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Florida's Marketable Title Act: Prospects and Problems

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FLORIDA'S MARKETABLE TITLE ACT: PROSPECTS AND PROBLEMS*

RALPH E. BOYER** AND MARSHALL S. SHAPOT†

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I. INTRODUCTION

The Florida Legislature passed a Marketable Title Act this year¹ after several years of agitation by scholars and practitioners,² and the enactment of similar laws by a dozen other jurisdictions, mostly in the Middle West.³

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1. Fla. Laws 1963, ch. 63-133. The act is cited hereafter only by section number.

2. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* 245-46 (1961); Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47 (1958); Carmichael, *The Current Proposed Marketable Title Act*, 34 FLA. B.J. 1056 (1960); Catsman, *Function of a Marketable Title Act*, 34 FLA. B.J. 139 (1960); Catsman, *A Proposed Marketable Record Title Act for Florida*, 13 U. FLA. L. REV. 334 (1960). For the standard general treatises, see generally SIMES & TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION*, esp. at 3-17, 253-362 (1960) [hereafter cited as SIMES & TAYLOR]; and BASYE, *CLEARING LAND TITLES*, esp. ch. 9 (1953).

3. The first marketable title act of any description was passed more than four decades

The marketable title concept is simple, although it has fathered many variations in draftsmanship. The idea is to extinguish all claims of a given age (thirty years in the Florida statute) which conflict with a record chain of title which is at least that old. The act performs this task by combining several features, which generally are singly labeled as "statutes of limitation," "curative acts," and "recording acts."⁴

The new act is in fact all of these: It declares a marketable title on a recorded chain of title which is more than thirty years old, and it nullifies all interests which are older than the root of title. This nullification is subject to a group of exceptions—including interests which have been filed for record in a prescribed manner.

The act is also more: It goes beyond the conventional statute of limitations because it runs against persons under disability. It is broader than the kind of legislation generally described as a curative act, because it actually invalidates interests instead of simply "curing" formal defects. It also differs from a recording act by requiring a re-recording of outstanding interests in order to preserve them.

Given this statutory foundation, the title searcher in Florida should only have to check a chain of title to a recorded title transaction which is thirty years old or more. He should be able to disregard all claims which are older, and which are not rooted in his own chain. The extent to which the Marketable Title Act achieves this objective is the primary consideration of the material that follows.

The purpose of this paper is to analyze in detail the Florida statute, and to pose the legal issues which may arise because of its existence. The statute will first be described in more or less chronological fashion. Reference will be made to key words or phrases which may furnish sources of litigation. After this description is finished, some of the problems will be explored in more detail, with reference to cases from other jurisdictions, and hypothetical instances which may prove useful in rela-

ago by Iowa. The Michigan act, passed in 1945 and effective as a bar since 1948, represents a significant landmark because of its careful creation by a subcommittee of the committee on real property of the Michigan Bar. Its chief parent was Professor Ralph W. Aigler of the Michigan Law School. See SIMES & TAYLOR 341. The Michigan act has been used as a pattern by several subsequent statutes. Another landmark is the Model Marketable Title Act, published in SIMES & TAYLOR 6-10. See also the proposed amendment, *id.* at 228-29. The Model Act is based on the Michigan statute, incorporating certain modifications. The full list of American statutes includes: ILL. ANN. STAT. ch. 83, §§ 12.1-4 (Smith-Hurd, Supp. 1962) (see also ILL. ANN. STAT. ch. 83, § 10a (Smith-Hurd 1956)); IND. ANN. STAT. §§ 2-628-37 (Supp. 1962); IOWA CODE ANN. §§ 614.17-20 (Supp. 1962); MICH. COMP. LAWS §§ 565.101-109 (1948), as amended, MICH. COMP. LAWS § 565.104 (Supp. 1956); MINN. STAT. ANN. § 541.023 (Supp. 1962); NEB. REV. STAT. §§ 76-288-301 (1958); N.D. CENT. CODE §§ 47-19A-01-11 (1960); OHIO REV. CODE ANN. §§ 5301.47-56 (Baldwin, Supp. 1962); OKLA. STAT. ANN. tit. 16, §§ 61-66 (Supp. 1962); S.D. CODE §§ 51.16B01-14 (Supp. 1960); WIS. STAT. ANN. § 330.15 (1958). See also Ontario's Investigation of Titles Act, ONT. REV. STAT. ch. 186 (1950).

4. See SIMES & TAYLOR 4.

tion to the Florida act. Serious questions also will be raised about the relationship of this statute to existing Florida legislation affecting land titles.

II. THE STATUTE

A. *Marketability*

The statute begins with definitions. The first possible source of controversy arises with the mention of the term "root of title."⁵ This term is defined as "any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least thirty (30) years prior to the time when marketability is being determined." The effective date of the "root of title" is the date when it was recorded. A sub-definition provides that a "title transaction means any recorded instrument or court proceeding which affects title to any estate or interest in land."⁶ A "root of title," therefore, is a recorded instrument or court proceeding which purports to create or transfer an interest in land, which has been recorded at least thirty years before the time when marketability is being determined.

The act then proceeds to one of its visceral features. This element is the declaration of a marketable record title for any person who has the legal capacity to own land who "alone or together with his predecessors in title, has been vested with any estate in land of record for thirty (30) years or more."⁷ The declaration of a marketable record title is subject to the qualification that there must be no recorded instrument "purporting to divest [the] claimant of the estate claimed."⁸ This qualification applies both to the claimant and his predecessors in title for the thirty-year period.

B. *Exemptions and the Requirements Thereof*

[Herein, of Notice Filing]

"Marketable record title" as defined by the act is subject also to a series of six specified exceptions.

The first of these exceptions is worth quoting in full:

Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based arising after the root of title; provided, however, that a general reference in any of the muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by

5. Section 1(2).

6. Section 1(3).

7. Section 2.

8. Section 2(2).

name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests; subject, however, to the provisions of subsection (5) [concerning easements] of this section.⁹

The basic effect of this limitation is that the title searcher must run down all clouds on his title to which sufficient indication is made in the recorded documents beginning with the root of title—*i.e.*, the title transaction which is closest to the time from which marketability is being claimed, but which is at least thirty years old.¹⁰

The stricture which seems to require specific identification of easements is vastly softened by another provision, which exempts easements in use from the operation of the act:

Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof.¹¹

This exception achieves, by extraordinarily broad language, the same result which has been created in other jurisdictions by the use of a specificity which borders on whimsy.¹² The broad nature of this clause would seem to dim the hope that the statute will provide a fully viable marketable title concept for Florida. The exclusion is so worded as to be incapable of liberal judicial interpretation. It removes from the operation of the act a varied and ubiquitous group of interests without so much as a requirement that the easement be observable.¹³ The clause "including those of a public utility or governmental agency" seems only to add a dreary superfluity. Presumably the exclusion would have the same effect without these words. If something else was intended, what seems simply

9. Section 3(1).

10. In view of the purpose of the act, the rather ambiguous language of § 3(1), quoted in text accompanying note 9 *supra*—"arising after the root of title"—unquestionably must be construed as the text statement indicates, *i.e.*, "beginning with the root of title." This is made clear by the use of the phrase "prior to the root of title" in the same subsection, as well as other phrasing elsewhere in the act, *e.g.*, § 3(4), quoted in text with note 27 *infra*. However, the language could have been more straightforward. *Cf.* Model Act § 2, reprinted in *SIMES & TAYLOR* 7, and see *Lytle v. Guilliams*, 241 Iowa 523, 41 N.W.2d 668 (1950).

11. Section 3(5).

12. See, *e.g.*, the recently passed Ohio act, which says that the marketable title idea shall not bar "any easement clearly observable by physical evidence of its use"—*and* easements whose existence "is evidenced" by the location of pipes, wires, valves or other conduits "beneath, upon or above" the land! *OHIO REV. CODE ANN.* § 5301.53 (Baldwin, Supp. 1962).

13. For a way to modify the harshness of an across-the-board use requirement, see text with note 64 *infra*.

superfluous is confusingly ambiguous. It is enough to say that the legislature should re-examine its handiwork in this respect.

Another major exception should be of immediate interest to practitioners. The act provides for the filing of notice to preserve any estate or interest in land,¹⁴ in the same manner as deeds are recorded—"as though the claimant were the grantee in the deed and the purported owner were the grantor in a deed."¹⁵ It also provides for entry in tract indexes, in counties where they exist.¹⁶ This notice may be filed during the thirty-year period immediately following the effective date of the root of title. A special extension was made to July 1, 1965, in the case of claims for which the thirty-year period has expired before that date.¹⁷ The notice will preserve a claim for thirty years, after which a re-filing is required.¹⁸

It should be noted that "no disability or lack of knowledge" shall stay the commencement or toll the running of the period.¹⁹ This feature may be distinguished from the conventional disability provisions of statutes of limitations.²⁰ However, notice may be filed on behalf of one who is under a disability,²¹ unable to assert claims in his own behalf,²² or who is a member of a class, but whose identity cannot be established or is uncertain at the time of filing.²³

A further exception excludes from the application of the act the "rights of any person in possession of . . . lands."²⁴ This is probably the most adequate provision that can be drafted with reference to possession problems. Some other statutes provide that the *claimant* must be in possession,²⁵ a requirement that is lacking in the Florida act. But this provision probably would cause more trouble than it is worth.²⁶

The statute logically excepts "estates or interests arising out of a title transaction which has been recorded subsequent to the effective date

14. Section 3(2).

15. Section 6(6). Another sub-section provides that the notice shall contain the "name and post office address of an owner, or . . . of the person in whose name said property is assessed on the last completed tax assessment roll of the county at the time of filing, who for the purpose of such notice, shall be deemed to be an owner." § 6(2).

16. Section 6.

17. Section 9.

18. Section 5(I).

19. *Ibid.*

20. See, e.g., FLA. STAT. § 95.20 (1961) (tolling of adverse possession period for minority, insanity or imprisonment); FLA. STAT. § 95.22 (extension for minor heirs, allowing claims two years after their majority when a deed is made by another heir).

21. Section 5(1)(a).

22. Section 5(1)(b).

23. Section 5(1)(c).

24. Section 3(3).

25. E.g., NEB. REV. STAT. § 76-288 (1958).

26. It would mean that "marketability depends upon a fact extrinsic to the record." See SIMES & TAYLOR 353. Further, the act could not be applied to vacant lands. See Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47, 52. See also *id.* at 61.

of the root of title."²⁷ This is axiomatic, for the Marketable Title Act operates side-by-side with the recording act.

A final exception exempts the "rights of any person in whose name the land is assessed on the county tax rolls for such period of time as the land is so assessed and which rights are preserved for a period of three (3) years after the land is last assessed" in his name.²⁸ This clause seems relatively harmless, but it poses the extra practical obstacle of another set of books to check.

C. *Nullification of Ancient Claims*

The statute then declares that a title which has fulfilled the requirements of a marketable record title and has avoided all the statutory exceptions "shall be free and clear of all estates, interests, claims or charges whatsoever" which depend upon title transactions and events which "occurred prior to the effective date of the root of title."²⁹ It complements these statements with the strongest language to be found in any marketable title act—the declaration that all prior adverse claims "are hereby declared to be null and void," with the exception of designated reservations in favor of the United States or the State of Florida.³⁰ If somewhat repetitious, this language makes the marketable title concept admirably clear. Thus, the title searcher, having done his statutory duty,³¹ is given his benefit: All claims prior to the root of title and not inherent in its muniments are eliminated from his search.

D. *Liberal Construction and Other Provisions*

The existence of other statutes already in the field is deferentially recognized by the statement that no provision of the act shall be construed to extend a statute of limitations or to affect the operation of a recording act. It is said also that "This act shall not vitiate any curative statute."³²

A salutary provision is the slander-of-title clause. It says that no one "shall use the privilege of filing notices hereunder" to assert "false or fictitious claims," and provides for an award of damages and costs incurred in litigation against one who is found to have registered a fictitious claim.³³

The statute provides, significantly, that it should be "liberally construed to effect the legislative purpose of simplifying and facilitating

27. Section 3(4).

28. Section 3(6).

29. Section 4.

30. *Ibid.* Ohio has a "null and void" provision. OHIO REV. CODE ANN. § 5301.50 (Baldwin, Supp. 1962). As to the designated reservations, see text with note 68 *infra*.

31. See text with note 10 *supra*.

32. Section 7.

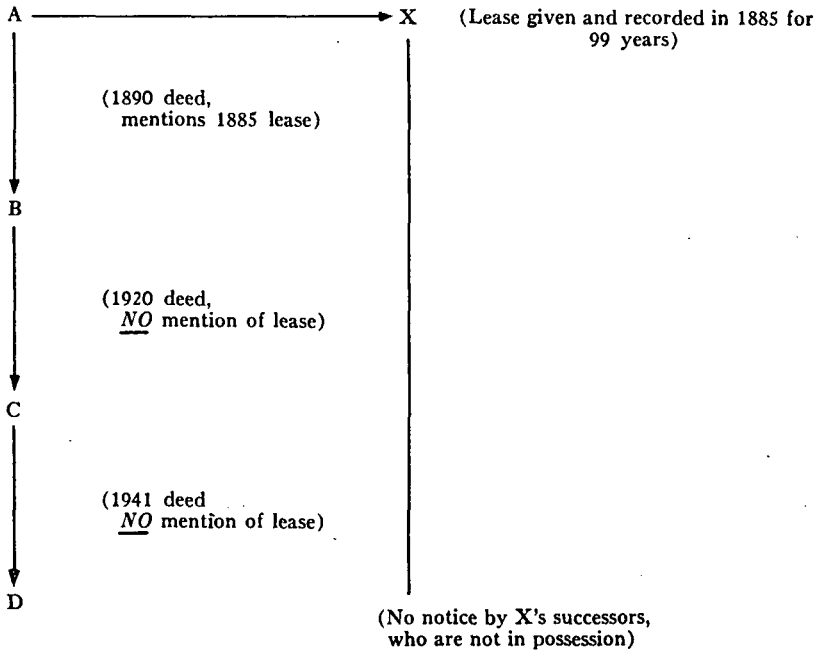
33. Section 8.

land title transactions by allowing persons to rely" on a record title as defined in the act, subject only to the specific statutory exceptions.³⁴ This language is consistent with the other essential provisions of the statute,³⁵ save the broad easements provision.³⁶

The act includes a savings clause,³⁷ which is rather perfunctory in view of the integrated nature of the act and its overall aim. The statute appears to be written in such a way that the invalidation of any essential clause will devitalize the legislation as a whole. The act concludes with a statement that it shall take effect September 1, 1963.³⁸

Before proceeding to an analysis of the statutory mousetraps, it is well to sum up the basic purposes of the act. This can be done by assuming the following situation:

A conveys Blackacre to B in 1890, at which time there appears of record a 99-year lease on the land, created in 1885 and held by X as lessee. This lease is mentioned in the deed from A to B. B conveys the



34. Section 10.

35. *E.g.*, the declaratory provision on marketable record title, § 2, discussed text with note 7 *supra*; the requirement of specificity in the reference to ancient defects in muniments of title, § 3(1), discussed at text with note 9 *supra*; the nullification provision, § 4, discussed at text with notes 29-30 *supra*; and the specific statement that disabilities will not toll the statutory period, § 5(1), discussed at text with note 19 *supra*.

36. Section 3(5), discussed at text with notes 11-12 *supra*.

37. Section 11.

38. Section 12.

fee, without mention of the lease, to C in 1920. The latter conveys a fee simple title to D in 1941.

In 1966,³⁹ D enters into an agreement to sell Blackacre to Y, who challenges the marketability of the title. D pleads the new statute, contending two⁴⁰ things: (1) It makes his title a marketable record title, because it has a root (the deed from B to C in 1920) which is more than thirty years old; and (2) It voids all interests (*e.g.*, the 1885 lease) which are older than the root of his title, which are not inherent in the muniments of that root, and which have not been filed for record.

D should win in this classic marketable title situation. He should win because, as was said with reference to an analogous situation under the Ontario Investigation of Titles Act, the statute

requires a search only to the first root of title prior to the [statutory] period. The purchaser is entitled to rely on the form of the instruments registered and is not bound to inquire into their substance and if the instrument on which he relies as the root of title prior to the [statutory] period is on its face sufficient to convey the fee . . . he is entitled to rely upon it.⁴¹

* * * *

We will turn now to a discussion of the issues which, it seems reasonable to assume, will be raised by this statute. This discussion will be subdivided into three parts: (1) Problems of construction and technique (2) Constitutional problems (3) Issues of relationship to other Florida law.

II. THE ISSUES: CONSTRUCTION AND APPLICATION

A. *Eligibility*

A key question with reference to any legislation is who may invoke it. We may pose the following situation, hypothetically litigated in 1966:

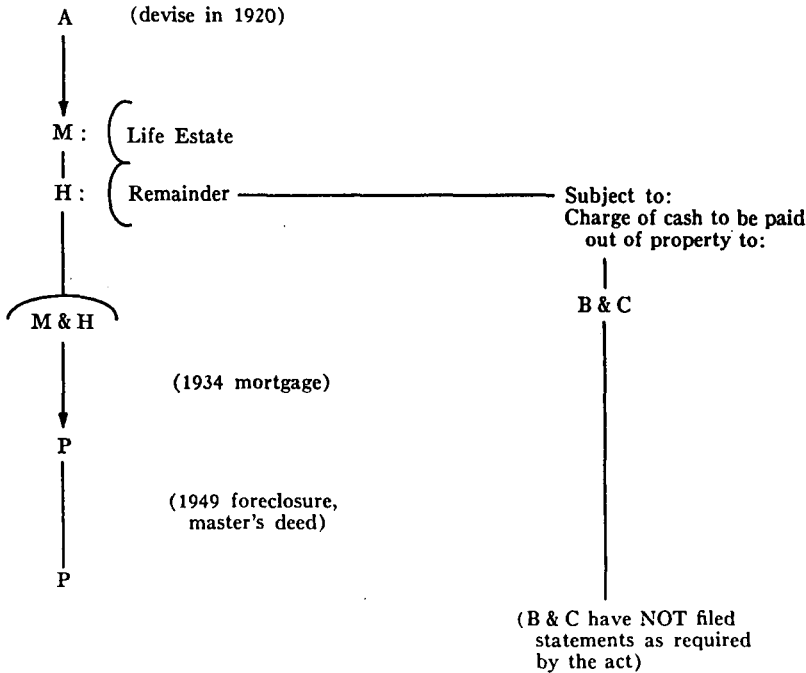
A dies in 1920, leaving a life estate in Blackacre to M and a remainder to H. The remainder is subject to a charge of cash to be paid out of the property to B and C, now both deceased. M and H mortgage the property to P in 1934. P forecloses in 1949, and takes at the court

39. It will be noted that the date 1966 is selected in several hypothetical instances. It must be recalled that under § 9 of the act, the period for filing notice is extended to July 1, 1965, if the thirty year period has expired before then.

40. See SIMES & TAYLOR 352.

41. *Re Algoma Ore Properties Ltd.*, [1953] Ont. 634, 642 (C.A.). This case involved a devise of a fee subject to mineral rights. Otherwise, the basic pattern is the same, except for a change in dates and the fact that Ontario's statutory period is forty years. It will be noted that the vendor in the hypothet (as in the *Algoma* case *supra*) has in his chain of title one conveyance within the thirty-year period, which is irrelevant for these purposes, and one previous to the thirty-year period. It is this prior conveyance which establishes his statutory "root of title."

sale by a master's deed. The heirs of B and C, holders of interests in the remainder devised by A, have not filed statements as required by the act.



The issue is whether P, as a prospective vendor, should be allowed to invoke the act in order to force specific performance by his vendee, D, who is claiming that the title is clouded by the interests of the heirs of B and C.

P will argue that the remainder interests vested in 1920—at the time of A's death—and that the Marketable Title Act extinguishes these interests, because they date back prior to the mortgage instrument, which in turn dates back more than thirty years from 1966. D will argue that P and his grantors "have not held a record chain of title" since 1936. He will emphasize that the mortgage made in 1934 by the life tenant and the remainderman was subject to the interests of B and C in the remainder. And, according to the one published decision on similar facts, D will defend successfully. The Iowa Supreme Court supported the reasoning ascribed to D in *Lytle v. Williams*,⁴² a 1950 case with the same basic factual pattern. A similar rationale prevailed in a case concerned with the Ontario Investigation of Titles Act, dealing specifically with mineral rights, but representing good general law on the necessary length of the chain of title.⁴³

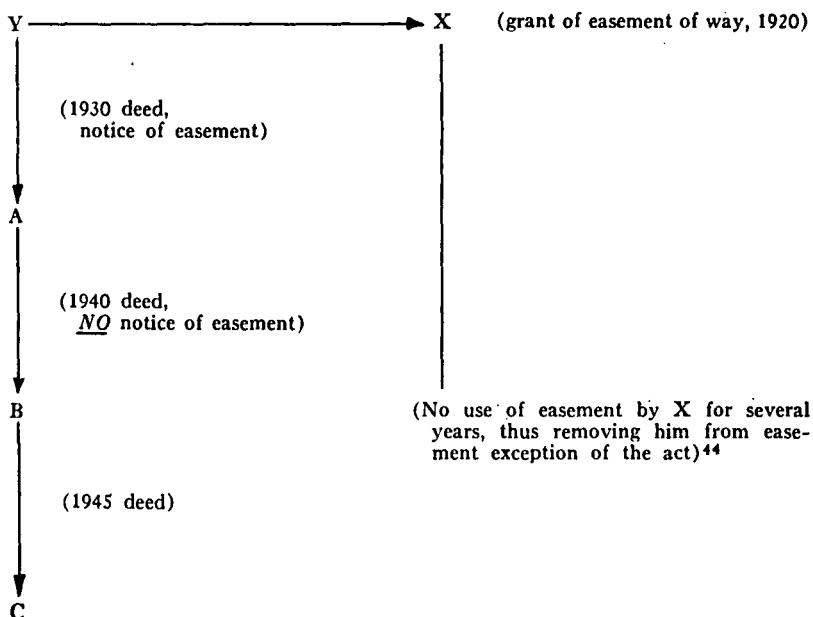
42. 241 Iowa 523, 41 N.W.2d 668 (1950).

43. Re Headrick & Calabogie Mining Co., [1953] Ont. Weekly N. 761 (C.A.), construing ONT. REV. STAT. ch. 186 (1950).

B. *The Time to Record*

Another side of the same problem arises with reference to the question of when the holder of the ancient interest must file his statutory notice. Assume this situation:

X is granted the right to drive vehicles across Y's land in 1920. Y's subsequent grantee, A, conveys to B without notice of the easement in 1940, and B conveys in turn to C in 1945. Assume further that X does not use the easement for a period of several years, thereby removing himself from the easement exception in the act.⁴⁴



Under the new Florida act, query whether X must file notice of his easement by 1965, under the extension provision,⁴⁵ or whether he has until 1970—thirty years from the time of the conveyance from A to B? It would seem that the better marketable title view is that X has until 1970, for as a leading treatise emphasizes, it is C's chain of title which is being quieted, not X's.⁴⁶

C. *From Which Roots?*

A different set of questions arises as to the meaning of the statutory concept of "root of title." A recent Nebraska case⁴⁷ posed the problem of whether a quitclaim deed by one tenant-in-common is sufficient to

44. Section 3(5), reprinted with text at note 11 *supra*.

45. See text with note 17 *supra*.

46. SIMES & TAYLOR 354-55. For a similar discussion on another closely related fact situation, see Jossman, *The Forty Year Marketable Title Act: A Reappraisal*, 37 U. DET. L.J. 422, 427-28 (1960).

47. *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959).

create a root of title which will defeat the interest of another tenant-in-common after the passage of the statutory period. The holding was that it is not, although the court's articulation of that holding was sprinkled somewhat with ambiguity.⁴⁸

D. *Interests Cleansed*

The act's declaration of a marketable title in anyone who "has been vested with any estate in land" naturally calls forth the question of which interests are cleansed of defects by the statute.

The Minnesota Supreme Court made a forthright declaration that the term "source of title" in the Minnesota act must be taken to refer to "recorded fee simple ownership." It set forth this definition in the landmark case of *Wichelman v. Messner*,⁴⁹ in which it construed the act to eliminate a possibility of reverter. The definition was constructed partly on the basis of the relationship between the Minnesota marketable title statute and the language of another Minnesota statute which defined estates of inheritance as fees. But the thrust of the court's decision was directed to the fact that the legislature intended "those owning interests in old conditions and restrictions which burden such [fee] ownership" to file notice.⁵⁰

As a practical matter, most cases which will arise under the Marketable Title Act will involve fees simple.⁵¹ However, it has been noted that a looser definition of "title" might lead to strange applications for the invocation of the act, for instance, lessees and life tenants trying to bar lessors and remaindermen who had not filed notice and were not in possession.⁵² It would seem that the Florida act could use some tightening in this respect—at least by the addition of a clause which prevents it from being applied to bar lessors.⁵³

E. *Interests Obliterated*

1. CONTINGENT REMAINDERS

The next category of problems concerns the interests which may be destroyed by the statute.

48. The ambiguity arises from that court's dictum that *if* the quitclaim grantor had purported to create "an entire title to the land in the grantee, it would have satisfied the provision of the Marketable Title Act." This "if" dictum is curious because the court previously emphasized that there was unanimity that "an ordinary quitclaim deed does not purport to convey the real estate but only the present interest of the grantor therein and . . . there is no implication . . . that the grantor had or conveyed entire title."

49. 250 Minn. 88, 83 N.W.2d 800 (1957), discussed more fully at text with notes 99-106, *infra*, in connection with the constitutional issue.

50. *Id.* at 106, 83 N.W.2d at 816.

51. Aigler, *A Supplement to "Constitutionality of Marketable Title Acts"—1951-1957*, 56 MICH. L. REV. 225, 231 (1957).

52. Note, 41 MINN. L. REV. 232, 234 (1957).

53. A possible model would be MICH. COMP. LAWS § 565.104 (Supp. 1956).

The case of the contingent remainderman was tried and found wanting in a leading Iowa case, *Lane v. Travelers Ins. Co.*⁵⁴ The applicable Iowa statute barred claims which arose or existed before 1920 and were not filed by 1931. The case was decided in 1941. The key plaintiffs, born in 1917 and 1919 respectively, were holders of contingent remainders following a life estate which had been set up by devise in 1895. The life tenant mortgaged the land, which was foreclosed by sheriff's deed in 1910. A complex chain of title began in 1913, when the sheriff's grantee quit-claimed to a woman who happened to be the wife of the original life tenant. The contingent remaindermen sued in equity to establish their interests against the insurance company, which was the foreclosing mortgagee of the wife.

The court saw as crucial the question of when the plaintiff remaindermen's claims arose. Premising its decision on the idea that a contingent remainder arises when it is created, the court held that the interest could be barred under the marketable title statute by the passage of the requisite time, even though the contingency did not occur. It bulwarked its reasoning by analogy to the substantial legal elements of contingent remainders—including the facts that these interests are entitled to the protection of equity, and may be conveyed by deed or mortgage. The Iowa court viewed the language of its statute, which vitiated "any claim," as "plain and unambiguous."⁵⁵ It would appear that the Florida act would require the same result, in view of its even stronger reference to "all estates, interests, claims or charges whatsoever."⁵⁶

2. MORTGAGES

The strength of the preceding language would seem also to apply to mortgages. An Ontario case⁵⁷ has even gone so far as to extinguish a mortgage which had been of record for more than the statutory period, though it appeared on the title after the vendor's root of title. The particular facts of that case⁵⁸ mute the holding, but the application of the Florida statute to mortgages which are at least thirty years old and older than the root of title is obvious.⁵⁹

54. 230 Iowa 973, 299 N.W. 553 (1941).

55. *Id.* at 978, 299 N.W. at 555.

56. Section 4.

57. *Re Layton*, [1950] Ont. Weekly N. 337 (Sup. Ct.).

58. There was produced a duplicate original copy of the mortgage, which bore an endorsement by the wife-mortgagee "by her attorney"—her husband. There also was an affidavit from the mortgagee's son that he was satisfied that the mortgage had been paid in full. The court further found that any action to recover money secured by the mortgage was barred by another statute.

59. See *SIMES & TAYLOR* 322-23. *Cf.* the Illinois statute, which excepts from its application all mortgagees' interests where the due date on the mortgage is not stated on its face, and the mortgage is not barred by another statute of limitations. ILL. ANN. STAT. ch. 83 §§ 12.1-4 (Smith-Hurd, Supp. 1962).

3. EASEMENTS AND SERVITUDES

The inapplicability of the act to easements and "servitudes in the nature of easements [in use]"⁶⁰ is probably one of its weakest links and an area for the immediate consideration of amendment. It would seem that the exception should be struck⁶¹ or at least modified to require that the easement be observable "by physical evidence of its use," to use the language of the Michigan statute.⁶² This kind of amendment could be softened to except governmental easements and even public utilities, as the present wording of the statute⁶³ no doubt reflects the political necessities in that regard.

Another exception could be drafted with respect to subdivisions. It would lack a use requirement but would at once lend precision to the act in terms of policy. This amendment could permit the filing of notice of an equitable servitude on behalf of all owners in a subdivision by an officer of a subdivision association.⁶⁴

4. MINERAL RIGHTS

Mineral rights may be considered separately. While it is not likely that cases will abound in this area in Florida, it is perhaps worthwhile to mention litigation in other jurisdictions dealing with certain aspects of this subject. The legal issues which most often come into play center on the twin elements of severability and possession.⁶⁵

5. GOVERNMENTAL LIENS

A further issue as to which claims are invalidated arises in connection with various governmental liens.⁶⁶ It will be noted that the act pur-

60. Section 3(5).

61. In which case presumably the requirement for exception from the act would be that there must be "possession" of the easement. See § 3(3) of the act, mentioned at text with note 24 *supra*. And see *United Parking Stations, Inc. v. Calvary Temple*, 257 Minn. 273, 101 N.W.2d 208 (1960), which also contains a clever but unsuccessful end run on the Minnesota statute—an attempt to argue that an easement had been reinstated by a recital.

62. MICH. COMP. LAWS § 565.104 (Supp. 1956).

63. Quoted at text with note 11 *supra*.

64. See "Amendment to Model Marketable Title Act as to Equitable Restrictions in a Subdivision," SIMES & TAYLOR 228.

65. See, e.g., *Northern Pac. Ry. v. Advance Realty Co.*, 78 N.W.2d 705 (N.D. 1956). In this case, the statute required possession. *Held*, parties who had notice of a mineral reservation had only "title to the surface," which "did not in any way give them possession of the minerals." But those who had notice got title to the oil and gas because there was no reservation. See also Davis, *Some Practical Aspects of Oil and Gas Title Examinations in Nebraska*, 34 NEB. L. REV. 1, 18-20 (1955). For Ontario cases on mineral rights, see *Re Algoma Ore Properties Ltd.*, [1953] Ont. 634 (C.A.); *Re Headrick & Calabogie Mining Co.*, [1953] Ont. Weekly N. 761 (C.A.).

66. *Cf. In re Frederick's Estate*, 247 Wis. 268, 19 N.W.2d 248 (1945). See also Ross, *Federal Tax Liens—Their Impact on the Law of Real Property*, 18 U. MIAMI L. REV. (1963).

ports to nullify "all estates, interests, claims or charges whatsoever . . ." ⁶⁷ and excepts specifically only rights of the United States or the state of Florida "reserved in [a] patent or deed." ⁶⁸

F. *Persons in Possession—et al.*

1. THE NATURE OF POSSESSION

Some of the built-in deterrents to the application of the act have been treated in the discussion of the interests which the act clears. We may note at least two other subject areas, delineated in court decisions since 1950, which may be relevant to the Florida act's exception of the "rights of any person in possession." ⁶⁹

The Minnesota court defined possession under its statute in *B. W. & Leo Harris Co. v. City of Hastings*, ⁷⁰ which involved the defendant city's claim that it had been in continuous possession of a tract of land. The evidence most favorable to the defendant was this: Each winter it erected and flooded a skating rink, and put a warming house on the tract. City employees watched over the rink. They also occasionally hauled dirt from city streets to the land, and built a baseball backstop there. The park commissioner cleaned the tract in winter and cut the weeds in summer. It was with the case in this posture that the court reversed a verdict for the city, refusing to find the degree of possession necessary to defeat the Minnesota Marketable Title Act. That possession, the court said, must be

present, actual, open and exclusive and must be inconsistent with the title of the person who is protected . . . It cannot be equivocal or ambiguous but must be of a character which would put a prudent person on inquiry. ⁷¹

This stringent view of the requisite possession is in line with the Minnesota court's obvious eagerness to make this legislation work. ⁷² It at least sets a good guideline for the interpretation of the Florida statute.

The Iowa case of *Boehnke v. Roenfanz* ⁷³ illustrates another exception to the application of the act. The Iowa statute at this time had a cut-off date of 1940, with suit barred against a "holder of record title . . . in possession" since that time. The factual situation was based on a trust instrument executed in 1932, providing that the defendant should run the family farm as trustee for his sisters, who each had received an un-

67. Section 4.

68. *Ibid.*

69. Section 3(3).

70. 240 Minn. 44, 59 N.W.2d 813 (1953).

71. *Id.* at 49, 59 N.W.2d at 816-17.

72. See also *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957), discussed in text with notes 49-50 *supra* and 99-106 *infra*.

73. 246 Iowa 240, 67 N.W.2d 585 (1954).

divided two-ninths interest when their father died intestate. The sisters brought suit in 1952 to establish their interest some years after their request for an accounting was denied. The brother pleaded, *inter alia*, that the action was barred by the Iowa Marketable Title Act, because of his own adverse possession. Rejecting the brother's related contention that there had been a repudiation of the trust agreement, the court premised that "between the trustee and the cestui que trust . . . statutes of limitation have no application,"⁷⁴ and found in favor of the plaintiff sisters. Although it is fully accepted that marketable title legislation is more than a statute of limitations,⁷⁵ the principle of the case is a valuable precedent.

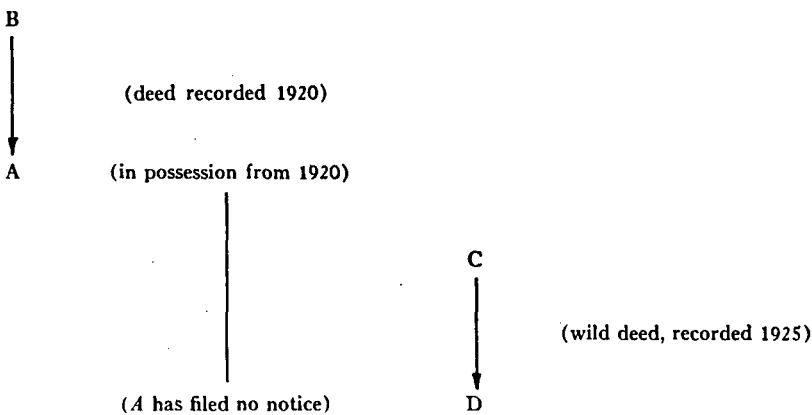
* * * *

Possession problems rear up in several other areas, which may be discussed individually.

2. PROBLEM OF THE TWO CHAINS

The Problem of the Two Chains is a classic theoretical issue in marketable title legislation, although it does not seem to have arisen in the recorded litigation. Assume the following situation, brought to court in 1966:

A claims under a deed to him from B, recorded in 1920. A takes possession in 1920 and remains in possession until the present, but has filed no notice. D claims under a wild deed from C, recorded in 1925.



Superficially, it would seem that both A and D could at least allege claims of "marketable record title." D would point out that his root of title begins after A's and is more than thirty years old. He would stress that A had not filed notice to keep alive his claim of record. The act's declaration of a marketable record title on a thirty-year root is made "free

74. *Id.* at 246, 67 N.W.2d at 590.

75. See BASYE, CLEARING LAND TITLES 262 (1953); Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47, 50-51 (1958).

and clear of all claims except the matters set forth as exceptions"⁷⁶— including the exception of persons in possession. Its nullification of other interests is "subject to" that exception.⁷⁷ D would therefore claim that he has a marketable record title subject to A's rights as a possessor.⁷⁸

Though this may seem a flimsy semantic device, A is compelled to reply to D's contentions regarding the relative lengths of the chains of title and especially regarding A's failure to file notice. A will have to place his emphasis on the fact that he holds a record chain of title for thirty years and that, indeed, he has been in possession for thirty years.

The act does not appear to reconcile this conflict explicitly. However, it seems well within the legitimate bounds of the judicial function to solve the problem in favor of A. The reasoning of this solution would focus on the apparent underlying intent of two provisions taken together: the declaration-of-marketable-title clause and the persons-in-possession exception. An alternative is the precise legislative solution found in a limited possession feature of the Model Act. This clause provides that if an owner has been in possession for at least the statutory period, and no title transaction has appeared of record in *his* chain of title, his possession should be deemed equivalent to his filing of notice during the statutory period.⁷⁹

3. LAST HURRAHS

A related issue is the question of whether an encumbering claim may be revived, *e.g.*, by the prior claimant going into possession after his claim has been eliminated by the passage of the statutory period. The better view, espoused by Simes and Taylor, is that the prior claimant's interest has been extinguished once and for all.⁸⁰

One other problem in this area is the one posed by the "Late-Squatting Possessor." In this situation, the squatting begins just before the claimant's thirty years have elapsed. At the end of the thirty years the claimant would appear to have a marketable record title, but the rights of the possessor (presumably none) would not be extinguished. However, outstanding rights of other parties, pre-dating the root of title and not otherwise appearing in the chain or otherwise excepted from the act, would be invalidated. This result seems obvious under the Florida

76. Section 2.

77. Section 4.

78. Compare the discussion of the problem of the Late Squatting Possessor at text with notes 81-84 *infra*.

79. Model Act § 4(b), reprinted at SIMES & TAYLOR 8; application discussed, *id.* at 353.

80. SIMES & TAYLOR at 353-54. The rationale of these authors is that it is better to adopt this view than to place the "enormous emphasis on the fact of present possession" which would be required by an interpretation allowing a revivor of the interest.

act.⁸¹ It coincides with a suggested solution⁸² to this hypothetical situation under the Michigan act, which denies a marketable record title "if the land . . . is in the hostile possession of another."⁸³ If this kind of provision is construed to mean that the claimant acquires a marketable record title subject to possessory rights, the purpose of the act is furthered and a squatter is unable to keep alive ancient interests "to which he is without actual knowledge or privity."⁸⁴

IV. THE ISSUES: CONSTITUTIONAL PROBLEMS

A statute of this kind naturally provokes constitutional issues, principally because of its retroactive features.⁸⁵ The clauses of the federal constitution which usually will be pleaded against this kind of legislation are the due process clause of the fourteenth amendment⁸⁶ and the clause which says that no state shall pass a law impairing the obligation of contracts.⁸⁷ These clauses generally are pleaded together, and the legal test for the validity of legislation under them seems to be the same.⁸⁸ Presumably one who challenges this statute would also plead section 4 of the Declaration of Rights of the Florida Constitution, which provides that all courts should be open for injuries done to a person in his lands, goods, person or reputation. However, this clause would not be pertinent, for reasons which presently will become apparent.⁸⁹

This part of the analysis will first consider Florida cases on analogous land legislation. It will then examine the results of litigation on marketable title acts and similar statutes in other jurisdictions. Third, it will consider some relevant decisions of the Supreme Court of the United States.

A. Florida Cases: Degrees of Great Distinction

The opponents of the statute probably will place their principal reliance on the Florida case of *Biltmore Village v. Royal*.⁹⁰ That case

81. Section 2 defines marketable record title only in terms of a record chain of title. There is no requirement that the claimant be in possession or that the land be not adversely possessed by another. See section IIA of this article *supra*. Section 3(3) exempts from the operation of the act the rights of any person in possession. See section IIB of this article *supra*.

82. Jossman, *supra* note 46, at 429.

83. MICH. COMP. LAWS § 565.101 (1948).

84. Jossman, *supra* note 46, at 429.

85. Scurlock defines a retroactive statute as one which "extinguishes or impairs interests acquired under the previously existing law." SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTEREST IN LAND 1 (1953).

86. U.S. CONST. amend. XIV, § 1.

87. U.S. CONST. art. 1, § 10.

88. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448 (1934). The Court swept the due process argument into the same bin as the contract clause contention, and also a plea of equal protection under the fourteenth amendment. It should be noted, however, that the latter clause is not nearly so popular a vehicle as the first two named. See also Note, *Constitutionality of Marketable Title Legislation*, 47 IOWA L. REV. 413, 427, at nn.83-85 (1962).

89. See notes 95-98 *infra* and accompanying text.

90. 71 So.2d 727 (Fla. 1954).

involved a Florida statute which provided in part that all reverter provisions should become void twenty-one years from the date of the conveyance, with the sole qualification that the holder of a reverter interest should be given a year in which to institute suit to enforce his right.⁹¹ The Florida Supreme Court voided the retroactive provision of this statute, presumably basing its decision on the contracts clause.⁹²

But the Marketable Title Act probably will be upheld, because its supporters will stress *Mahood v. Bessemer Properties*,⁹³ another Florida case which is one of the most-cited decisions on this kind of legislation. The plaintiff in *Mahood* was a vendor seeking to enforce a contract for the sale of land, the title to which was claimed to be clouded by an executory 17-year-old agreement made by the vendor to sell to another. The plaintiff pleaded section 695.20 of Florida Statutes, which provided that when anyone contracted to buy realty prior to 1930 by a contract requiring all payments to be made in ten years, the contract would not constitute notice to purchasers unless notice of it had been filed within six months of the enactment of the statute.

The Florida Supreme Court upheld the legislation in a well-articulated decision, refusing the defendant's plea of the contracts clause. It emphasized that the act "does not cancel or render void the contract. . . . It simply imposes a duty or burden on [the party claiming an interest adverse to the chain of title] to do additional enumerated things."⁹⁴ The court characterized the change wrought by the statute as one affecting only the "remedial" law, and said that a state might "modify existing remedies and substitute others without impairing the obligation of contracts, providing a sufficient remedy be left or another sufficient remedy be provided." It answered affirmatively the essential constitutional question of whether the statute was reasonable.

This case is of outstanding importance with reference to future constitutional litigation on the marketable title act. First, it is a Florida case. Second, the profile of the legislation involved is quite similar to that of the marketable title act, and the grace period for filing is only six months, rather than the two years provided by the marketable title statute.

It should be stressed that there is a very definite distinction between

91. FLA. STAT. § 689.18 (1961).

92. See *Biltmore Village v. Royal*, 71 So.2d 727, 728-29 (Fla. 1954). For the relationship of the Marketable Title Act to the prospective provisions of the reverter act, see text with notes 134-36 *infra*.

93. 154 Fla. 710, 18 So.2d 775 (1944).

94. *Mahood v. Bessemer Properties*, 154 Fla. 710, 719, 18 So.2d 775, 780 (1944). One alternative was the filing of a written instrument executed by the record title holder, evidencing an extension or modification of the original contract, showing that it remained in force. Others included the recording of a deed or other conveyance, and the filing of suit.

Mahood, in which this filing requirement was upheld, and *Biltmore*, in which the retroactive reverter clause was held unconstitutional.⁹⁵ The statute in *Mahood* required only a filing. The statute which was voided in *Biltmore* required the bringing of a suit. The requirement of suit was probably also the controlling element in two cases from other jurisdictions, in which different kinds of land legislation were held unconstitutional.⁹⁶ It will be noted that section 4 of the Declaration of Rights of the Florida Constitution⁹⁷ was pleaded in *Mahood*, and that the court said, in rejecting the defendant's arguments, that the statute did not "deprive him of the right to litigate his contract rights."⁹⁸

Considering all the factors discussed above, it may be said that the Florida Marketable Title Act has protection in the homegrown constitutional precedent of the *Mahood* case.

B. *Wichelman v. Messner and Other Voices*

The most-cited foreign precedent on the constitutionality of marketable title acts is the Minnesota case of *Wichelman v. Messner*,⁹⁹ which is justly heralded. The case's main virtues as a precedent are that it deals with the constitutional issues directly and that it may even be said to go out of its way to uphold the statute.

This case was based on a conveyance in 1897 to the predecessor of the defendant school district. The conveyance contained a possibility of reverter, subject to the use of the land for school purposes. The school board, after closing down the school in 1946, sold the land to the defendant Messner in 1952. The plaintiff, an unsuccessful prospective vendee, solicited releases and quitclaims from the heirs of the original grantor, and then brought an action to determine adverse claims and for possession. There had been no notice filed under the Minnesota statute, which had a forty-year clause, and there had been no form of re-entry attempted.

The question of statutory construction presented an immediately challenging issue. The facts included a reservation in the muniments of the root of title—*i.e.*, the possibility of reverter. Under the explicit lan-

95. See discussion, text with notes 90-92 *supra*.

96. *Murrison v. Fenstermacher*, 166 Kan. 567, 203 P.2d 160 (1949); *Girard Trust Co. v. Pennsylvania R.R.*, 364 Pa. 576, 73 A.2d 371 (1950), *affirming* 71 Pa. D. & C. 533 (C.P. 1950). It may be noted that there were other sticky legal problems in these cases. The court in *Murrison*, *supra*, noted that the statute in question, which required suit within one year to protect a claim against the statutorily perfectible title, acted "irrespective of possession." And both courts in the *Girard Trust* case, *supra*, stressed that the legislation in question was "confusing" (71 Pa. D. & C. at 537) and "unsusceptible of rational interpretation" (364 Pa. at 578, 73 A.2d at 371). All things considered, however, the necessity for a suit seemed to be the most emphasized factor in both cases.

97. See text with note 89 *supra*.

98. 154 Fla. at 720, 18 So.2d at 780.

99. 250 Minn. 88, 83 N.W.2d 800 (1957).

guage of the Florida statute,¹⁰⁰ this would have been enough to foil the defendant's plea. However, the Minnesota court swept all before it in this regard. It applied the act to the situation before it, with the aid of some contortive construction involving another statute.¹⁰¹ Indeed, it unleashed a full broadside at the muniments-of-title idea, which it cited specifically from the Indiana act. This kind of provision, the court said,

defeats in large measure the very purpose of this type of legislation which is intended to relieve a chain of title from the accumulated burdens of old conditions and restrictions set forth in provisions contained in instruments making up the chain of title.¹⁰²

The court then explicitly upheld the constitutionality of the statute, emphasizing that the legislation was intended to insure that "ancient records shall not fetter the marketability of real estate." It took note of the other marketable title legislation in the field at the time, and said that these statutes

proceed upon the theory that the economic advantages of being able to pass uncluttered title to land far outweigh any value which outmoded restrictions may have for the person in whose favor they operate.¹⁰³

The court said that the constitutionality of the statute was preserved both by the exemption of persons in possession and the provision for the filing of notice. It may be noted that the transitional notice provision, which allowed filing for claims which already were more than forty years old at the time the act was passed, gave less than ten months grace.¹⁰⁴

In general, it may be said that if the Minnesota court's construction¹⁰⁵ of the statute was arguable,¹⁰⁶ its powerful validation of constitutional policy was admirable.

Cases from two other states deserve mention on the constitutional

100. Section 3(1), quoted at text with note 9 *supra*.

101. See text with note 50 *supra*.

102. 250 Minn. at 114, 83 N.W.2d at 821.

103. *Id.* at 121, 83 N.W.2d at 825.

104. Minn. Laws 1947, ch. 118, noted in 33 MINN. L. REV. 54 (1948).

105. It may be noted that the 1959 session of the Minnesota Legislature amended the act to provide, *inter alia*, that:

the words "source of title" . . . shall mean any deed, judgment, decree, sheriff's certificate, or other instrument which transfers or confirms, or purports to transfer or confirm, a fee simple title to real estate. MINN. STAT. ANN. § 541.023 (Supp. 1962).

It is unclear whether the legislature meant to overrule *Wichelman* or—as seems more probable—to codify it!

106. For raised scholarly eyebrows, see BAYSE, *CLEARING LAND TITLES* (Supp. 1962, at 92-93); Aigler, *A Supplement to "Constitutionality of Marketable Title Acts"—1951-1957*, 56 MICH. L. REV. 225, 232-33 (1957).

question. Iowa's supreme court has approved that state's marketable title statute in two rather strong dicta.¹⁰⁷ And the Illinois Supreme Court has upheld legislation which invalidated reverter rights more than fifty years old.¹⁰⁸ Justice Schaefer, speaking for the Illinois court in *Trustees of Schools of Township No. 1 v. Batdorf*, approved the "reasonableness of the method chosen by the General Assembly."¹⁰⁹

C. Policy in Practice at the Federal Supreme Court

Although the Supreme Court of the United States has not ruled on marketable title legislation, there is basis in analogical holdings and dicta for arguments to validate the Florida statute. For instance, the Supreme Court has consistently upheld recording statutes with a retroactive effect.¹¹⁰ A classic statement of the rationale of these cases is found in a nineteenth century decision involving a Louisiana requirement that mortgages and privileges should be recorded.¹¹¹ The Supreme Court said that this requirement "did not impair the obligation of the contract," since it gave "ample time and opportunity to do what was required." The statutory provision did not take away or destroy security, the court said; it did tell the mortgagee that he had "a secret lien" which should be made known to those who were dealing with the lienee.

Chief Justice Hughes cast the jurisprudential policy argument for this kind of legislation in broader terms in his majority opinion validating the Minnesota Mortgage Moratorium Law, a piece of legislation spawned by the depression.¹¹² After a review of several decisions, the Chief Justice emphasized a "growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." The question no longer was simply one involving a clash between two parties to a contract; it involved the "use of reason-

107. *Tesdell v. Hanes*, 248 Iowa 742, 749, 82 N.W.2d 119, 123 (1957) ("we are satisfied the legislature had ample authority to enact a limitation statute . . . subject to a condition a reasonable time must elapse before it becomes effective"); *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 978-79, 299 N.W. 553, 555 (1941) ("little doubt of the desirability of statutes giving greater effect and stability to record titles"). See discussion in Note, *Constitutionality of Marketable Title Legislation*, 47 Iowa L. Rev. 413, 428-29 (1962).

108. Sections 4 & 5 of the Reverter Act, Ill. Laws 1949 at 659-60. This legislation is now found in ILL. ANN. STAT. ch. 30, §§ 37(e)-(f) (Smith-Hurd, Supp. 1962). The present § 37(e) changes the applicable period to forty years.

109. 6 Ill. 2d 486, 493, 130 N.E.2d 111, 115 (1955). It may be noted that the court validated the statute despite its belief that a "more sensitive treatment of the problem" might have been possible, e.g., the conferring of "equitable jurisdiction to extinguish such interests when they might have ceased to serve any useful purpose." *Id.* at 492, 130 N.E.2d at 115.

This decision should of course be compared with *Biltmore Village v. Royal*, 71 So.2d 727 (Fla. 1954), discussed at text with notes 90-92 *supra*.

110. See SCURLOCK, *op. cit. supra* note 85, at 73.

111. *Vance v. Vance*, 108 U.S. 514 (1883) (state constitutional provision plus statute enacted pursuant to it).

112. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

able means to safeguard the economic structure upon which the good of all depends." The complications of modern economic life, he said, were "inevitably" leading to "an increased use of the organization of society in order to protect the very bases of individual opportunity."¹¹³

The Chief Justice then applied this reasoning to the statutory extension of the period of redemption. It is true that the decision mentioned on several occasions the severity of the emergency¹¹⁴ and the temporary nature of the relief.¹¹⁵ However, the Court's language was easily broad enough to cover a potential severance of ancient interests.¹¹⁶

It should be noted that the two-year transitional period for filing interests older than thirty years seems constitutionally safe on the basis of Federal Supreme Court decisions.¹¹⁷

The answers to constitutional arguments against the act may be summed up simply: The object of the legislation is the accomplishment of a worthy public purpose—"the simplification of land title transactions and the resulting greater alienability of land."¹¹⁸ The very importance of that purpose should weigh heavily in the constitutional balance.¹¹⁹ The statute is adapted to its stated purpose.¹²⁰ It attains its objective in a manner which cannot be called unreasonable.

It is to be hoped that these arguments will carry the day.

V. WHO'S ON FIRST: THE ACT AND ITS STATUTORY TEAMMATES

It may now be asked what relationship the Marketable Title Act bears to Florida law existing at the time of its passage. This discussion necessarily must focus on the somewhat inscrutable language of section 95.23 of the Florida Statutes. This statute, originally enacted almost forty years ago,¹²¹ is worth quoting in full:

After the lapse of twenty years from the record of any deed or the probate of any will purporting to convey lands no per-

113. *Id.* at 442.

114. *E.g., id.* at 425, 444-45, 447.

115. The postponement of foreclosure under the law, which was passed in 1933, was in no event to be extended beyond 1935.

116. And even broader. Note that *Blaisdell* was cited favorably in *Biltmore Village v. Royal*, 71 So.2d 727 (Fla. 1954) invalidating Florida reverter provisions (text with notes 90-92 *supra*), as well as in *Mahood v. Bessemer Properties*, 154 Fla. 710, 18 So.2d 775 (1944), upholding retroactive title-clearing legislation (text with notes 93-94 *supra*).

117. *Turner v. State of New York*, 168 U.S. 90 (1897) (six-month leeway upheld); *Terry v. Anderson*, 95 U.S. 628 (1877) (nine and one-half months period upheld).

118. See Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185, 201 (1951).

119. See SIMES & TAYLOR 271 (1960).

120. Indeed, it may be argued that it does not go far enough. See, *e.g.*, text with notes 11-12 and 60-64 *supra*.

121. Fla. Laws 1925, ch. 10171 §§ 1, 2.

son shall assert any claim to said lands as against the claimants under such deed or will, or their successors in title.

After the lapse of twenty years all such deeds or wills shall be deemed valid and effectual for conveying the lands therein described, as against all persons who have not asserted by competent record title an adverse claim.¹²²

There is a striking similarity between section 95.23 and the Marketable Title Act. The Marketable Title Act has two major pillars: The declaration of marketability on given facts¹²³ and the nullification of other interests.¹²⁴ The second paragraph of section 95.23, deeming documents to be "valid and effectual," is in effect, a declaration of marketability. The first paragraph of section 95.23 is in effect, a nullification of other interests, even though it is cast in the language of a statute of limitations. We may therefore conclude that there is a high degree of *functional* correlation between the statutes, despite their differences in form. On one hand, section 95.23 has marketable title features. On the other, the Marketable Title Act is in effect a "curative act with a limitations provision," as one writer has labeled section 95.23.¹²⁵

It may thus be concluded that clever advocacy could have molded section 95.23 into a marketable title act, and the present legislation is in that sense actually superfluous. But the major problem in this respect is that the key section 95.23 decisions of the Florida Supreme Court give a Scotch verdict at best. A supreme court decision in 1953 explicitly declared that section 95.23 was a bar to an assault on a deed which had been unattacked of record for more than twenty years.¹²⁶ However, this statement was inextricably mixed up with a holding of laches.¹²⁷ Another decision¹²⁸ which seemed to apply section 95.23 was concerned only with a defect in acknowledgment, a matter which hardly could be said to test the theoretical outer limits of that statute.¹²⁹ That case also involved some rather confusing references to possession.¹³⁰

A recent decision of the First District Court of Appeal is perhaps the most clearcut validation of the marketable title possibilities of section 95.23. This is the case of *Lefkowitz v. McQuagge*,¹³¹ an ejectment

122. FLA. STAT. § 95.23 (1961).

123. Section 2, discussed in text with notes 7-8 *supra*.

124. Section 4, discussed in text with notes 29-31 *supra*.

125. This phrase was used by Professor Day to describe § 95.23 in *Curative Acts & Limitations Acts Designed to Remedy Defects in Florida Land Titles*, 9 U. FLA. L. REV. 145, 168 (1956). See also an earlier article under the same title, 8 U. FLA. L. REV. 365, 379 (1955).

126. *Grable v. Nunez*, 64 So.2d 154 (Fla. 1953).

127. *Id.* at 160.

128. *Montgomery v. Carlton*, 99 Fla. 152, 126 So. 135 (1930).

129. *Cf.* FLA. STAT. §§ 95.26, 694.08 (1961).

130. *Montgomery v. Carlton*, 99 Fla. 152, 163-64, 126 So. 135, 139 (1930).

131. 122 So.2d 328 (Fla. 1st Dist. 1960).

action in which the key issue was the refusal of the chancellor to admit into evidence a deed and a power of attorney, both nearly fifty-nine years old. The chancellor's ruling on the point stemmed from his understanding of the relationship of section 95.23 to another statute.¹³² The district court, reversing, held that the deed "must be deemed valid and effectual" to convey the lands, adding that "it was not important or even pertinent that there may have been a break in the plaintiffs' chain of title prior to the recording of the deed."¹³³

This language seems to suggest that if section 95.23 were carried to its fullest legal limits, the Marketable Title Act might be not only superfluous, but in effect, an addition of ten years to a perfectly good twenty-year statute. However, though the language of section 95.23 may be pliable, the explicit language of the new act, plus its pedigree from other jurisdictions, make it a definite step forward.

Still, it is provocative to contemplate a hypothetical situation in which the claimant seeks to defend a recorded instrument which is twenty, but not yet thirty years old.

A further point should be made about the interplay which section 689.18 of the Florida Statutes will provide in 1972. The retroactive provision of this statute was declared unconstitutional in the *Biltmore* case, previously discussed.¹³⁴ But the prospective clause,¹³⁵ placing an absolute twenty-one-year limit on all reverter and forfeiture provisions contained in any deed executed after July 1, 1951, is probably constitutional.¹³⁶ And if it is, it will lop nine years off the Marketable Title Act with respect to reverter provisions.

Section 95.23 serves also as a springboard to several possible problems in the application of the new act, concerning homesteads, trust relationships, and forged deeds.

The supreme court dealt with an interesting bundle of homestead issues in the recent case of *Reed v. Fain*,¹³⁷ which featured a fast intra-family doubleplay. The case involved a conveyance from a father joined by his wife to their son, without consideration, and a reconveyance by the son to the parents, also without consideration, and purporting to

132. FLA. STAT. § 92.08 (1961) (requiring ten days notice of intention to use copy of document).

133. The court cited a previous dictum of the Florida Supreme Court to make its point that "the key to interpretation of Section 95.23 'is a recognition of the fact that its purpose is to perfect a title of record for twenty years which might, for various reasons, otherwise be defective. . . .'" *Lefkowitz v. McQuagge*, 122 So.2d 328, 331 (Fla. 1st Dist. 1960), quoting *Moyer v. Clark*, 72 So.2d 905, 908 (Fla. 1954).

134. See text with notes 90-92 *supra*.

135. FLA. STAT. § 689.18(4) (1961).

136. See BOYER, FLORIDA REAL ESTATE TRANSACTIONS 481 (1960).

137. 145 So.2d 858 (Fla. 1962), *overruling* *Thompson v. Thompson*, 70 So.2d 555 (Fla. 1954).

set up an estate by the entireties. A daughter brought an action in equity to cancel the deeds. The son pleaded section 95.23 as a bar, basing his contention on the fact that the reconveyance had been of record without adverse claim for the statutory twenty years.

A closely divided court¹³⁸ took a double-barreled approach centered on the homestead issue. First, it held that section 95.23 was inapplicable because the deed was void as an attempt to alienate homestead without consideration, and the statute should not apply to void deeds. Second, the court said, the legislature "did not intend" section 95.23 "to be applicable to deeds or wills conveying or devising 'homestead property.'"

It is further relevant with respect to the homestead issue that both supreme court and district court decisions have held that at least one other conveyancing statute is inapplicable to homestead property.¹³⁹ It may well be asked, therefore, whether the Marketable Title Act will be construed to nullify homestead interests which have not been recorded within the statutory period.

It may also be asked whether it will place the stamp of marketability on conveyances made by cestuis que trust in violation of a trust agreement, when the trustee does not file the statutory notice. In the knotty case of *Model Land Co. v. Crawford*,¹⁴⁰ the supreme court held in effect that section 95.23 could not be used as a bar in this kind of situation.

A similar question arises with reference to the applicability of the new statute to forged deeds, which the Florida court has decided cannot claim the protection of section 95.23.¹⁴¹

VI. CONCLUSION

Florida's Marketable Title Act is a competent transcription of a good idea. The act's major provisions say everything they should say about marketability of the claimant's title and the nullification of adverse claims. It is to be expected that the excellent Title Standards of the Florida Bar will be expanded to include the application of the statute.

138. On the original hearing of the case, a four to three majority would have applied section 95.23. However, on rehearing, 145 So.2d at 864, the vote shifted to four to three the other way.

139. See *Estep v. Herring*, 154 Fla. 653, 18 So.2d 683 (1944), and *Moorefield v. Byrne*, 140 So.2d 876 (Fla. 3d Dist. 1962), construing FLA. STAT. § 689.11 (1961) (making all interspouse deeds effectual to convey title "as if the parties were not married").

140. 155 Fla. 323, 20 So.2d 122 (1944). See also discussion of *Boehnke v. Roenfanzen*, 246 Iowa 240, 67 N.W.2d 585 (1954), at text with notes 73-75 *supra*.

141. *Wright v. Blocker*, 144 Fla. 428, 198 So. 88 (1940).

It should be noted that the act is not written as a panacea.¹⁴² By no means will it automatically eliminate all interests more than thirty years old. It will not necessarily determine marketability in a commercial sense.

However, it should work¹⁴³ where it does not make exceptions, and it should aid materially in clearing land titles and cutting down the scope of title search.

It would seem that one link in the new chain demands immediate repair. This is the exception for all easements in use. Its elimination or drastic modification is necessary to fulfill the modest but significant promise of the statute.

142. For a vista of more dramatic results, compare the discussion of *Wichelman v. Messer*, at text with notes 100-02 *supra*.

143. See the assurance to this effect from a Michigan lawyer, writing with reference to that state's marketable title act, which incidentally has not been challenged by litigation in two decades of operation: "It has rendered a service to the bench and bar by freeing land titles. . . . The great majority of Michigan's lawyers are pleased with the statute and are endeavoring to make use of it." Jossman, *The Forty Year Marketable Title Act: A Re-appraisal*, 37 U. DER. L.J. 422, 431 (1960).