to file a notice of claim to protect the donor’s “reverter right.” Thus, future limited gifts of land to charitable institutions may avoid the hazard posed by marketable title acts, but past ones will not—another sad commentary on the mechanical operation of the acts. Actually, much can be said for placing some sort of limit on the duration of reverter rights, even in the case of grants to public and charitable institutions, because of the difficulty of tracing the reverter holder’s successors in interest if the reverter takes effect at a far remote time. For one suggestion, see the last sentence of note 120 infra.
serve interests of the same type without following any pattern based on their presumed length of usefulness. Suppose that \( O \) owns three lots in a row, and he wants to retain the middle one, Lot 2, as his residence. In 1920 he conveys Lot 1 to \( A \), and Lot 3 to \( X \), each subject to a possibility of reverter if the lot conveyed is ever used for any purpose other than a residence. In 1921 \( X \) conveys Lot 3 to \( Y \) without any mention in the deed of the reverter right reserved in \( O \). \( A \), on the other hand, keeps Lot 1 until 1960, when he conveys to \( B \). \( A \)'s lawyer, in drafting the deed from \( A \) to \( B \), is careful to make it expressly subject to \( O \)'s possibility of reverter. \( B \) continues to own Lot 1 until his death in 1990. Under the Model Act, Lot 3 may be freed of \( O \)'s reverter in 1961, while Lot 1 cannot be freed of it until sometime during or after the year 2030. Thus, the time at which an interest will be cut off is really dependent on two entirely accidental factors: (1) how soon after its creation a title transaction occurs that is capable of serving as a new root of title; and (2) how precise the conveyancer who drafts the new root of title (or any deed in the chain within forty years after the new root) happens to be in identifying exceptions to the grantor's warranty covenants.\textsuperscript{119} If it is determined that, because of their limited social utility, certain interests should not be permitted to endure longer than a particular period of time, a statute can be drawn specifically for that purpose.\textsuperscript{120} To accomplish such an end by means of a marketable title act is like using a machete to perform an appendectomy, and a dull one at that!\textsuperscript{121}

Another argument made in justification of marketable title acts is that those outstanding interests that are not excepted from extin-

\textsuperscript{119} The Ohio act, by providing that possibilities of reverter and powers of termination that have existed for 40 years or more can be preserved only by the filing of a notice of claim, eliminates accidental factor (2). But it is difficult to see how the Ohio provision can succeed in excluding factor (1). Thus, if Ohio wished to restrict reverter rights to a life of 40 years, it would have been preferable for Ohio to enact special legislation for that purpose. OHIO REV. CODE ANN. § 5301.49(A) (Page Supp. 1966).

\textsuperscript{120} See, for example, the model acts restricting the duration of reverter rights, proposed in SIMES & TAYLOR 214-16. Perhaps a more just solution would be to enact a very short limitations period (with no exception for persons under disabilities), within which suit would have to be brought to enforce a reverter right \textit{after violation of the condition}. Such a solution might well be more clearly constitutional than the model legislation proposed by Simes and Taylor. See note 126 infra. An even better solution might be to provide that no reverter right, whether created before or after the date of enactment, shall be alienable or inheritable, but if it was created for the purpose of benefiting other particular land, then it shall be enforceable as an equitable servitude by the owner of such land both before and after the death of the holder of such right.

\textsuperscript{121} Others have characterized marketable title legislation, perhaps more felicitously, as "a bull in a china shop." E. BADE, CASES ON REAL PROPERTY AND CONVEYANCING 92 (1954).
guishment will rarely continue to be "live" interests after forty years. (Live interests are those that the holder continues to be interested in enforcing.) Doubtless, one indication that an interest is alive is that it has been the subject of a transfer; thus, the acts do tend to preserve live interests by providing an exception for interests transferred of record within forty years after the root of title.\(^{122}\) But the only way one can tell for sure whether a particular interest is alive is either to seek out the holder and ask him to execute a quitclaim or release, or to violate the holder's rights and see if he takes steps to vindicate them within the period of the statute of limitations. The first alternative is time-consuming and sometimes expensive, and the second exposes the client to unacceptable risks.\(^{123}\) Simes and Taylor suggest that the very small number of notices of claim filed under enacted marketable title acts prescribing a forty-year period tends to prove that few of the interests subject to extinguishment are still alive.\(^{124}\) On the other hand, however, it may prove merely that many holders of outstanding interests are ignorant of the existence and mode of operation of the marketable title acts. Presumably, the shorter the period of the act, the greater should be the volume of notices of claim (assuming that the holders are aware of the act), because there will be more live interests subject to extinguishment under a shorter act. Yet, Simes and Taylor acknowledge that even under the act with the shortest period, the number of notices of claim filed is very small.\(^{125}\)

The crucial argument made in justification of allowing marketable title acts to extinguish express interests outstanding of record is that, even if live interests of possibly continuing social utility are subject to extinguishment, they can all be preserved by the simple expedient of filing notices of claim. But how are people going to learn of this saving procedure, or even of the threat of extinguishment? It

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\(^{122}\) See Model Act § 2(d). Again, the assumption is made that the section will be interpreted in the way Simes and Taylor seem to have intended.

\(^{123}\) The risk is particularly unacceptable if the limitations period is as long as 30 years. See note 120 supra.

\(^{124}\) SIMES & TAYLOR 4-5, 355.

\(^{125}\) Id. at 317. See also Ruemmele, supra note 6, at 479, stating that "the experience in North Dakota has not indicated that the twenty year period brings forth any more filing of claims than the forty year period would. A ten-year period might well be better." But the North Dakota act excepts substantially more interests from extinguishment than most 40-year acts; so experience under that act is of little value for comparative purposes. Besides the Model Act, the statutes of Michigan, Ohio, Oklahoma, and Utah provide a 40-year period; Indiana's period is 50 years; Florida's is 30; North Dakota's is 20; and in the Nebraska and South Dakota acts, the period is inconsistently described as 22 and 23 years.
is certainly no adequate answer nowadays to fall back on that old legal sleight-of-hand that everyone must be presumed to know the law. The stock answer to the question is that the recording acts pose a similar threat and offer a like saving procedure: interests based on unrecorded instruments are subject to extinguishment, and all one need do to protect the interest is to record the instrument. The analogy is inappropriate. Since many states adopted recording acts early in their history, the regime imposed by them grew as the states grew. Unlike marketable title acts, they did not revolutionize a mature and full-blown system of private titles. Also, some requirement of affirmative action such as that demanded by the recording acts was essential for the protection of subsequent bona fide purchasers; the filing requirement of marketable title acts is not.\textsuperscript{126} Moreover, since almost all land

\textsuperscript{126} Although the observations in the text are presented for their bearing on the question whether marketable title acts represent sound legislative policy, they also relate to the question whether such statutes, if enacted, will be upheld as constitutional. For a full-fledged discussion of the latter issue, see the materials cited in note 6 \textit{supra}. Apparently, none of the acts discussed in this article has yet been involved in a suit asserting it to be unconstitutional. The only marketable title act that has been clearly sustained against such an attack is the Minnesota act. Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957); cf. Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957). But we have already noted that the Minnesota court in \textit{Wichelman} succeeded in bypassing a number of problems by considerably "amending" its act. Decisions sustaining the constitutionality of the recording acts are inapposite for the reasons pointed out in the text. However, acts that require a re-recording or the filing of a notice or declaration of claim to preserve an already recorded interest do seem analogous. For decisions sustaining such acts, see Mahood v. Bessemer Properties, 154 Fla. 710, 18 So.2d 775 (1944); Opinion of the Justices, 101 N.H. 515, 131 A.2d 49 (1957). For a decision striking down such an act, see Board of Educ. v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965).

The Florida and New Hampshire cases involved statutes directed at old executory contracts of sale and old mortgages, respectively. These decisions do not seem to support the constitutionality of marketable title acts, since the instruments covered created only temporary interests in land that would be either discharged or converted into legal title, depending on whether certain payments over a specified period were completed. Thus, the acts in question, at least the Florida act, simply serve to make conclusive the natural presumption that if, after the expiration of the specified period, no conversion to legal title appears of record and no notice of claim has been filed, the interest must have been discharged. In other words, they merely buttress the natural conclusion that a title examiner would be likely to draw upon seeing an old instrument of that type and nothing further of record.

On the other hand, the New York case involved a statute seeking to nullify reverter rights contained in old deeds of record if no "declaration of intention to preserve" them was timely filed. The rationale of the opinion was that since the attempted extinguishment of such vested interests lacked a proper purpose, such as the protection of bona fide purchasers, it was not a valid exercise of the state's police power. This decision seems more relevant than the Florida and New Hampshire cases and therefore casts serious doubt on assertions that marketable title acts are constitutional, despite the
transactions in the United States are handled by experts, the occasion
is tailor-made for the expert to advise his layman client of the neces-
sity for the initial recording. But what occasion will there be for the
experts to notify laymen of the new need to file a notice of claim, or
for them to remind laymen to refile periodically? The only holders
of outstanding interests in land who are likely to learn of the filing
requirement in time to protect themselves are those who are kept
constantly advised of new legal developments, such as institutional
lenders, oil companies and speculators, and railroads and public util-
ities. Remarkably, it is precisely their types of interests that enacted
versions of the marketable title act tend to exempt from any require-
ment of filing.

What, then, is the real justification for marketable title acts? It
seems to lie in simplifying title examination and reducing the amount
of curative action needed to make a title good. Abstracts all the way
back to the sovereign will continue to be examined, but title exam-
iners may disregard most matters prior to a root of title at least forty
years of record. Is this justification sufficient in light of the potential
for injustice inherent in a marketable title act? Perhaps so, if such
acts were the only available alternative for keeping the growing mass
of land records from choking the title examiners.

In some states the accepted practice of the conveyancing bar has
been to examine titles back only a certain length of time, usually sixty
years. In other states, where the practice is not so sanctioned, many
lawyers probably do the same, especially if the amount of money in-
volved in the transaction does not justify the fee that would have to
be charged for a search all the way back to the sovereign. Of course,
such a practice leaves the client to bear any loss resulting from old
undiscovered defects and interests, with a possible right of recovery
over against the lawyer if the latter failed to explain the limited
nature of the examination and the risks involved. A marketable title
act buttresses such a practice by eliminating many of the risks in-
volved.127 But such practices, even when so buttressed, are not very

127 Because marketable title legislation eliminates many pre-root title risks and
shortens the time needed to make a title investigation, it is no surprise to discover that
title companies favor it. Some people have assumed that such legislation would result
correspondingly in a reduction of title insurance premiums. The assumption has proved
rather naive. See Jossman, supra note 6, at 424.
economical. In a fifteen-year period, three or four lawyers may examine the same title independently, covering much the same ground.

When a lawyer examines title to a piece of land, his title opinion is usually meant to reflect fully and accurately the present state of the complete record title. If he is both competent and careful, it will. And if all his requirements are satisfied, there seems to be little reason for any other expert handling a subsequent transaction involving the same land to cover the same ground again. He should simply pick up at the point in time when the first examiner left off. But since the bar has steadfastly refused to set up standards of competence for specialties within the law, and both examiners operate separately, with independent liabilities, the one dares not trust the other. Of course, within the same firm, whether it be a firm of lawyers or a title insurance company, no examiner ever retraces the steps of another, except perhaps unwittingly. The writer understands that in Florida, where a high percentage of the conveyancing bar participates in the same bar-related title insuring organization, it is becoming the practice for participating lawyers to rely on the prior opinions of other participants. But until the liabilities of all examining experts are backed by the financial resources of the same organization, the waste resulting from repeated re-examinations of the same title will never be eliminated completely.

It may seem old hat to say so, but the writer does not see how the problem can be solved completely without resort to some type of official registration of the present state of the title—a sort of official title opinion that is constantly kept up to date. In other words, the need is for some type of Torrens system. Such a system is not really such a radical departure from the recording system, except that the initial title examination results in an opinion that has official sanction, and each subsequent transaction is ineffective until officially noted on that “opinion.” Thus, there is no need to retain for future examiners the records of all those past transactions on which the opinion is

128 The organization, Lawyers Title Guaranty Fund, has its own technique for assuring competence. This technique, which one might call the fraternity principle, probably leaves something to be desired in theory, though doubtless it works pretty well as a practical matter. Title examinations submitted to the Fund by an applicant lawyer are simply re-examined by a fully-participating member of the Fund until the latter is willing to certify to the Fund that the applicant has reached a safe level of proficiency. Thereupon the applicant is admitted to the fraternity. Since the Fund is out to corral all competent members of the conveyancing bar, and thereby keep lawyers' title services competitive with (or even preferable to) those of commercial title companies, there has been no problem of exclusiveness on the part of the fraternity.
based. Under a Torrens system, of course, the initial title examination must be accompanied by an action in rem. But there are many land titles on which a quiet title action must be brought at some time or other, and, unlike the registration suit under a Torrens system, such an action does not have the advantage of being a “once-for-all” affair; an action of the same type may again become necessary to cleanse the records of accumulated “debris.” Moreover, since many laymen are already familiar with a Torrens-type system in the motor vehicle registration laws, it should be much less likely to defeat their natural expectations than a marketable title act.

From the lawyers’ point of view, there are two possible objections to a soundly-conceived, efficient title registration system. First, there will be an official check of their work product each time they handle a title transaction under a registered title. But a similar check exists under the recording system, namely, that provided by a subsequent title examiner. To have such a check provided immediately, rather than at the time of some subsequent title transaction, may, of course, be more embarrassing for the lawyer, but it is certainly better for the system. And the standards used in making the check are likely to be more uniform under a Torrens system. Second, a Torrens system may deprive lawyers of fees. But this fear is surely groundless. Lawyers would have to bring the initial registration suits under a Torrens system; many members of the conveyancing bar could be employed as special masters to examine titles for initial registration and, more permanently, as registrars, and lawyers will still have to handle all subsequent title transactions up to the point at which the executed instrument is sent to be registered. Lawyers should not find it difficult to justify charging the same fees for handling transactions under a Torrens system that they charge under the recording system.129

The writer is not necessarily suggesting that any particular Torrens act now on the books of any state or country is completely satisfactory; but surely it is possible to devise one that will operate just as quickly in effecting transfers as the recording system. While keeping titles far more reliable, a Torrens system can eliminate the tremendous waste and inefficiency of the recording acts. It is a baffling fact that the United States is rapidly becoming virtually the only country

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129 In most transactions today, the fee a lawyer can conscientiously charge is barely enough to compensate him for the time spent in preparing for and handling the closing. If he also prepares the contract of sale, he is over the limit. Thus, examining an abstract, let alone making a search through the records themselves, is rapidly becoming a profitless, as well as distasteful, chore.
in the world whose land title system is not founded upon Torrens-type principles. The writer finds it incredible that a system which seems to work quite well almost everywhere else cannot be satisfactorily adapted to the United States. If all the brainpower expended by law professors and by the property-law sections of local, state, and national bar associations on marketable title acts were expended instead on devising a model Torrens act, surely a satisfactory adaptation could be found.1

With the opposition of the legal profession out of the way, only the abstractors and title insurance companies would be left. Their opposition is inveterate, because, as a Torrens system increases, they must decrease. Yet as long as these parasites that make their living off the inadequacies of the recording system succeed in enlisting the conveyancing bar in support of the proposition that "a little title examination is a good thing" (though all agree that too much is pure hell), legislatures are likely to continue to pass, and courts to uphold, half-way measures like the marketable title acts, hoping to keep the whole present absurd system from collapsing under its own weight.

1 Professor Simes acknowledges that, in undertaking the research project initiated by the ABA Section on Real Property, Probate and Trust Law, which culminated in the publication of Simes & Taylor, he "disregarded as useless any investigation of the so-called Torrens Title Registration System." The reason given seems to be that in most American states where such legislation has existed, it hasn't been very successful—which is hardly the sort of reasoning to be anticipated in a project the very object of which is a general reform of inadequate statutory frameworks. He also says, addressing lawyers, that "whether we like it or not," the recording system will continue to be the heart of conveyancing. Simes, supra note 6, at 2358. Why this must be so, whether the bar likes it or not, the writer cannot fathom. Has the influence of lawyers and the organized bar in state legislatures atrophied to such an extent that they can do nothing without the support of the abstractors and title insurance companies? The writer feels that, unless lawyers resort to some co-operative plan such as the Florida Lawyers' Title Guaranty Fund, their role in land transactions will, sooner or later, be completely eliminated by the competition of title companies: "If you can't lick 'em, join 'em." A Torrens system, on the other hand, might well serve to rescue the conveyancing bar from such a fate, by eliminating every service title companies presently provide that cannot be considered the practice of law. Of course, there are those who fail to see any reason why the title companies should not be allowed to supplant lawyers completely in land transactions, but the writer is definitely not one of them.
Section 1. Marketable Record Title. Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, shall be deemed to have a marketable record title to such interest as defined in Section 8, subject only to the matters stated in Section 2 hereof. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in

(a) the person claiming such interest, or
(b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

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

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

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

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

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

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

Section 3. Interests Extinguished by Marketable Title. Subject to the matters stated in Section 2 hereof, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.
Section 4. Effect of Filing Notice or the Equivalent.

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

1. under a disability,
2. unable to assert a claim on his own behalf, or
3. one of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(b) If the same record owner of any possessory interest in land has been in possession of such land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him or on his behalf as provided in Subsection (a), and such possession continues to the time when marketability is being determined, such period of possession shall be deemed equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in Subsection (a).

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

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

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

Section 8. Definitions. As used in this Act:

(a) "Marketable record title" means a title of record, as indicated in Section 1 hereof, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in Section 3 hereof.
(b) "Records" includes probate and other official public records, as well as records in the registry of deeds.

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

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

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

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

Section 9. Act to Be Liberally Construed. This Act shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 1 of this Act, subject only to such limitations as appear in Section 2 of this Act.

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