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In recent years several states in that part of the United States commonly identified as the "Middle West" have enacted comprehensive legislation that is hoped will simplify land title transactions.[1] These statutes, though varying in detail, have a common objective—the extinguishment in favor of certain persons of claims against, and interests in, land, which claims and interests arose out of events and transactions that occurred many years ago, unless such claims or interests have been preserved by the recording of a preserving notice within that period of time.[2] A comparatively short period is prescribed for such recording as

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[1] In chronological order of enactment these statutes are: Wis. Stat. (1949) §330.15; Minn. Stat. Ann. (1947, 1950 Supp.) §541.023; Mich. Comp. Laws 1949, §§565.101 to 565.109; Ind. Stat. Ann. (Burns, Supp. 1951) §2-628 et seq.; Neb. Rev. Stat. Ann. (1950) §§76-288 to 76-298; S.D. Laws (1947) c. 233; N.D. Laws (1951) H.B. 728.

Legislation in Illinois (Ill. Rev. Stat., c. 83, §10a) and in Iowa (Code of 1939 §11024) should also be noted.

[2] The Michigan statute, for example, provides:

"Sec. 1. Any person, having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for 40 years, shall at the end of such period be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by application of the provisions of succeeding sections of this act and subject also to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed and which have been recorded during said 40 year period: Provided, however, That no one shall be deemed to have such a marketable record title by reason of the terms of this act, if the land in which such interest exists is in the hostile possession of another. . . .

"Sec. 3. Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all interests, claims, and charges whatsoever the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred prior to such 40 year period, and all such interest, claims, and charges are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, That any such interest, claim, or charge may be preserved and kept effective by filing for record during such 40 year period, a notice in writing, duly verified by oath, setting forth the nature of the claims. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said 40 year period. For the purpose of recording notices of claim for homestead interests the date from which the 40 year period shall run shall be the date of recording of the instrument, non-joinder in which is the basis for such claim. Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is:

to old claims and interests in existence at the time the statute became operative.[3]

The certain persons whose ownerships are thus freed of such old claims and interests are, speaking quite generally, those who are in possession[4] of the affected land and can show a connected chain of record title thereto covering a considerable number of years.[5]

While such statutes may be useful in court proceedings to clear titles, it is believed that their greatest contribution is in simplifying title searches, thus making more reasonable the cost of title examinations and to an extent at least cutting down the number of bills to quiet title, etc., again resulting in savings in expense and delays in completing land transactions.

Assuming *A* to be in possession of Blackacre as owner or that someone is in possession on *A's* behalf, and that *A* can show an unbroken chain of record title for as much as forty years, ending in himself, the chances that he is a safe and proper person for a prospective purchaser or mortgagee to deal with are overwhelming. It would be interesting to know in what percentage of situations in which someone

(a) Under a disability,
(b) Unable to assert a claim on his own behalf,
(c) One of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record. . . .

"Sec. 6. This act shall be construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons dealing with the record title owner, as defined herein, to rely on the record title covering a period of not more than 40 years prior to the date of such dealing and to that end to extinguish all claims that affect or may affect the interest thus dealt with, the existence of which claims arises out of or depends upon any act, transaction, event or omission antedating such 40 year period, unless within such 40 year period a notice of claim as provided in section 3 hereof shall have been duly filed for record. The claims hereby extinguished shall mean any and all interests of any nature whatever, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental."

[3] Again for example, the Michigan statute allows one year, or, to be strictly accurate, from May 22, 1947, when the act became fully operative, until February 1, 1948. These dates by an amendment were substituted for the one year period provided for by the act as originally enacted in 1945.

[4] Most of the statutes here referred to limit their extinguishing effect only in favor of persons who can show the prescribed chain of record title and who are *in possession*. It will be observed that the Michigan legislation does not require an affirmative showing of possession; it requires the negative showing of no one in hostile possession. That statute in its formative stage contained the affirmative requirement of possession; it was changed to the negative form in order that the considerable areas of unoccupied land in the state might clearly be brought within the protective features of the legislation. Of course, normally the one in possession is the owner or one there with his permission.

[5] The statutes vary as to the required number of years; forty seems about the average.

has taken a deed or mortgage, etc. from one in *A's* position, his claim to the premises has been successfully challenged by someone relying on a claimed interest that arose out of some event or transaction more than forty years in the past. The writer has put this question to men of wide practical experience in title matters. Apparently the known instances are exceedingly rare, and those known are usually ones arising out of some remotely contingent future interest.

Of course easements more than forty years of age are not uncommon. The same may be said of mortgages, particularly those executed by corporations. Section 4 of the Michigan act excepts certain of these interests. The section is as follows:

> "This act shall not be applied to bar any lessor or his successor as reversioner of his right to possession on the expiration of any lease or any lessee or his successor of his rights in and to any lease; [or to bar any interest of a mortgagor or a mortgagee or interest in the nature of that of a mortgagor or mortgagee until after such instrument under which such interests are claimed shall have become due and payable, except where such instrument has no due date expressed, where such instrument has been executed by a railroad, railroad bridge, tunnel or union depot company, or any public utility or public service company, or to bar or extinguish any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidences of its use, by reason of failure to file the notice herein required]. Nor shall this act be deemed to affect any right, title or interest in land owned by the United States, [nor any right, title or interest in any land owned and used by the State of Michigan, or by any department, commission or political subdivision thereof]."

The act as originally enacted did not contain the language in brackets; those terms were added by two amendments which obviously were badly drawn. When read in the light of this fact, the intent of the legislature in the amendments is reasonably clear. Since the amendments were designed to add to the situations withdrawn from the operation of the act, if the language is found to be so confused as to be meaningless, it would seem clear that only the amendments would drop out. The act was a complete thing as originally adopted.

The customary technique of land title examination, as is well known, is to start with an assumption of ownership in someone (the United States Government in much of the area of the United States),

tracing the course of the ownership out of the Government,[6] and then on from one to another, down to the present. A meticulous examiner ordinarily can find what appear to be defective links in almost any chain of title of any length, and to the "fly-specker" all defects are serious regardless of their age.

By many it is thought that under these Marketable Title Acts the more sensible technique of examination is in the reverse order: Determine first who is in possession and then if it is found that the person intended to be dealt with or someone under him is the possessor (or, if in Michigan no one is in hostile possession), see whether he is at the present end of a connected chain of record title covering the past forty (or whatever it may be) number of years. If thus *A*, for example, is found (1) to be in possession and (2) an unbroken chain of record title covering the preceding forty years ends up in him, it is the objective of the statute to fix him as a person having a marketable title, in short, one safe to deal with as owner. Giving the statute its full operative force according to its terms, remembering that all old interests and claims are extinguished by it unless a preserving notice has been recorded, the examiner may ignore anything appearing in the title history back of that date, many years in the past. Indeed, a logical conclusion would be that an abstract of title covering the preceding forty or fifty years would be all the examiner would need to study.[7]

Back of these statutes is also the recognition of the fact that as the years go by, sometime a point is bound to be reached when it has become utterly impracticable to have at each land deal an examination of the entire chain of title from the Government to the then present.[8]

It has been the writer's hope that in at least one of the states with these Marketable Title statutes litigation would develop which would lead to a decision by a court of last resort applying the statute, preferably a case in which the court would have to face squarely the question of constitutionality. The natural conservatism of the bar leads to an understandable skepticism regarding the constitutionality of all legisla-

[6] Whether the Government's title was good is not deemed a necessary subject of inquiry!

[7] Of course it is recognized that facts that cannot be disclosed by the most carefully prepared abstract may be vitally important.

[8] Not a few students of the subject take the position that there should be a complete abandonment of our traditional system of land titles and the adoption of an entirely different plan such as the Torrens system. A discussion of that system is not within the scope of this paper.

tion of a new type, and it must be remembered that these statutes do purport to destroy not a few property interests. Until the validity of the legislation has been definitely set at rest, it is to be expected that full use of it will not be made.

In *Lane v. Travelers Ins. Co.*[9] the Iowa Supreme Court applied the statute cited in note 1 supra. In that case an action to establish interests in land was instituted by contingent remaindermen. Two of the plaintiffs were minors. The contingent remainders were created by a will that had taken effect long before 1920. Defendant claimed that the interests of the plaintiffs had been effectively divested by a court decree of 1923. Plaintiff's answer to this was that that decree was voidable because the proceedings in which it was entered were fraudulent. The trial court ruled that so much time had elapsed since the date of that decree that the adult plaintiffs were no longer in position to question its validity. As to the two minors, however, it was concluded that there was no bar.

On appeal the defendant urged that the minors were barred by the provisions of the statute cited in note 1. The pertinent language of the statute is as follows:

> "No action based upon any claim arising or existing prior to January 1, 1920, shall be maintained . . . in any court to recover any real estate . . . or to recover or establish any interest therein or claim thereto . . . against the holder of the record title . . . in possession, when such holder of the record title and his grantors . . . are shown by the record to have held chain of title . . . since January 1, 1920, unless such claimant, by himself, or by his attorney or agent, or if he be a minor or under legal disability, by his guardian, trustee, or either parent shall within one year from and after July 4, 1931, file in the office of the recorder of deeds . . . a statement in writing . . . definitely describing the real estate involved, the nature and extent of the right or interest claimed, and stating the facts upon which the same is based. . . ."

After observing that though this statute first appeared in 1919, that it had never been construed by the Supreme Court and that "No attack upon the validity of this statute is made by the appellees [plaintiffs in the court below]" the court pointed out (1) that the appellant clearly satisfied the statute's requirements regarding a record title holder

[9] 230 Iowa 973, 299 N.W. 553 (1941).

in possession, (2) that appellees' claimed interest had arisen prior to 1920, and (3) that no preserving statement had ever been recorded, and concluded that the contingent remainders asserted by the appellees were barred "by the plain provisions" of the statute.

The court went on to say:

> "It may be that the legislature did not intend this provision to apply to such a case as the present. However, as we view it, the language of the statute is plain and unambiguous. Nor are we concerned with the policy of the lawmakers in enacting this measure. We may observe, however, that there can be little doubt of the desirability of statutes giving greater effect and stability to record titles. We believe it our duty to enforce this statute as written."[10]

Obviously the decision would be more persuasive on the constitutional problem if the question had been raised and argued. It is interesting to note that the Iowa court in *Swanson v. Pontralo*[11] found in the *Lane* decision some support for upholding the constitutionality of other legislation designed to protect tax titles. Again in *Lytle v. Guilliams*[12] the court takes for granted the validity of the statute.

In *Grand Lodge v. Fischer*[13] the South Dakota court upheld the constitutionality of a curative act. The court thus found it unnecessary to discuss Sec. 5, Ch. 175, Laws 1943, a statute preceding the South Dakota legislation cited in note 1 supra. The learned judge (Rudolph) writing the opinion, however, went on to say:

> "However, in the consideration of this case the court has given thought and attention to this 1943 act and the purpose which it seeks to serve. The need for shortening the period during which the record title to real estate must be examined is imperative, but as pointed out by the Hon. D. K. Loucks at the meeting of The State Bar in 1944 (S. Dak. Bar Journal, Vol. XIII, page 140), Ch. 175, Laws of 1943, is, perhaps, not a very scientific approach to the problem. The Wisconsin and Iowa legislatures have tried to meet the same problem [citing the *Lane* case]."[14]

The South Dakota statute of 1947 may, perhaps, have been due in part to Judge Rudolph's observations.

[10] Id. at 978.
[11] 238 Iowa 693, 27 N.W. (2d) 21 (1947).
[12] (Iowa 1950) 41 N.W. (2d) 668.
[13] 70 S.D. 562, 21 N.W. (2d) 213 (1945).
[14] Id. at 569-570.

In *Estate of Frederick*[15] the Wisconsin court referred to their statute without comment other than to observe that its provisions were not applicable to the problem then before the court.

Two decisions, one in Kansas,[16] the other in Pennsylvania,[17] may be thought to cast doubt upon the validity of statutes of the type under consideration here. Though, to be sure, those cases did declare unconstitutional two acts aimed at the clearance of land titles, the invalidated legislation had objectionable features not found in most of the statutes under examination in this paper. As will be pointed out below, the Indiana statute, however, may be within the scope of these decisions.

The Kansas case was instituted by a purchaser of a platted lot to require the defendant-seller to furnish a marketable title. The defendant claimed, and the trial court held, that the defect in the title, over which the dispute arose, had been cleared by Kans. G. S. 1947 Supp. 67-612 (Ch. 264 of the Laws of 1945). That statute declared:

> "In all cases where a plat . . . has been of record more than twenty-five years and deeds executed [by the platter] . . . have been of record more than twenty-five years prior to the taking effect of this act, such deeds shall be conclusively presumed to have conveyed perfect title notwithstanding any defect in the title of the grantor therein . . . : Provided always, Such presumption shall not be applied to any action brought within one year from the date this act takes effect."

The Kansas court first pointed out that this statute was not one protecting a possessor against claimants out of possession, nor was it a curative act or a limitation act; its declared effect was to confirm ownership in a grantee who factually satisfied the requirements of the statute despite any and all defects in the grantor's title, with the proviso, however, that the presumption of perfect title would not apply in any action brought within one year from the effective date of the enactment. This, in effect, meant that anyone with a competing claim, however good in fact and law, could save his rights as against the grantee only by bringing an action within one year. The reviewing court declared the statute unconstitutional as violative of the due process pro-

[15] 247 Wis. 268, 19 N.W. (2d) 248 (1945).

[16] Murrison v. Fenstermacher, 166 Kan. 568, 203 P. (2d) 160 (1949).

[17] Girard Trust Co. v. Pennsylvania R. Co., 364 Pa. 576, 73 A. (2d) 371 (1950).

vision. The court's view is expressed by the following language used by the Mississippi court quoted by the Kansas court:[18]

> ". . . The power of the Legislature to prescribe within what reasonable time one having a mere right of action shall proceed is unquestionable; but there is a wide distinction between that legislation which requires one having a mere right to sue, to pursue the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action, and then limits the time in which the suit may be brought. The mere designation of such an act as an act of limitation does not make it such, for it is in its nature more than that."

The court relied not only upon the Mississippi cases[19] but also upon decisions in Michigan,[20] Minnesota[21] and Washington. Cooley's *Constitutional Limitations* is also quoted in support.[22]

The Pennsylvania case (or cases, since two suits had been consolidated) declared unconstitutional the Act of May 23, 1949 (Act No. 512, Purdon's Pa. Stat. Ann., tit. 68, §451, 1949).

"In order to quiet title to and to facilitate alienation"[23] of land, section 1 of the act provided for a "conclusive presumption of payment, release or satisfaction" of all mortgages, ground rents, etc. charged against land "unless within one year of the effective date of this act a proceeding to enforce payment of or to preserve, revive or continue such encumbrance or charge shall be instituted against the present owners of such real estate encumbered or charged therewith." The mortgages, charges, etc. thus extinguished were declared to be those "payable presently or at a future time, and the period of fifty years has elapsed, including minority and disability, or shall have elapsed after the principal of such encumbrance or charge has become or shall become due and payable, and where no due date is recited in such instrument then fifty years after date of creation or date of such instrument, and no action or proceeding shall have been instituted for the payment or collection of such charge, . . . as provided by law, within

[18] 166 Kan. 568 at 573, quoting Dingey v. Paxton, 60 Miss. 1038 at 1054 (1883).

[19] In addition to the Dingey case, Leavenworth v. Claughton, 197 Miss. 606, 19 S. (2d) 815 (1944).

[20] Groesbeck v. Seeley, 13 Mich. 329 (1865); Case v. Dean, 16 Mich. 12, 21 (1867).

[21] Baker v. Kelley, 11 Minn. 358 (1866).

[22] 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 762, 763 (1927).

[23] The quoted words appear at the beginning of the section.

said period of fifty years, on account of such charge . . . against the owner or owners of the land encumbered or charged therewith. . . ."[24]

One of the actions was by the Girard Trust Company as trustee under a mortgage executed by the Pennsylvania Railroad Company in 1873, to secure a large bond issue due in 1960. It was alleged that the bonds were outstanding in the hands of the public and that no defaults had occurred. The second action was brought by the trustee under the will of Dunbar against a railroad company The plaintiff was the owner of a ground rent created by a deed executed in 1853; the defendant was the owner of the land charged with the rent. Here, too, there had been no default. In neither case had any action been brought for the payment or collection of the monies.

These actions were instituted under the provisions of the Act of 1949 and were labeled as complaints to quiet title. The defendant in each case sought to have the complaint dismissed on the ground that the only basis for the action was the statute and that it was unconstitutional and void.[25]

The Common Pleas Court of Philadelphia County, Smith, P. J., sustained defendants' objections to the complaint, being of the opinion that the act was void.[26] In a brief opinion the Supreme Court of Pennsylvania affirmed. The court pointed out, first, that the act is "so incomplete, conflicting and inconsistent in its various provisions and so unsusceptible of rational interpretation as a whole as to be incapable of judicial enforcement,"[27] and, second, that it offended against both the state and federal constitutions by attempting deprivations of private property without due process and by impairing the obligations of valid and subsisting contracts. The court was content to rely upon Judge Smith's opinion. The vice in the statute in both respects was the requirement that the owner of the interest that without suit would be in effect extinguished had to institute a proceeding, within one year of the

[24] It is not entirely clear, but it would seem that this first section was intended to affect only encumbrances and charges outstanding when the statute was enacted. This conclusion is indicated by the fact that the presumption was to be effective "unless within one year of the effective date of this act a proceeding to enforce payment," etc. were instituted.

[25] It is possible that the actions were instituted for the purpose of testing the validity of the act.

[26] 71 Pa. D. & C. 533 (1950).

[27] 364 Pa. 576 at 578 (1950). The section involved was, it must be admitted, clumsily drawn, but that it was "incapable of rational interpretation" seems a bit strong. Cf. note 24 supra.

effective date of the act, "to enforce payment of or to preserve, revive or continue such encumbrance or charge."

Reference was made to some uncited case in which it had been held that an act of April 27, 1855, P.L. 369, was valid. It is said that "The Court there held that that act was constitutional since it merely deprived the owner of the remedy for the collection of his ground rent after the expiration of 21 years from any payment, suit, claim or demand for the same." That was in effect a statute of limitations, a bar to a remedy; the Act of 1949, on the contrary, as the court pointed out, affected "the ground rent estate as well as the obligation of the mortgage contract."[28]

"As to presumption of payment," the court continued, "it is one thing to apply this presumption to a delinquent charge.[29] It is quite a different thing to apply it to a perpetual mortgage or an irredeemable ground rent which is not in default and on which no action for payment can be brought as long as the current payments are being made."

Again and again the court refers to the requirement in the statute that "a proceeding" be instituted by the owner of the aged interest. For example: "This act requires a judicial determination in an adversary proceeding where there is no controversy. Suits must be instituted to preserve irredeemable ground rents and open end mortgages where no defaults have occurred, where no cause of action has arisen and where all parties are in agreement concerning, and admit the existence and validity of, the charge or obligation. This the legislature has no right to require."[30]

[28] 71 Pa. D. & C. 533 at 544-545.

[29] The uncited case to which reference is made in the preceding paragraph no doubt is Korn v. Browne, 64 Pa. 55 at 57 (1870), in which the court said: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the results of a necessary regard to the peace and security of society."

[30] 71 Pa. D. & C. 533 at 545. The case is noted in 12 UNIV. PITT. L. REV. 114 (1950). A second section of the Act of '49, not involved in these cases, provided that "In all cases where any defect in title appears of record by reason of unrecorded deed or deeds or break or breaks in chain of title making the same unmarketable, arising, occurring, existing or dating more than fifty years prior to the filing of any proceeding under this act to remedy or correct such defect therein or to enforce any claim thereunder, a conclusive presumption of marketability shall be created, and no claim . . . shall be valid . . . against any owner of real estate in the chain of title in which such defect in title appears of record unless within one year of the effective date of this act a proceeding to enforce any right arising out of such defect in title shall be instituted," etc. It is interesting to note that this section is aimed at wiping out defects in title appearing of record. One cannot escape the conclusion that this act was drawn either hastily or without a real understanding of the title problem.

So much for the decisions that have anything like a direct bearing upon the subject matter of this paper. The recent marketable title statutes referred to at the beginning of this paper fall into three classes. (1) The Minnesota and Wisconsin acts utilize the framework of a statute of limitations. The Minnesota legislation, for example, begins with the heading "Limitations of actions affecting title to real estate." The act then goes on to declare that no action shall be brought "affecting the possession or title . . . to enforce any right . . . founded upon any instrument, event or transaction which was executed or occurred more than forty years prior to the commencement of such action, unless within forty years after such execution or occurrence" a preserving notice as to such claimed interest has been recorded. The action is barred as against a claim of title based upon a source of title, which source has then been of record at least forty years. (2) The Michigan act, and the same is true of those in Nebraska, South Dakota and North Dakota, as will be seen by reference to note 2 supra, states a factual situation in which one shall be deemed to have a marketable title, which title is then declared to be free and clear of all interests, etc. arising out of transactions or omissions that took place more than forty years in the past, with a proviso that such old interest or claim may be kept alive by the recording of the simple preserving notice. (3) The Indiana statute adopts the approach of the Minnesota statute, as pointed out above, but singularly adds to the requirement of recording a preserving notice the additional step of commencing an action. It is stated that "If an action is not commenced on the claim set forth within one year from the time of filing, it shall be completely barred and all rights under such notice shall terminate."[31]

A court persuaded of the soundness of the Kansas and Pennsylvania decisions discussed above might be expected to strike down the Indiana statute; it is subject to precisely the same constitutional objections.

So far as the constitutional question is concerned, it is believed that it is immaterial whether the legislation takes the limitation form of Minnesota and Wisconsin or the marketable title form of the other

[31] It is pure speculation on the part of the writer, but the addition of the requirement of a suit may have been due to a notion on the part of the draftsman that the legislation thus became truly a limitation act and thus free of constitutional objection. As so clearly pointed out by the Kansas and Pennsylvania courts, an act that requires suit in relation to an interest or claim when there is no cause of action is not a statute of limitation, and such requirement amounts to a deprivation of property without due process and an impairment of obligation of contract.

states. The former type in effect extinguishes the old interest by barring any remedial steps in relation thereto; the latter form directly destroys such old claims and interests. Both types protect the same class of people.

A consideration of the constitutional problem as to these marketable title acts necessitates a brief resume of the land title situation and the philosophy of the recording acts.

The feeling has been growing not only among laymen but also the bar that land title transactions including, of course, the repeated title examinations are entirely too complex and expensive.[32] Indeed, a bill was introduced in the Michigan legislature making lawyers guilty of barratry for calling attention to title defects if it were later disclosed that they had been cured![33] Examinations of, and opinions regarding, a land title and the status of the current ownership are customarily based largely, if not entirely, upon what appears of record, and the longer the period of time covered by the record, the greater is apt to be the difficulty, and consequently the expense and delay. The idea back of the statutes under consideration herein is to shorten the period of necessary search and to make the record for that shortened period one to be safely relied upon.

Unlike chattels, the units of which are usually interchangeable, a particular tract of land is in a sense unique. A purchaser wants *that* tract, not just *some* tract. This is the factor that has made contracts for the sale of land subject to decrees for specific performance while contracts for the sale of chattels generally are not. The land purchaser thus wants as definite assurance as may be possible that a deed from his seller will really give him the dependable ownership he wants. Here comes the need for the skilled services of the title examiner.

While the wording of the recording acts varies, almost all of them may be said to declare in effect that certain instruments (those included by the statutory language) as to certain people (also determined by the statute) are void, or fraudulent, or of no effect (the terms vary) unless they have been recorded (or, perhaps, filed for record). There seems to be no difference of opinion that the statutes are expected to get all the

[32] See Viele, "The Problem of Land Titles," 44 POL. SCI. Q. 421 (1929); also Aigler, "Clearance of Land Titles—A Statutory Step," 44 MICH. L. REV. 45 (1945), reprinted in 24 MICH. ST. B.J. 675 (1945).

[33] See editorial, 24 MICH. ST. B.J. 365 (1945).

documents bearing upon the title upon the records, which, of course, are open to public inspection, thus enabling a prospective purchaser, mortgagee, etc. to determine, not beyond a shadow of a doubt but with a reasonable degree of certainty, with whom it is safe for him to deal regarding that particular tract.

The framers of the recording acts wisely did not content themselves with a mere direction in the legislation that instruments of title shall be recorded. Also wisely, they did not provide merely for a penalty, perhaps by fine or imprisonment, for failure to record. The declared consequence of such failure is the possibility of complete divestiture of the ownership or interests acquired through the unrecorded instrument. The fear of such serious consequence leads to the practice of prompt recording being very common indeed.

If *O*, owner of Blackacre, effectively conveys it to *A* who fails to record and then *O* executes a conveyance of the same premises to *B* who qualifies as one of those certain people under the terms of the recording act, *A*'s ownership, by operation of the statute, is taken away and conferred upon *B*—the failure of *A* to record as required has left in *O* a power to accomplish that divestiture. So far as the writer knows, the constitutionality of the recording acts has never been seriously questioned, though it must be recognized that they operate, as just indicated, to destroy property interests. Indeed many instances might be listed in which it has been recognized that it is within the legislative power in furtherance of the public interest to limit, or even destroy, private property.[34] It will suffice here, without going into the general constitutional problem at any length, to observe that the basic question is whether the accomplishment of the public purpose, as viewed by the legislative body, warrants visiting such consequence upon private ownership. In passing on the constitutional question the courts naturally consider the nature and degree of public advantage to be accomplished by the legislation under examination in comparison with the suitability of the means of accomplishment and the degree of the re-

[34] Among the many legislative acts that encroach markedly upon rights that otherwise might be exercised because of ownership are the common zoning acts and ordinances. The public good thus deemed to be accomplished overrides the private interests of the landowners and such legislation may well be found within the legislative power. Among the many cases sustaining zoning legislation, see the striking one in City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 S. (2d) 364 (1941).

sultant effect upon private rights.[35] It seems quite clear that the public interest in having a complete record of land title instruments has been deemed sufficient to warrant the divestiture of *A*'s ownership in the simple fact situation stated above.

It is now much too late to inquire whether or not the public interest served by the recording acts was sufficient to warrant the provisions contained therein for the divestiture of *A*'s ownership in our simple hypothetical case and the conferring of it upon *B*. Suffice it to say that our earlier legislators' objective of enabling people to rely upon the ownership as thus indicated by the record, with a reasonable measure of safety, justified it in their minds and in the minds of our later eminent students of Constitutional Law. The device is now one of the key foundation stones of our property law. The objective of present day legislatures in attempting to clarify the mass of record title built up by the recording acts is based upon the same public interest that motivated the earlier legislators. When the size and complexity of the record has grown to a point which defeats the original purpose of clarity and certainty in land ownership then a resort to the same device of divestiture may be similarly justified. The constitutional question presented by the marketable title acts may be stated as follows: Is sufficient public interest served by requiring the recording of the simple preserving notices within the prescribed period of time in order that thereby title searches may be shortened and simplified, thus saving expense, avoiding delays, and making land more freely alienable,[36] to justify the destruction of aged interests if no such preserving notices are recorded?

Just as it was in the public interest to have a recorded chain of title as complete as possible,[37] so with the passing of time it is now considered by more than a few legislatures, as well as bar associations, to be

[35] "The principle underlying these decisions [those upholding legislation which abridge or destroy private property] is that the degree of legal protection that must be accorded private property against acts of government and of private persons depends on the character of the property and the extent to which limiting such protection can be justified as a reasonable means of promoting a legitimate public benefit." ROTTSCHAEFER, CONSTITUTIONAL LAW 519 (1939).

[36] The venerable Rule Against Perpetuities developed out of a realization that it is desirable to have land freely alienable. The Rule, of course, does not destroy interests already created; it strikes them down in the process of creation.

[37] The power in the grantor in an unrecorded instrument to divest the grantee of his ownership with its resulting pressure upon him to record is a reasonable means to attain the desired end, the completeness of the record title.

in the public interest to make land titles more freely marketable by freeing them of interests and claims arising out of events and transactions long past, unless the existence of such interests and claims can be found by a search of the public records over a shortened but still rather long period prescribed by the legislature. As in the case of the familiar recording act, these statutes do not destroy those interests and claims directly; it is the failure on the part of their owners to take the simple and inexpensive step of preserving them by recording a notice of their existence that effects the destruction.

The statutes declare their public purpose. The Minnesota act, for example, states that it is "hereby declared as the policy of the State of Minnesota that, except as herein provided, ancient records shall not fetter the marketability of real estate." The Michigan act expresses it as follows: "This act shall be construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons dealing with the record title owner, as defined herein, to rely on the record title covering a period of not more than 40 years prior to the date of such dealing and to that end to extinguish," etc. As Professor Rottschaefer says,[38] "The general principle that due process prohibits legislation that effects an uncompensated transfer of one person's property to another private person prevails *unless* [italics ours] it conflicts with an important social interest." The "social interest" served by these statutes is clearly stated by the legislatures themselves.

According to the Kansas and Pennsylvania cases, discussed above, the institution of an action as a necessary step in preserving such old interests is not a reasonable requirement, particularly when in many instances under the facts no cause of action has arisen. It is more than doubtful that even those courts would consider that a requirement of recording a simple preserving notice was not a reasonable means of effecting the desired "social interest."

Since these statutes apply to existing, as well as subsequently arising, interests, a possible constitutional question may arise regarding the time within which, after the effective date of the legislation, the necessary preserving notice must be recorded. A closely analogous question is presented when a statute of limitation is amended by cutting down the period of time. Those amendments must allow sufficient time

[38] ROTTSCHAEFER, CONSTITUTIONAL LAW 523 (1939).

for commencing suit upon then existing causes of action. The question has frequently been before the courts. A leading case is *Terry v. Anderson*[39] in which the Supreme Court of the United States upheld a statute though it required claimants with existing causes of action to sue within nine months and seventeen days. The act, before amendment, allowed twenty years. The Court pointed out, as of some significance, that when the new legislation took effect, the claimants had already let over four years go by.[40]

Turner v. New York,[41] in the same Court, is another significant decision on this problem. It also may be of use to those supporting the constitutionality of an act containing, over and beyond the requirement of recording a preserving notice, the bringing of an action. The New York statute there upheld was one declaring that deeds from the state comptroller of lands sold for nonpayment of taxes should, after having been of record for two years, be deemed conclusive as to irregularities in assessment, in any action brought more than six months after the statute became effective.[42] Among the many cases approving and applying the *Turner* case is *Blinn v. Nelson*,[43] in which Holmes, J., observed that "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done."[44]

[39] 95 U.S. 628 (1877).

[40] No interest is destroyed under the Marketable Title Acts unless it is many years old, from thirty to fifty, depending on the particular statute.

[41] 168 U.S. 90, 18 S.Ct. 38 (1897).

[42] Id. at 94. The Court said, "Independently of the consideration that before the passage of the statute the plaintiff had had eight years since the sale, and three years since the recording of the deed, during which he might have asserted his title, this court concurs with the highest court of the State in the opinion that the limitation of six months, as applied to a case of this kind, is not repugnant to any provision of the Constitution of the United States."

[43] 222 U.S. 1, 32 S.Ct. 1 (1911).

[44] Id. at 7. See also Alexander, Inc. v. United States, (5th Cir. 1942) 128 F. (2d) 82; United States v. 25.4 Acres, (D.C. N.Y. 1943) 52 F. Supp. 75; Campbell v. Bruce, 231 Iowa 1160, 3 N.W. (2d) 521 (1942); Meigs v. Roberts, 116 N.Y. 371, 56 N.E. 838 (1900). In Mulvey v. Boston, 197 Mass. 178, 83 N.E. 402 (1908), the court considered a statute which reduced the period for bringing certain types of actions from six to two years. The act was applicable to existing causes of action, but no special period was expressly allowed for starting suit on such existing causes. It was held that the thirty days that had to elapse before the act took effect was not an unreasonable time for instituting actions; hence the act was valid. In Kentucky the court seems inclined to require that more time be allowed. Berry & Johnson v. Ransdall, 4 Met. (61 Ky.) 292 (1863) (thirty days not sufficient); Pearce v. Patton, 7 B. Mon. (46 Ky.) 162 (1846) (six months, too short). In Krone v. Krone, 37 Mich. 308 (1877), an allowance of one year for suing

In situations such as those covered by the statute in the *Turner* case the person whose rights might be foreclosed and barred by the comptroller's deed having been of record for two years, may or may not have had a "cause of action," in the usual sense of the term. This fact did not bother the Supreme Court. The Court said: "It was argued . . . that the statute was unconstitutional, because it did not allow him any opportunity to assert his rights, even within six months after its passage. But the statute did not take away any right of action which he had before its passage, but merely limited the time within which he might assert such a right. Within the six months, he had every remedy which he would have had before the passage of the statute. If he had no remedy before, the statute took none away."[45] It is significant that the Court in the *Turner* case was not disturbed by the fact that the person whose rights might be barred by the statute may not have had a "cause of action." There were, however, steps available under the state law by which he could protect his rights.

It must be emphasized again and again that almost all of these recent marketable title acts require the claimants under the ancient interests and claims merely to assert (note the language of the Supreme Court, quoted in note 42 supra) the continued existence of such interests and claims by taking an exceedingly simple and inexpensive step, and that the taking of that step is required in furtherance of what can hardly be denied is the public interest—the simplification of land title transactions and the resulting greater alienability of land.[46]

The following language used by the Supreme Court of Wisconsin in a very recent decision[47] upholding legislation which was designed

upon an existing cause of action was held sufficient. In McKisson v. Davenport, 83 Mich. 211 at 215, 47 N.W. 100 (1890), the court said: "Every suitor must have a reasonable time in which to commence an action to enforce his rights, and it is for the Legislature to provide a general rule applicable to all cases falling within a class, and not for the judiciary to declare what is or should be a reasonable time varying with the circumstances of each case as it arises."

[45] Turner v. New York, 168 U.S. 90 at 94, 18 S.Ct. 38 (1897).

[46] See Aigler, "Clearance of Land Titles—A Statutory Step," 44 MICH. L. REV. 45 (1945); 33 MINN. L. REV. 54 (1948); 1942 WIS. L. REV. 258, 272; 55 HARV. L. REV. 886 (1942); Cooper, "Commentary on the Michigan Marketable Title Statute," 19 CONN. B.J. 281 (1945); Stebbins, "Significance of Chapter 293, Laws of 1941, in Connection With Examination of Titles to Real Property," 15 WIS. ST. B.A. BUL. 93 (1942).

[47] State v. Ross, (Wis. 1951) 48 N.W. (2d) 460.

to prohibit the practice of selling certain items of merchandise below cost, states what is believed would be the judicial attitude in considering the question examined above:

> "The police power, which is about all the power that sovereign government has, aside from its power of eminent domain and taxation, is not limited to protection of public health, morals, and safety. It extends also to economic needs. The benefit to be derived from the enactment of a statute under the authority of legislative police power is primarily a question for determination of the legislature and its determination will not be set aside unless it manifestly appears to be an arbitrary one and based on no substantial ground."