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A SUPPLEMENT TO "CONSTITUTIONALITY OF
MARKETABLE TITLE ACTS"—1951-1957

*Ralph W. Aigler**

AN article bearing the title, "Constitutionality of Marketable Title Acts," was published in December 1951.¹ It was there pointed out that such legislation, of which the Michigan act is an example,² should be found to be within constitutional limits. It was recognized, however, that direct authority was scarce and that cases that might be deemed pertinent were conflicting.

An Iowa decision³ then came closest to being a decision on the point. As an authority it is weakened by the fact that the party against whom the statute would have effect had made no attack upon its validity. The court said:

"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 law-makers 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."⁴

In that article reference was made to two decisions, one in Kansas,⁵ the other in Pennsylvania,⁶ that might be thought to indicate a contrary conclusion. These cases were distinguished; they ran afoul of the constitutional safeguards in that the statute involved in each case contained a provision which, however, is not found in the marketable title legislation of the states above referred to, with the exception of Indiana.⁷

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¹ Aigler, "Constitutionality of Marketable Title Acts," 50 MICH. L. REV. 185 (1951).

² The statutes to which reference is made may be found in Illinois, Iowa, Wisconsin, Minnesota, Michigan, Indiana, Nebraska, South Dakota and North Dakota. The sections of these statutes are cited in the article in 50 MICH. L. REV. 185 (1951).

³ Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941).

⁴ Id. at 978-979. See also Lytle v. Guilliams, 241 Iowa 523, 41 N.W. (2d) 668 (1950).

⁵ Murrison v. Fenstermacher, 166 Kan. 568, 203 P. (2d) 160 (1949).

⁶ Girard Trust Co. v. Pennsylvania R. Co., 364 Pa. 576, 73 A. (2d) 371 (1950).

⁷ The marketable title statutes referred to in note 2 supra (with the exception of Indiana) provide for the preservation of the old interest or claim by the simple

In the earlier article it is said:

"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 legislation 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."⁸

Recently, particularly within the past few months, we have decisions that should go far in resolving such doubts as there may be as to the validity of such legislation. None of these decisions is binding upon Michigan courts, but surely they would view these cases as strongly influential.

The first of these decisions is that in *Harris Co. v. City of Hastings*.⁹ The action was to determine whether Harris or the city had the superior right to a vacant and unoccupied lot within the city limits. The former was on the current end of a connected chain of record title that went back to 1855, nearly a hundred years. The city's claim was based upon adverse possession that was initiated in 1876. If its relation to the lot had been that of an adverse possessor, ample time had elapsed since 1876 to acquire ownership under the statute of limitations.

The court pointed out that before it was warranted in considering whether the city had really been in adverse possession it had better consider the effect of the Minnesota Marketable

step of recording a preserving notice. In the Kansas and Pennsylvania cases the statutes required the institution of a suit within one year. The Kansas court, quoting *Dingey v. Paxton*, 60 Miss. 1038 at 1054, said: ". . . 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." For preserving the old interest the Indiana statute requires record of the preserving notice and the institution of a suit within a year. The Minnesota act, as originally enacted in 1943, contained a similar requirement. In the article referred to it was pointed out that this feature of the Indiana legislation might warrant a conclusion of unconstitutionality.

⁸ 50 MICH. L. REV. 188 (1951). Despite this not uncommon disposition of members of the bar, it is reported that in Michigan a lot of use has been made of the Marketable Title Act. Note the reference to the new set of Title Standards *infra*.

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

Title Act. Under that statute Harris, with well over forty years of connected record title, was entitled, according to its language, to a *conclusive presumption* that the city had *abandoned* its claims to the land in question unless it had recorded, within forty years of occurrence of the event under which it made its claims, a notice preserving it. It was conceded that there had been no such recordation, the statute of limitations having completed its running in 1891, fifteen years after the assumed adverse possession started in 1876.

Under the Minnesota statute the city was thus bound to lose unless it was saved by section 6 of the act. That subdivision declares that "This section shall not . . . bar the rights of any person, partnership or corporation in possession of real estate." After pointing out that the possession referred to must be "present, actual, open, and exclusive and must be inconsistent with the title of the person who is protected by this section,"¹⁰ the court went on to examine the facts which the city claimed amounted to possession and concluded that they did not do so.¹¹

The Minnesota court does not discuss the question of constitutionality, but it obviously was of the opinion that the legislation was effective.

The second significant case was decided by the Iowa Supreme Court in April 1957.¹² The action was one for a declaratory judgment to the effect that the vendor's title to a tract of land, which he had contracted to sell to defendant, was "good and merchantable" as provided for in the contract. The vendor had a title of record going back beyond 1907. In that year the then record title holder had executed a deed to his successor through whom the vendor claimed, but by mistake the subject matter as described in the deed was a different tract. The abstract of title showed that the deed of 1907 and its record had been corrected, but there

¹⁰ *Id.* at 49. The court stated, "It cannot be equivocal or ambiguous but must be of a character which would put a prudent person on inquiry," and added a footnote: "This is the same type of possession which constitutes constructive notice under the real estate recording act, §507.34."

¹¹ Under the statute a preserving notice on the part of the city would have had to be recorded not later than Jan. 1, 1948. The court thus declared that a possession that would be effective for it must not only have been in existence on that date but must have been continuous to Jan. 25, 1948, the date the action was commenced. If the city had been in possession on Jan. 1, 1948, and had later (before Jan. 25, 1948) abandoned that possession, "the bar falls," the court said (at p. 49), "and he cannot revive his right by again going into possession."

¹² *Tesdell v. Hanes*, (Iowa 1957) 82 N.W. (2d) 119.

was no reference therein showing by whom the change was made or who authorized it. Under those circumstances the defendant claimed that the abstract did not show the agreed merchantable title.

Applying section 614.17, Iowa Code (1954), a statute with the general features of the marketable title acts, the court entered judgment for the plaintiff. The statute declared that "No action based upon any claim arising or existing prior to January 1, 1940, shall be maintained . . . to recover any real estate in this state or to recover or establish any interest therein . . . against the holder of the record title to such real estate in possession, when such holder of the record title and his grantors immediate or remote are shown by the record to have held chain of title to said real estate, since January 1, 1940 . . ." unless the claimant shall within one year after July 4, 1951, file in the recorder's office a statement in writing.

It is further declared that "For the purposes of this section, such possession of said real estate may be shown of record by affidavits showing such possession. . . ." It appeared that the vendors had filed for record an affidavit stating, *inter alia*, that they were then in actual possession and that they and their predecessors in the chain of title had been, since prior to January 1, 1940, "in continuous, actual, visible, open, notorious, exclusive and hostile adverse possession thereof, under color of title. . . ."¹³

Plaintiff had made out his case for a judgment establishing his claimed estate by (1) proof of a connected chain of record title from January 1, 1940, to the filing of his suit and (2) proof of his possession by means of the recorded affidavit. His claim could have been defeated by showing that a preserving notice had been recorded in accordance with the statutory provision. But no such notice had been placed on record.

¹³ *Id.* at 121. The court pointed out that the affidavit does not need to be one asserting adverse possession; the only requirement is one of possession.

It will be noted that the Iowa act frees the required record title of conflicting claims only when the party claiming to be freed is in possession. The Michigan act in the comparable place requires not possession affirmatively speaking, but, negatively, no one in "hostile possession." That, as was pointed out in 50 *MICH. L. REV.* 183 (1951), was done to make it clear that record owners of lands not really in anyone's possession, could have the benefits of the act. There is nothing in the Michigan version comparable to the Iowa provision to establish by affidavit the possession or, on the other hand, the absence of hostile possession. Obviously proof of possession which will be available in a large percentage of the possible cases automatically proves absence of hostile possession. The Michigan act might be improved by incorporation of this provision for filing affidavits of possession or absence of hostile possession.

The court noted that the statute purports to bar all claims affecting the title to realty except those of the state or the United States, specifically that no allowances or exceptions were made for disabilities, etc. It is then succinctly stated, "We are satisfied the legislature had ample authority to enact a limitation statute such as [this one] . . . subject to a condition a reasonable time must elapse before it becomes effective."¹⁴

Noted also is the fact that the State Bar Association's Land Title Examination Standards recognize the usefulness of such statutes. The court said: "This court heretofore has given consideration to the work and recommendations of this committee and has commented on its efforts to simplify the title examination situation in Iowa. . . . It has been stated in the 1955 revision of the Iowa Land Title Examination Standard, p. 101, title standards are no substitute for statutes or judicial decisions. However, we are disposed to give serious consideration to these standards."¹⁵

It should be observed that the statutes above referred to, commonly grouped together as marketable title acts, fall into two general classes. The first category seeks to accomplish the desired result by declaring in substance, as does the Iowa act, that no action shall be maintained upon an "ancient" claim. These acts are in the pattern of statutes of limitation. Those in the second category, initiated by Michigan, declare that when certain facts are established a designated party is said to have a marketable title which title is then freed of claims antedating in their origin a stated number of years. Although the approach is different, the objective is much the same.¹⁶

The final one of the small group of cases that prompt this paper is an extraordinarily interesting one decided by the Minnesota court, June 18, 1957.¹⁷

In 1897, *H* conveyed a small parcel out of his farm to a school district, the deed containing the following language:

" . . . provided nevertheless and on condition however, that said premises shall be used and occupied as and for a school house site and school grounds and that whenever such oc-

¹⁴ *Id.* at 123.

¹⁵ *Id.* at 123-124.

¹⁶ The Marketable Title Acts, while in a sense statutes of limitations, are generally something more than that: they bar claims and interests that have not become bases of suit or self help.

¹⁷ *Wichelman v. Messner*, (Minn. 1957) 83 N.W. (2d) 800.

cupancy and use of the same shall cease and terminate said premises shall revert to said parties of the first part, their heirs and assigns and again become a part of and belong to Lot No. 4 above described.' ”¹⁸

The school board closed the school in 1946, and since then it was not used for school purposes, and a sale was decided upon in 1952. Shortly thereafter, the school lot was sold and conveyed to defendant Messner, the present owner of the *H* farm. Plaintiff secured quit claim deeds from the heirs of *H*. The action was then instituted for the determination of adverse claims. A judgment for plaintiff¹⁹ was reversed by the supreme court. Thereupon a petition for rehearing was filed. This petition was supported by a multitude of lawyers from all over the state. The court adhered to its conclusion but substituted for its earlier opinion the one found in the *Reporter*; it covers seventeen pages plus a syllabus by the court in thirty paragraphs. The decision is based squarely on the Marketable Title Act and apparently was arrived at after listening to a wide variety of contentions advanced by presumably erudite and resourceful counsel.

The decision is peculiarly significant to the Michigan bar, for the Michigan marketable title act was in considerable part patterned after the legislation in Minnesota and Wisconsin.²⁰ The question before the court was, in a sense, within rather narrow compass. It was whether the ownership of the school parcel had been freed of the power of termination or possibility of reverter, whichever it was.²¹ The defendant could show, and did so, (1) that he was on the current end of a connected chain of record title of at least forty years, and (2) the plaintiff's claimed interest arose out of an event or transaction more than forty years in the past, with no recordation of any preserving notice by him or his predecessors before the forty-year period had expired. That meant,

¹⁸ *Id.* at 809.

¹⁹ It would seem that the trial court thought that the deed of 1897 left in *H* either a power of termination (right of reentry) or, more likely, a possibility of reverter, which plaintiff had acquired from the heirs of *H*. In that view Messner took from the school district an estate subject to such outstanding interest. Evidently Messner had no confidence in a position that upon cessation of use by the school board the ownership of the parcel reverted to him as "a part of and belonging to Lot No. 4 above described."

²⁰ The Michigan act is by no means a copy of either of those acts. In a number of respects our act departs from those in the other two states. See note 16 *supra*. The departures, however, are in respects which should not make the question of constitutionality a different one.

²¹ In the court's view, what it was made no difference; it had been destroyed in any event.

if the statute was applicable, that plaintiff's claimed interest was to be deemed abandoned and the title of defendant's predecessor was marketable despite the old interest created in 1897. The court so concluded, because, as it pointed out, the Marketable Title Act so declared.

Although the decision was on that precise point, its significance lies in the fact that here the court squarely faced the question whether the act was constitutional. Even a casual reading of the opinion is convincing that the court fully realized the gravity of the problem and that it wanted to set at rest the many questions and doubts that obviously had been expressed.²²

Clearly one of the points most heavily urged was that the interest claimed to have been extinguished was created by the very same instrument relied upon as a link in defendant's recorded chain of title. Counsel seem to have insisted that the act by its own terms could be invoked "only by one who owns a separate and complete source of title which has been of record at least 40 years and for that period not subject to the adverse claim to be barred."²³

The Minnesota act provides: "As against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced. . . ." ²⁴ The court interpreted this as applying only to a fee simple ownership and then repeatedly emphasized the stated legislative purpose "to relieve a title from the servitude of provisions contained in ancient records which 'fetter the marketability of real estate.'" An estate in fee simple subject to a power of termination or possibility of reverter is still, it was pointed out, a fee simple; even putting these points together the conclusion was reached that counsels' argument for the limited coverage of the act was not to be accepted.

It is appropriate here to point out a striking difference between the Minnesota and Michigan acts. The Minnesota version, with the language quoted in the preceding paragraph, leads the court to confine the protections of the statute to fees simple. The

²² The court recognized that much of its opinion goes beyond the immediate issues. "This is explained," it is said, "by the fact that counsel amici curiae have voiced concern as to the impact of the Marketable Title Act, §541.023. In deference to them and the considerable segment of the bar for whom they speak, we have attempted to express our views as to all the points raised." 83 N.W. (2d) 800 at 811.

²³ *Ibid.*

²⁴ Minn. Stat. (1953) §541.023, subd. 1.

Michigan legislation, however, declares, "Any person . . . 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. . . ." ²⁵ Under this language it is possible for estates and interests other than fees simple to be declared marketable and freed of old claims that have not been preserved. As a matter of practicality, of course the vast majority of instances calling for the operations of the statute will be fees simple.

In this respect the Michigan version is broader in its operation than is the case in Minnesota. However, in another related respect the Michigan operation is narrower. Under the latter an interest or claim, though old enough to be barred, may survive despite failure to record a preserving notice. The Michigan act declares that the marketable title that results from the showing of forty or more years of connected record title with no one there in hostile possession is subject "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. . . ." ²⁶

Though the act was unqualifiedly found to be within the legislative power, one may wonder whether the Minnesota court did not err in its application to the facts before it.

The deed from *H* to the school district in 1897 of course did create an estate appropriately classified as a fee simple, but the estate in the district was subject to a condition or limitation. The record title in the district was of that kind of interest, and for

²⁵ Mich. Comp. Laws (1948) §565.101.

²⁶ *Ibid.* This provision seems wholly consistent with the general purpose of such legislation which of course is the reduction to 40 years of necessary title search.

As said by the Minnesota court, questions of construction must be resolved in such way as to effectuate the purpose of the act as stated therein. The basic idea is that when it develops that a person (or that person and his predecessors in a connected chain of title) appears by the record during the preceding forty years to be the owner of the estate or interest intended to be dealt with, it is normally safe for a purchaser or mortgagee to deal with him, particularly if such person is in possession or even if no one is in hostile possession. The title of such persons is to be viewed, generally speaking, as marketable, subject to what the reasonably diligent title examination covering a comparatively short period, commonly forty years, will disclose in the way of outstanding interests and claims.

The title thus declared to be marketable is then freed of interests and claims that arose out of events that transpired prior to the beginning of the specified short period, unless the records during that period disclose by a preserving notice the existence of the old interest. The idea, in short, is that title searchers will not need to go back before the beginning of the related short period.

all of the forty-year period, beginning in 1897, that was the fact. What was the sort of estate, then, that the district had that on the basis of this statute could be declared marketable? Is it not the essence of the act that the *title of record* is freed of the outstanding interest, the statute declaring that after forty years, etc., the outstanding claim or interest is conclusively deemed to have been abandoned? Abandoned in favor of what and whom? It is more than a little difficult to see how a title of record for forty years, a title which according to the muniments of title making up the forty-year record is one subject to the power of termination or possibility of reverter (or an easement, for example) is or should be enlarged by the operation of these marketable title acts. If *A* executes a conveyance of Blackacre to *X* and his heirs subject, however, to an easement created by appropriate language in the deed in favor of the grantor and the grantor records that deed and then forty years pass should it be concluded that *X* is now freed of the easement? Of course if *X* had, after the conveyance to him, executed a deed of the premises to *Y* in fee simple with no reference to any outstanding easement which deed was recorded and then forty years elapse after *that* recording, the title act may well work an extinguishment of the easement: a forty-year search of the title in such case would disclose no easement in *X*. After all, is it not the prime objective of those acts to make it possible for a purchaser or mortgagee to *rely* on the forty-year title? In this last imaginary situation the title searcher would be warranted in concluding that *Y* or his successor on the record had an unincumbered fee simple. That would be in keeping with the spirit and objective of the act.

Though one may have doubts as to the soundness of the court's construction and application of the act, the value of the decision on the constitutional question is not lessened. Indeed, if the court is right on the matter of construction, the case is an even more striking one on the constitutional phase.

The same public policy that was found to be back of the Iowa and Minnesota statutes is behind the Michigan act. As well said by the Minnesota court, the obvious objectives sought to be effectuated by the legislature should be given significant weight in settling questions of construction. It is difficult to see how a Michigan court could fail to follow the lead of those recent decisions and do otherwise than conclude that the act is within the legislative power.

Although the objective of this article is to challenge attention to the recent developments bearing on the question of constitutionality, it is appropriate to emphasize the matter of construction of the act. In dealing with and applying the marketable title acts a prime principle of construction is attention to the declared objectives of the legislation.

The following language from the Minnesota court's opinion in the *Wichelman* case is significant in this connection. It expresses a problem and what should be the judicial approach to settling problems arising under these title acts:

"Counsel amici curiae for the plaintiff assert that the act raises serious questions as to the status of the relative rights of parties on all instruments of record more than 40 years and make specific reference to certain continuing interests in real estate. In considering this objection we must continue to keep in mind that the statute should be given a reasonable construction in light of its stated purpose that 'ancient records shall not fetter the marketability of real estate.' Although the language of the statute is general, it may be limited in its operation to cases which may be said to fall within the mischief intended to be remedied."²⁷

The Michigan act, in section 6, states the purpose of the legislation in terms not to be mistaken. It is declared, "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. . . ."²⁸

Despite the desirability in general of a purchaser or mortgagee being able to rely upon what a search of the pertinent records

²⁷ 83 N.W. (2d) 800 at 813-814. The court then went on to discuss party wall agreements, utility easements, mineral rights, mortgages, leases, and remainder interests.

²⁸ Mich. Comp. Laws (1948) §565.106. The reference here to "dealing" may lead some to think that the old interests and claims cut off by the act are barred only in favor of one with whom the holder of the forty-year record title has had some dealing. It is to be noticed first that the quoted language is found in §6 which deals with general matters of construction. That section can be, as pointed out in the text, valuable, even controlling, in determining the meaning of ambiguous words and provisions in other parts of the legislation. Here, however, the language of §3 is too clear to need construction on the point under examination. Section 3 starts out by declaring that "Such marketable title [based upon at least forty years of record title and no one in hostile possession] shall be held by such person and shall be taken by his successors in interest free and clear of" the old interests and claims that are not within the preserving provisions of the act, the "dealing" referred to is theoretical, not actual.

covering the preceding forty years would disclose, it must be recognized that such reliance cannot be complete. The act contains exceptions—some old interests and claims are not extinguished even though no preserving notice has been filed for record within the preceding forty years. Such exceptions are not numerous and as to many titles there will be no such interests and claims, but the possibility that there are such makes it impossible to rely completely upon the forty-year record.²⁹

Aside from the exceptions, two other features will require resort in some instances to records antedating the forty-year period: (1) establishment of the *fact* that the claimant of protection of the act has actually had in himself or in him and predecessors in a connected chain, the requisite forty years of title of record; (2) determination of the nature of the extent or interest declared by the act to be marketable.³⁰

The Michigan act became fully operative in February 1948. On that effective date many old claims and interests as to which no preserving notices had been filed for record were extinguished.³¹ In 1948, there were many record titles then forty years, or more, old. To find the initiating record inevitably it was necessary to locate an instrument on record *more* than precisely forty years in the past. While section 3 says, "Such marketable title shall be held by such person³² and shall be taken by his successors in interest free and clear of" interests and claims depending upon events that occurred "prior to such 40 year period," it must be clear that the statute could not constitutionally be a declarer of marketable titles and extinguishers of old interests prior to February 1948. The phrase, "prior to such 40 year period," must then necessarily be that which began in February 1908, that is, as to claims and interests extinguished in 1948.³³

²⁹ In drafting the bill which became the statute this fact was realized, and no doubt the legislators whose votes made the bill law were aware of it. As often happens, factors of practicality and fairness led to stopping short of the desired ideal.

³⁰ Note that §1 states that "Any person . . . 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. . . ." This resort to the records *preceding* the forty-year period is not to be confused with the need to look at the records *during* the forty-year period to find what interests and defects "as are inherent in the provisions contained in the muniments of which such chain of record title is formed and which have been recorded during said 40 year period."

³¹ Ample time was allowed by the terms of the act for recording preserving notices.

³² This person is the one who can show forty years of record title in himself or in himself and predecessors in a connected chain and no one in hostile possession.

³³ This would seem to be true although the beginning of the chain of record title upon which rests the claim of marketable title is a record made in, let us say, 1900.

When, however, the instrument the record of which is relied upon as initiating the forty-year period was recorded *after* 1908, for instance, in 1910, the statute, assuming the other essential facts, operates as a possible declarer and extinguisher in 1950. In such cases the "forty year" period is the same whether looked at backward from 1950 or forward from 1910.

It is worth noting, in conclusion, that the Title Standards adopted by the Michigan State Bar give full recognition to the effectiveness of the Marketable Title Act. When the Michigan courts have occasion to pass on the broad question, the subject matter of this paper, it is to be assumed that they, like the Iowa Supreme Court, will give no little weight to the position taken in the Standards.