North Dakota Law Review

Volume 41 | Number 4 Article 3

1964

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THE NORTH DAKOTA MARKETABLE RECORD TITLE ACT

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"No other remedial legislation which has been enacted or proposed in recent years for the improvement of conveyancing offers as much as the marketable title act. It may be regarded as the keystone in the arch which constitutes the structure of a modernized system of conveyancing."[1]

The need for a modernization of the conveyancing system in the United States has been urged upon the organized bar for years. Professor Paul E. Basye has commented:

> For over half a century there has been ever increasing dissatisfaction with our system of transferring land. On a mounting scale real estate transactions have grown unnecessarily slow, unduly expensive, and needlessly uncertain. With the passage of years and the lengthening of chains of title, the process of appraising marketability has become progressively more cumbersome. The machinery employed for these purposes has become altogether inadequate for the needs of our time.[2]

And over twenty-five years ago George E. Beers, then chairman of the Section of Real Property, Probate and Trust Law of the American Bar Association stated:

> One of the discredits of our whole system has to do with the recording of titles. It presents a topic of great difficulty. Like Mark Twain's weather, everybody finds fault, but nobody seems to be able to do anything about it. . . .[I]t is quite true that the evil that men do lives after them, and is not interred with their bones.[3]

The Committee on Acceptable Titles to Real Property, of the same section, in its 1954 report noted:

> This committee commented last year upon the increasing dissatisfaction with our present general system of land transfers, the confusion, frustration and irritation caused the bar and the public thereby, and the threat contained therein to the retention by the bar of its title practice. . . . .Thus a

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1. SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 3 (1960).
2. SIMES & TAYLOR, *supra* note 1, at xi.
3. Beers, *What of the Future? The Work Before the Section of Real Property, Probate and Trust Law*, A.B.A. SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 24 (1939).

challenge is posed to the bar which it cannot afford to ignore.[4]

The 1964 report of the Committee on Improvement of Land Records of the same section said simply, "this challenge remains to be met."[5]

Apparently the warning that the bar might not retain its title practice did more to arouse the bar to these warnings than anything else,[6] as a complete study of the subject was undertaken with the result that a joint project resulted not only in recommendations to improve the system by legislation but by the use of title standards.[7]

The biggest problem confronting even those who were aware of the dissatisfaction of the conveyancing system was what to do about it. The tremendous building development following World War II, coupled with the use of real property as a hedge against inflation and increasing income taxes, brought about pressures on the system that it was not able adequately to meet under existing laws and practices of title examiners.

The foundation of the American conveyancing system has been the recording acts. Recording statutes were originally designed to prevent fraudulent conveyances and provide a public depository upon which a purchaser could rely with some certainty. However, as time goes the instruments of record become more numerous, original indexing systems make it very tedious to find the instruments in the chain being searched, and the number of errors in the instruments and the record correspondingly increases. The first basic need in improvement is to make the record a more reliable source for an intelligent determination as to the actual state of the title, and the second basic need is uniformity on the part of title examiners in making that determination.

The first improvement must come by way of legislation, as the record is a creature of statutory law. It has been suggested that this legislation should endeavor to accomplish the five following propositions:

(a) The record should include, as nearly as possible, all the facts required to determine the state of the title. . . .

(b) So far as practicable, the record should be self-proving. . . .

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4. REPORT OF THE COMMITTEE ON IMPROVEMENT OF LAND RECORDS, A.B.A. SECTION OF REAL PROPERTY, PROBATE & TRUST LAW 34 (1954).

5. REPORT OF THE COMMITTEE ON IMPROVEMENT OF LAND RECORDS, A.B.A. SECTION OF REAL PROPERTY, PROBATE & TRUST LAW 94 (Aug. 10-12, 1964).

6. *E.g.* State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); State v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961); New Jersey State Bar Ass'n. v. Northern N.J. Mtg. Ass'n., 32 N.J. 430, 161 A.2d 257 (1960); Bar Ass'n. of Tenn. Inc. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959); Beech Abstract & Guar. Co. v. Bar Ass'n. of Arkansas, 230 Ark. 494, 326 S.W.2d 900 (1959); Pioneer Title Ins. & Trust Co. v. State Bar of Nevada, 74 Nev. 186, 326 P.2d 408 (1958); Title Guar. Co. v. Denver Bar Ass'n., 135 Colo. 423, 312 P.2d 1011 (1957); San Antonio Bar Ass'n. v. Guardian Abstract & Title Co., 156 Tex. 7, 291 S.W.2d 697 (1956); Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954).

7. SIMES & TAYLOR, MODEL TITLE STANDARDS (1960).

(c) The length of the record required for a marketable title should be shortened. . . .
(d) Stale claims should be eliminated. . . .
(e) Some future interests should be restricted in duration. . . .[8]

The second improvement must come by way of uniformity in appraisal of title. The adoption of title standards has done much, but there is still a long way to go.[9]

These suggestions for improvement clearly recognize an inadequate record and a lack of uniformity in an examiner's conclusions. From the recording system courts of equity established as a standard for an acceptable title as a "good title," "a merchantable title," or a "marketable title," and the examiner's purpose then became that of determining whether the record disclosed, in his opinion, such a title.

Generally the giving of a name to a title does not in and of itself constitute much help to an examiner. The North Dakota Supreme Court has stated:

> A "good and merchantable title" means a title in fee simple, free from litigation, palpable defects, and grave doubts; that is, a title which will enable the purchaser not only to hold the land in peace, but will enable him, whenever he may desire to do so, to sell or mortgage the land to a person of reasonable prudence and caution.[10]

Such a definition really served no purpose when it used the term "grave doubts" or "reasonable prudence and caution," as what met the test of these terms soon becomes the standard established by the most picayunish fly specker in the community. But even courts have found it necessary to expand their thinking and the North Dakota Supreme Court in 1955, relying on a New Mexico case,[11] added an additional requirement:

> We are satisfied that at the time the title was rejected the probability was very remote that Charles Breen would assert any claim to the property. This record is devoid of evidence that any attack by Charles Breen would have been successful. The remote possibilities charged as defects against this title are not sufficiently substantial to raise a reasonable doubt as to its validity. The title was therefore marketable.[12]

A comment on this holding that a defect does not create a reasonable doubt unless there is something more than a probability that the title would be successfully attacked stated:

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8. SIMES & TAYLOR, *op. cit. supra* note 1, at xvii.
9. See BASYE, CLEARING LAND TITLES § 7 (1953).
10. Kennedy v. Dennstadt, 31 N.D. 422, 154 N.W. 271 (1915).
11. Campbell v. Doherty, 53 N.M. 280, 206 P.2d 1145 (1949).
12. Coverston v. Egeland, 69 N.W.2d 790 (N.D. 1955).

> We suggest that the holding in Coverston v. Egeland, is a dangerous expansion of the rule, for (1) it shifts to the buyer the burden of showing that the title is unmarketable, and (2) forces upon an unprotected purchaser the risk of defending his title against a clear defect in what might prove to be expensive litigation.[13]

The bar cannot justify a system which demands the examination of the record by members of the bar, who sometimes cannot agree, and causes all parties concerned to resort to litigation in the final analysis to judge the quality of a title. Title standards were designed to remove areas of disagreement and adopt a standard as a guide for all examiners. In a limited way these have been successful.

However, in 1945 Michigan adopted a most far reaching statute[14] which was designed to (1) define the marketability of the owner's title in terms of his record title during a specified period of time and (2) to bar and extinguish all claims and interests having an origin prior to a certain date or period of time. The second purpose of the statute had been used as early as 1919,[15] but the first purpose was distinctly unique in its approach, as for the first time a statutory definition of the term "marketability of record" was available to guide the examiners and the courts; thus the birth of the marketable *record* title acts.

It was not long before other states followed this lead.[16] A model act was proposed in 1960,[17] and following the pattern of the model act other states enacted this type of legislation.[18]

The North Dakota statute in defining marketability states:

> Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by himself and his immediate or remote grantors under a deed of conveyance which has been recorded for a period of twenty years or longer, and is in possession of such real estate, shall be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by the application of the provisions of this chapter, instruments which have been recorded less than twenty years, and any encumbrances of record not barred by the statute of limitations.[19]

and in definition it is said:

> A person shall be deemed to have the unbroken chain of

13. REPORT OF COMMITTEE ON ACCEPTABLE TITLES TO REAL PROPERTY, A.B.A. SECTION OF REAL PROPERTY, PROBATE & TRUST LAW 32 (1955).
14. MICH. COMP. LAWS §§ 565.101 to 565.109 (1948).
15. Iowa Acts 1919, ch. 270, § 1.
16. See, *e.g.*, S.D. CODE, ch. 51.16B (1960); NEB. REV. STAT. §§ 76-288 to 76-298 (1958); N.D. CENT. CODE, ch. 47-19A (1960).
17. SIMES & TAYLOR, *op. cit. supra* note 1, at 4.
18. See, *e.g.*, Fla. Stat. Ann. ch. 712 (1963); Indiana Ann. Stat. ch. 56-11 (Supp. 1964); Okla. Stat. Ann. tit. 16 §§ 71-81 (Supp. 1964); Utah Code Ann. ch. 57-9 (1963).
19. N.D. CENT. CODE § 47-19A-01 (1960).

> title to an interest in real estate when the official public records of the county wherein such land is situated disclose a conveyance or other title transaction dated and recorded twenty years or more prior thereto, which conveyance or other title transaction purports to create such interest in such person or his immediate or remote grantors, with nothing appearing of record purporting to divest such person and his immediate or remote grantors of such purported interest.[20]

and a

> Title transaction means any transaction affecting title to real estate, including title by will or descent from any person who held title of record at the date of his death, title by a decree or order of any court, title by tax deed or by trustee's, referee's, guardian's, executor's, master's in chancery, or sheriff's deed, as well as by direct conveyance.[21]

There has been a good deal of discussion by law review writers as to the length of the chain of title to be used to give the effect of marketability. Most statutes provide a forty year period, and some have stated the longer period is used to eliminate a rash of claims being filed. However, 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.

In the practical application of the statute the examiner looks for a "conveyance or other title transaction" of record twenty years or longer, and uses this as the "root of title." By the terms of the statute the claiming record owner can only claim such interest which the conveyance or other title transaction "purports" to create by this root of title, if nothing appears of record subsequent thereto purporting to divest such person and his immediate or remote grantors of such purported interest.

The Nebraska Supreme Court in applying this statutory requirement to a quit claim deed which quit claimed all the right, title, interest estate, claim and demand, both at law and in equity, of a grantor who was the owner as a tenant in common of only an undivided one-tenth interest in the land held, "The weakness and defect in the claim of appellees is that they assert an interest in the land more extensive than that which the quit claim deed purported to create in the grantee named in that deed."[22] And thus the present record claimant could only make claim under the act to the undivided one-tenth interest.

An interesting question is raised as to what interpretation the

20. N.D. CENT. CODE § 47-19A-02(1) (1960).
21. N.D. CENT. CODE § 47-19A-02(2) (1960).
22. Smith v. Berberich, 168 Neb. 142, 95 N.W.2d 325, 329 (1959).

North Dakota Supreme Court might place on a quit claim deed under the marketable record title statute. The Court has held that a quit claim deed is as effective as a warranty deed to confer color of title,[23] and is sufficient to create a color of title under the ten-year color of title act,[24] intimating that quite likely there is a big difference in quit claiming all "that" right, title and interest, and quit claiming all "his" right, title and interest.

A good deal of discussion has arisen relative to the county auditor's tax deed issued to the county for the nonpayment of taxes.[25] Some examiners take the position that such a deed is a sufficient "root of title" notwithstanding the rights of the former owner to repurchase.[26] The better view would seem to be that the county holds title subject to this right of repurchase, and that the tax deed to the county purports to convey only such a title. Statutory limitations on sales by representatives and other court-appointed officers must also be considered.[27] Some of the acts apparently do not have a limitation upon the title gaining the benefit from the provisions of the act.[28]

In addition to the requirement of the unbroken chain of title the statute requires that the record title claimant be "in possession of such real estate" in order to be deemed to have a marketable record title, and the "fact of possession of real estate referred to in section 47-19A-01 may be shown of record by one or more affidavits which shall contain the legal description of the real estate referred to and show that the record titleholder is upon the date thereof in possession of such real estate."[29] It is quite clear that the statute anticipates that the record title claimant shall be in actual possession of the premises, or that his possession shall be that imputed to the title claimant where no one else is in the actual possession hostile to the title claimant.

The fact of possession requirement in order to secure the benefits of this type of legislation was conceived in 1919 in the original Iowa Act.[30] Some misunderstanding has developed over this requirement, but the full import of the purpose adds clarification. The basis for the requirement is more than likely the thought that in order to override constitutional objections the claimant must be

23. Morrison v. Hawksett, 64 N.W.2d 786 (N.D. 1954).
24. N.D. CENT. CODE § 47-06-03 (1960).
25. N.D. CENT. CODE § 57-28-09 (1960).
26. N.D. CENT. CODE § 57-28-19 (1960).
27. N.D. CENT. CODE § 30-19-20 (1960) provides that a sale of property under that chapter by an executor or administrator "conveys all of the right, title, interest, and estate of the decedent in the premises at the time of his death" and also that which he might have acquired by operation of law subsequent thereto. It would seem that in such cases the title of decedent should be examined even though beyond the 20-year period.
28. See Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957), where the court took the view that the act contemplated a fee simple. See also, United Parking Stations, Inc. v. Calvary Temple, 257 Minn. 273, 101 N.W.2d 208 (1960).
29. N.D. CENT. CODE § 47-19A-07 (1960).
30. Iowa Acts 1919, ch. 270, § 1.

in possession. This gains its theory from statements that limitation statutes cannot constitutionally compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims[31] or that a right cannot be cut off by compelling prosecution of a remedy when he is already in possession of all that he demands.[32]

It is argued by some that even this questionable constitutional limitation can be very readily circumvented by looking upon the marketable title acts not as placing a limit on the time to commence an action but rather requiring a recording or re-recording to give notice of existing interests, and can extinguish claims of those who fail to record in time,[33] but we find no case squarely in point.[34]

The North Dakota court has clearly found that it is not the affidavit of possession, but the fact of possession which gives the benefit of the act.[35] However, there is a benefit to be derived from the recording of an affidavit to establish of record the fact of possession. It completes the record insofar as the statutory requirement is concerned. If the affidavit is false the statutory requirements have not been met, and no claims are barred or the holder thereof precluded from enforcing them. But, insofar as the record can, it does show a title which meets the test demanded in most land sales contracts used in abstract-attorney's opinion systems requiring an abstract of title showing a title marketable of record.

The problem of possession in reality only arises at the time when the acceptability of the title is an issue in a discussion of a method to simplify a system for land transfers. No real purpose is gained in establishing a satisfactory title of record and forcing upon a vendee a title which he can only enjoy by resorting to litigation to gain the enjoyment of possession.

However, as a matter of substantive right to possession, we find that under the North Dakota act that

> Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of all interest, claims, any charges whatever, the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred twenty years or more prior thereof, whether such claim or charge be evidenced by a recorded instrument or otherwise, and all such interests,

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31. COOLEY, CONSTITUTIONAL LIMITATIONS 365 (1st ed. 1868).
32. Groesbeck v. Seeley, 13 Mich. 329 (1865).
33. SIMES & TAYLOR, *op. cit. supra* note 1, at 271.
34. Wichelman v. Messner, *supra* n. 28, at 828, has been cited for the constitutionality of this approach, the court declaring, "[I]t appears further that the constitutionality of the Minnesota statute is preserved by the provisions exempting persons in 'possession of real estate' from the requirement of filing notice and allowing persons not in possession a reasonable time to file statutory notice."
35. Northern Pacific Ry. Co. v. Advance Realty Co., 78 N.W.2d 706 (N.D. 1956), where the court held that the owner of the surface could claim no possession of severed minerals, and not having possession by exercising some dominion or possession of the minerals separate and apart from the surface estate, he could not claim the protection of the act.

> claims, and charges affecting such interest in real estate shall be barred and not enforceable at law or equity, unless any person making such claim or asserting such interest or charge, shall, on or before twenty years from the date of recording of deed of conveyance under which title is claimed, . . . file for record a notice in writing, duly verified by oath, setting forth the nature of his claim, interest or charge; and no disability nor lack of knowledge of any kind on the part of anyone shall operate to extend the time for filing such claims after the expiration of twenty years from the recording of such deed of conveyance. . . .[36]

The question of what effect this section—which purports to bar all interests, claims and charges which depend upon any act, transaction, event or omission that occurred twenty years or more prior to such marketable title—will have upon one claiming under adverse possession still remains. It would seem that the actual entry by the adverse possessor would constitute an "act" or an "event" within the purview of the statute. Under a similar statute which states claims arising prior to the statutory period "shall be conclusively presumed to have been abandoned," the Minnesota court has ruled:

> If a claimant subject to the provisions of the statute has not filed the required notice, the only way he can avoid the statute's conclusive presumption is by being in possession at the time it would otherwise take effect. If at any later time he abandons his possession, the bar falls and he cannot revive his right by again going into possession. Thus, to avoid the conclusive presumption of abandonment imposed by the statute, the claimant's possession must be continuous.[37]

It would seem that under the twenty-year adverse possession statute of North Dakota[38] an entry made prior to the "root of title" deed could only ripen into title by a continuous possession for twenty years after the recording of the root of title and up to the time the acceptability of title is to be determined. Such adverse possession would prevent the record title claimant from ever qualifying for the protection afforded by the marketable record title act.

Upon the same reasoning it would seem that the entry by an adverse possessor after the recording of the root of title instrument is not within the purview of the statute at all.

The effect of marketable record title on the so-called "Ten Year Color of Title Statute"[39] constitutes in a sense a different question. This statute presupposes an instrument creating a color of title

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36. N.D. CENT. CODE § 47-19A-03 (1960).
37. B.W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 59 N.W.2d 813, 816 (1953), where the court further stated the nature of the possession contemplated by the statute was such as would put a prudent person on inquiry.
38. N.D. CENT. CODE § 28-01-04 (1960).
39. N.D. CENT. CODE § 47-06-03 (1960). Also see, Ruemmele, *North Dakota's Ten-Year Statute of Limitations*, 28 N.D.L. REV. 159, 298 (1952).

in the grantee, and an adverse possession and payment of taxes for a period of ten years. The instrument need not necessarily be placed of record. If the instrument is placed of record or the entry made subsequent to the recording of the root of title, there would seem to be no question of the applicability of the marketable record title act. If the instrument is not placed of record, but the entry made prior to the recording of the root of title, subsequent recording of the color of title instrument should constitute a sufficient notice under the act, and a continuous possession would prevent the act from applying at all. If the color of title is recorded prior to the recording of the root of title and the entry made either prior to such recording or after and continues adversely for a period of ten years or more, coupled with the payment of taxes, for the same period, we could conceivably have a situation arise which could cause some difficulty. For example, if the adverse possessor should remain in possession for nineteen years after the recording of the root of title, and then abandons his possession, the root of title claimant could go into the actual possession and be there at the expiration of the twenty-year period.

The North Dakota Court has stated in regard to the ten-year statute:

> The contention, in effect, that the statute. . .is merely a statute of limitations, and may not be used as a sword of attack, but only as a shield of defense, is without merit. By the express language of this section, as well as the preceding one, a compliance therewith operates to confer a good and valid title, and we know of no reason why a title thus acquired cannot be asserted by its owner in exactly the same manner as a title acquired in any other way.[40]

Perhaps in the hands of a bona fide purchaser from the root of title claimant, the adverse possessor under the color of title would be barred by the recording statutes,[41] but this area of uncertainty should be considered for improvement along with the whole body of limitation statutes dealing with real property.

With the usual skepticism found in a slow moving Bar, some members of the North Dakota Bar had evidenced a reluctance to rely upon the marketable record title act on constitutional grounds, especially where it is stated to be applicable to those under a disability or without knowledge. Simes & Taylor[42] make a very exhaustive study of the problem and conclude the authority in favor of constitutionality, especially the Minnesota case of *Wichelman v. Messner*,[43] is quite strong. Courts in many instances have found

40. Woolfolk v. Albrecht, 22 N.D. 36, 45, 133 N.W. 310, 314 (1911).
41. N.D. CENT. CODE § 47-19-41 (1960).
42. SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION (1960).
43. 250 Minn. 88, 83 N.W.2d 800 (1957).

the legislative purposes of simplifying and facilitating real estate title transactions far outweigh the outmoded tethers of past decisions dealing with constitutionality.

North Dakota has seen fit to adopt a type of marketable record title act which defines what shall constitute such a title. It has been said that "the title will be marketable because the act makes it so, and not because the act declares it so."[44] If the act makes the title marketable, why should not the act declare it does? One of the problems of modern practice has been the indefiniteness of "marketability," which most examiners have considered synonymous with an acceptable title, or one which a purchaser or lender would be obliged to accept.[45] One of the main purposes of marketable record title acts is to narrow the distinction between "marketability of record" and "marketability in fact," recognizing in a large sense the "marketability of record" standard adopted by many land sales contracts is not one which is acceptable in modern times.[46] The record must be bolstered to constitute much more than a bundle of rebuttable presumptions and assumptions.

Quite often when endeavoring to secure the passage of legislation it becomes necessary to compromise on certain points. Some of the exceptions of the North Dakota act are grounded on this reason. The exceptions state the chapter on marketable record title shall not be

1. Applied to bar:
   a. The rights of any lessor or his successor as reversionary of his right to possession on the expiration of any lease by reason of failure to file the notice herein required;
   b. The rights of any remainderman upon the expiration of any life estate or trust created before the recording of a deed of conveyance as set out in section 47-19A-01.
   c. Rights founded upon any mortgage, trust deed, or contract for sale of lands which is not barred by the statute of limitations; or
   d. A mere possibility not coupled with an interest nor a mere right of re-entry or repossession for breach of a condition subsequent created by a conveyance of record less than forty years; or
2. Deemed to affect the right, title or interest of the state

44. SIMES & TAYLOR, *op. cit. supra* note 42, at 305.

45. *Ibid.*, where the authors say, "the acts do not dictate the title which a purchaser or lender must accept or an examiner must approve. It might be possible to legislate in that plane, but the acts do not do so. . . ." *But see* 3 American Law of Property § 11.48, n. 1 (Supp. 1962),where it is stated: "Statutory definitions of marketable title now determine in several states the type of title which will be treated as marketable and to which a purchaser cannot raise the objection of unmarketability." Marketable record title acts of Michigan, Nebraska, North Dakota and South Dakota are cited.

46. See BASYE, CLEARING LAND TITLES §§ 4, 373 and 374 (1953).

of North Dakota, or the United States, in any real estate in North Dakota.

3. Applied to the right, title, or interest of any railroad.[47]

Excepting the reversionary right of the lessor is generally an exception in all the acts, and can be justified on the basis that the possession of the tenant should be considered the possession of the landlord. Also, the landlord would not be very likely to know of hostile claims where the tenant is actually in possession.

The rights of remaindermen upon the expiration of any life estate were excepted from the act primarily because of the Iowa case of *Lane v. Travelers Ins. Co. of Hartford, Conn.*[48] as at the time the act was considered there were some that felt the barring of the rights of remaindermen was inserting an unduly harsh provision.

Removing mortgages, trust deeds, and contracts of sale from the purview of the act was based upon the thought that separate statutes should be applied to these. In 1959 a special statute applicable to mortgages was passed endeavoring to define more clearly the limitations upon actions to foreclose,[49] but this enactment was repealed[50] effective January 1, 1964, and in lieu thereof some apparent weaknesses were eliminated by new enactments effective January 1, 1964.[51]

Also in 1959 special treatment was given to the cancellation or enforcement of contract for sale of real estate.[52] These enactments are in reality statutes of limitations, which remove any possible extension by partial payment, disability, or nonresidence, so that the record itself can be self-executing in eliminating such recorded instruments from the examiners consideration, and really are complementary to the marketable record title act.

The problem of the elimination of stale reverters and rights of re-entry was anticipated in the original enactment of the marketable record title act in 1951, but because of the large number of reverters and rights of re-entry in existence, the proponents of the act were obliged to eliminate from the effect of the act "conditions subsequent contained in any deed." While not apparently applying to possibilities of reverter, the act did come in for criticism very early.[53] In 1959 the Legislature clarified this particular exception, and added a limitation.[54] Under North Dakota statutes property of any kind may be transferred except: "1. A mere possibility not

47. N.D. CENT. CODE § 47-19A-11 (1960).
48. 230 Iowa 973, 299 N.W. 553 (1941). This case cut off contingent remainders of minors.
49. N.D. Sess. Laws 1959, ch. 256, § 1.
50. N.D. Sess. Laws 1963, ch. 256, § 4.
51. N.D. CENT. CODE §§ 35-03-14, 15 (Supp. 1963).
52. N.D. CENT. CODE § 28-01-42 (Supp. 1963).
53. See Leahy, *The North Dakota Marketable Record Title Act*, 29 N.D.L. REV. 265 (1953).
54. N.D. CENT. CODE § 47-19A-11 (1960).

coupled with an interest; and 2. A mere right of re-entry or of repossession for breach of a condition subsequent which cannot be transferred to anyone except the owner of the property affected thereby."[55]

The North Dakota Supreme Court has never had occasion to consider just what types of interests are meant by the statute. However, the South Dakota Court in construing a deed on the same statutory provision found it contained a "reverter clause" with "reverter language" and partakes of the nature of "a condition subsequent."[56] In the belief that in referring to a "mere possibility not coupled with an interest" the statute meant to refer to a fee simple upon a conditional limitation, and in referring to "a mere right of re-entry or of possession for breach of a condition subsequent" the statute meant to refer to a fee simple upon a condition subsequent, the 1959 enactment borrowed this language and made the act subject only to such interests "created by a conveyance of record less than forty years," thus materially limiting the continuance of such possible claims.

Perhaps no subject has been dealt with more prolifically than the marketable title acts. Simes & Taylor have included a bibliography listing those prior to 1960, and indices to current publications contain many more. The consideration of the problem of simplified procedures for land transfers by so many gives an indication that the Bar is aware of the apparent public dissatisfaction and the growing use of other than the traditional systems. There is still much to be done, especially as to the record itself.

55. N.D. CENT. CODE § 47-09-02 (1960).
56. Rowbotham v. Jackson, 68 S.D. 566, 5 N.W.2d 36 (1942). See Meschke, *Estates in North Dakota*, 30 N.D.L. REV. 289 (1954); Comment, 25 N.D. BAR BRIEFS 124 (1949).