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apart from the averaging scheme provided in the Code.⁵⁹ For example, a twenty-seven-year-old intern, anticipating that his peak income-producing years would be between his fortieth and fiftieth birthdays, could arrange to "sell" some of his expected income to a trusting individual, receive a yearly payment for the next five or six years, and report the consideration received as income in the years it was received. Since he is presently an intern in a comparatively low income bracket for the next few years, the taxes on these annual payments would be much less than the taxes would be in later years when he has moved to a higher bracket. The young doctor could save the consideration he received until he reaches forty and be in exactly the same economic position as if he were then earning the income, yet his overall tax liabilities would be much less. Since Congress has established a comprehensive income averaging scheme,⁶⁰ it is highly unlikely that it intended to leave room for any private averaging schemes such as the one hypothesized. This loop-hole may be available, however, after *Stranahan*.

E. GRAHAM MCGOOGAN, JR.

Property Law—North Carolina's Marketable Title Act—Will the Exceptions Swallow the Rule?

Shouts of jubilation from weary title examiners resounded through dusty deed vaults in courthouses across North Carolina as news spread of the enactment of a marketable title act¹ that would reduce the length of title searches to thirty years. Initial joy was supplanted by disappointment, however, when a reading of the act, effective October 1, 1973, revealed thirteen exceptions to the thirty year limitation.²

Marketable title acts have evolved in answer to the major shortcoming of the recording system. When the common law maxim of "first in time, first in right" yielded to the concept that he who first records an interest in real property gains primacy over a subsequent recorder of that interest,³ a title recordation system arose that preserved indefi-

⁵⁹INT. REV. CODE of 1954, §§ 1301-05.

⁶⁰*Id.*

¹N.C. GEN. STAT. Ch. 47B (1973 Advance Legislative Service, pamphlet no. 3).

²*Id.* § 47B-3 (1973 Advance Legislative Service, pamphlet no. 3).

³Payne, *The Alabama Law Institute's Land Title Acts Project: Part I*, 24 ALA. L. REV. 175, 181 (1971).

nately technical defects impairing marketability.⁴ As the chain of title, originating by sovereign grant, adds new links, generation by generation, the likelihood that a defective transfer will occur increases with a consequent expansion of the title examiner's time and energy in his effort to discover it.⁵

The obstacles encountered daily by title examiners illustrate the need for remedial legislation to correct the imperfections of the recording system. Ancient deeds, transcribed in longhand and difficult to read, often contain references to natural monuments long since vanished or to the lines of adjoining landowners that are now impossible to locate.⁶ Restrictions and encumbrances with no one in existence to assert them are preserved, and interests such as possibilities of reverter or rights of entry prohibit full enjoyment of property indefinitely.⁷ Facts extrinsic to the record such as fraud or failure of delivery render titles insecure.⁸ Since no determination of title is conclusive, each successive grantee of a tract must obtain expert assurance that the title is marketable.⁹ The inevitable result is the "flyspecking" that makes the title search a risky, tedious, and expensive service. Finally, the transition from rural to urban society, complemented by increased home ownership, mortgaging, and business activity, compounds the frequency with which these problems arise.¹⁰

⁴"Once an interest is placed on the books in the register's office, there is no existing method to cleanse the records periodically of the barnacles of antiquated interests, however obsolete." Webster, *The Quest for Clear Titles—Making Land Title Searches Shorter and Surer in North Carolina via Marketable Title Legislation*, 44 N.C.L. REV. 89, 101 (1965). "The story is told that in some counties across America, a clerk would record a recipe if it were acknowledged!" Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. Q. 45, 86 (1967).

The North Carolina recording statutes were enacted in 1885 and are known as the Connor Act, ch. 147, § 1, [1885] N.C. Sess. L. 1245. The relevant statutes are N.C. GEN. STAT. §§ 47-18, -20 (1966). These are pure race statutes because they protect "any purchaser for value of specific land who records first, whether he has notice of a prior unrecorded conveyance or not, and irrespective of whether he is a prior or subsequent purchaser." J. WEBSTER, *REAL ESTATE LAW IN NORTH CAROLINA* 411 (1971).

⁵P. BASYE, *CLEARING LAND TITLES* § 171, at 366-67 (2d ed. 1970).

Defects include notarial and probate error such as the negligent omission of a spouse's signature or seal. Webster, *supra* note 4, at 97. The North Carolina General Assembly has recently enacted a statute that prevents the failure to include the notation "seal" after a signature from rendering a recorded document invalid. N.C. GEN. STAT. § 47-108.11 (1973 Advance Legislative Service, pamphlet no. 6).

⁶Whitman, *Transferring North Carolina Real Estate Part I: How the Present System Functions*, 49 N.C.L. REV. 413, 425 (1971).

⁷Hicks, *The Oklahoma Record Title Act Introduction*, 9 TULSA L.J. 68, 68-71 (1973).

⁸*Id.*

⁹Barnett, *supra* note 4, at 45-46.

¹⁰Hicks, *supra* note 7, at 69.

Initial response to the conveyancing crisis came from the Iowa legislature in 1919 in the form of a statute that extinguished claims arising before 1900.¹¹ The object of the Iowa act and the marketable title legislation that followed was to simplify land transactions and to protect purchasers of real property by making title examinations more secure.¹² The labor and difficulty involved in conveyancing were reduced by requiring examination of recent records only.¹³ In 1945 the marketable title concept gained momentum when Michigan adopted a prototype of the Model Marketable Title Act.¹⁴ Subsequently, thirteen other states adopted similar legislation with varying degrees of sophistication and adaptation to local need.¹⁵ In their operation these acts contain elements of marketable title acts, curative acts, or statutes of limitation.¹⁶

The North Carolina Act follows the pattern common to most marketable title legislation.¹⁷ It requires examination of only recent records and establishes a point in time, often called the root of title, that marks the beginning of the chain.¹⁸ If an owner presently has a record chain of title for thirty years, all conflicting claims based on title transactions prior to the thirty year period are eliminated. His title is marketable

¹¹Ch. 270, § 1 [1919] Iowa Acts 316 (now IOWA CODE ANN. §§ 614.17 (1950), *as amended*, (Supp. 1973).

¹²L. SIMES & C. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* xv (1960).

¹³*Id.*

¹⁴No. 200, §§ 1-9 [1945] Mich. Pub. Acts 267 (now MICH. COMP. LAWS ANN. § 565.101-.109 (1948). Lewis Simes and Clarence Taylor of the University of Michigan School of Law through a project with the Section of Real Property, Probate and Trust Law of the American Bar Association used the Michigan Act as the basis for the Model Act.

¹⁵CONN. GEN. STAT. ANN. §§ 47-33(b) to -33(1) (Supp. 1973); FLA. STAT. ANN. §§ 712.01-.10 (1969); ILL. ANN. STAT. ch. 83, §§ 12.1-.4 (Smith-Hurd 1966); IND. ANN. STAT. §§ 56-1101 to -1110 (Supp. 1972); IOWA CODE ANN. §§ 614.17-.20, .29-.38 (1950), *as amended*, (Supp. 1972); MICH. COMP. LAWS ANN. §§ 565.101-.109 (1948); MINN. STAT. ANN. § 541.023 (Supp. 1973); NEB. REV. STAT. §§ 76-288 to -298 (1971); N.D. CENT. CODE §§ 47-19A-01 to -11 (1960); OHIO REV. CODE ANN. §§ 5301.47-.56 (Page 1970); OKLA. STAT. tit. 16, §§ 71-80 (Supp. 1972); S.D. COMPILED LAWS ANN. §§ 43-30-1 to -15 (1967); UTAH CODE ANN. §§ 57-9-1 to -10 (1953), *as amended*, (Supp. 1973); VT. STAT. ANN. tit. 27, §§ 601-06 (Cum. Supp. 1973); WIS. STAT. ANN. § 893.15 (1966).

¹⁶Wichelman v. Messner, 250 Minn. 88, 106-07, 83 N.W.2d 800, 816 (1957). See text accompanying notes 37-39 *infra*.

¹⁷The North Carolina Act originated from a draft by James A. Webster, Jr. of Wake Forest University School of Law patterned after the Model Marketable Title Act. It has been presented to the General Assembly several times since 1965. For an analysis of the proposed act, see Webster, *supra* note 4.

¹⁸"Real property transfers should be possible with economy and expediency. The status and security of recorded real property titles should be determinable from an examination of recent records only." N.C. GEN. STAT. § 47B-1(4) (1973 Advance Legislative Service, pamphlet no. 3).

subject to (1) claims excepted from the operation of the act,¹⁹ (2) all encumbrances arising on or since the root of title,²⁰ and (3) ancient claims, otherwise extinguished, that are preserved by re-recording them with the register of deeds.²¹

The thirty year period used to establish the root of title under the North Carolina Act falls between the minimum period of twenty²² and maximum of fifty years adopted by other states.²³ The length of the period is crucial because an excessively long period forfeits the basic value of the act, and one that is too short increases the risk that too many notices to preserve old interests will be filed.²⁴ While most states have adopted a forty year period,²⁵ North Carolina's thirty year period is commendable because the starting point in 1943 falls after the Depression when defective tax sales, foreclosures, and generally inferior conveyancing techniques left title records in great confusion.²⁶ Barring the rare occasion when the root of title falls on a transfer recorded exactly thirty years prior to the present transaction, the chain will begin at the transaction next preceeding the thirty year period.²⁷ For example, if *A* presently claims title under a grant from *O* recorded in 1913, and no subsequent conveyances have occurred, *A*'s root of title begins in 1913, not 1943. Similarly, if *O* had conveyed to *X* in 1913, and *A* claims title by deed from *X* recorded in 1953, *A*'s root of title again begins in 1913.²⁸

In its operation the statute incorporates a device that allows re-recording of interests that would otherwise be extinguished. To illustrate, consider the following example. *O* conveys Blackacre by deed recorded in 1913 to *X* "so long as no tavern is constructed on the property." In 1943 *X* conveys to *A* making no mention of the restriction. In 1973 *A*'s title is no longer subject to the 1913 prohibition.²⁹ Had

¹⁹N.C. GEN. STAT. § 47B-3(1)-(13) (1973 Advance Legislative Service, pamphlet no. 3).

²⁰*Id.* § 47B-3(1) (1973 Advance Legislative Service, pamphlet no. 3).

²¹*Id.* § 47B-4 (1973 Advance Legislative Service, pamphlet no. 3).

²²N.D. CENT. CODE § 47-19A-01 (1960).

²³IND. ANN. STAT. § 56-1101 (Supp. 1972).

²⁴L. SIMES & C. TAYLOR, *supra* note 12, at xxiv.

²⁵CONN. GEN. STAT. ANN. § 47-33(c) (Supp. 1973); ILL. ANN. STAT. ch. 83, § 12.1 (Smith-Hurd 1966); MINN. STAT. ANN. § 541.023 (Supp. 1973); OHIO REV. CODE ANN. § 5301.48 (Page 1970); UTAH CODE ANN. § 57-9-1 (1953), *as amended*, (Supp. 1973); VT. STAT. ANN. tit. 27, § 601 (Supp. 1973).

²⁶Payne, *supra* note 3, at 194.

²⁷Webster, *supra* note 4, at 107.

²⁸Assume *O* gave a mortgage to *M* in 1943 and interest payments are still being made. If *O* sold the property to *A* in 1953, *M* should record a preserving notice in 1983 since it is *A*'s thirty year period that is crucial, not *M*'s.

²⁹N.C. GEN. STAT. § 47B-2(c) (1973 Advance Legislative Service, pamphlet no. 3).

the deed recorded in 1943 contained a reference such as "this conveyance subject to the restriction found in deed of 1913 recorded in deed book 30, page 160 of Z county registry," the restriction would be preserved.³⁰ A general reference in the 1943 deed such as "subject to easements and restrictions of record" would fail to preserve the exception.³¹ Finally, if *O* desired to preserve his restriction, he could record his claim with the register of deeds before October 1, 1976, and the restriction would remain enforceable for thirty years and would be subject to re-recording at the end of that period.³²

Section 47B-5 which provides the owner of an interest recorded at any time prior to 1943 a three year "transitional" period to re-record and preserve that interest will become unnecessary after 1976. Without this provision, however, the constitutionality of the act could be jeopardized. As purely retroactive legislation it could impair contractual rights and could deprive owners of their property without due process.³³ This section also provides those who do not follow legislative enactments closely an adequate opportunity to learn of the legislation, and to re-record their interests.

In addition to an understanding of the statute's general operation, it is essential to examine its individual provisions. Section 47B-1 summarizes the problems that have required marketable title legislation and states the objectives of the act. The only substantive value of this salutary provision is an affirmative identification of the legislative intent which could bolster court opinion in subsequent judicial interpretation.³⁴

Section 47B-2 affirmatively defines marketability and serves as an orientation to the individual provisions of the act. It greatly reduces the risk that an exception will be overlooked because it limits title examination to recent records.³⁵ It provides a comprehensive definition of marketability, however, only in the sense that marketability is determined by examination of instruments recorded during the restricted period.

³⁰*Id.* § 47B-3(1) (1973 Advance Legislative Service, pamphlet no. 3).

³¹*Id.*

³²*Id.* § 47B-5 (1973 Advance Legislative Service, pamphlet no. 3). An ethical question arises whether an attorney, aware that a former client could lose a property interest, should advise of this potential loss or should remain silent to avoid solicitation.

Since certain interests, such as possibilities of reverter and rights of entry unduly restrict property enjoyment, perhaps a limit should be placed on the right to re-record.

³³P. BASYE, *supra* note 5, § 175, at 384.

³⁴Webster, *supra* note 4, at 103-04.

³⁵*Id.* at 105.

True marketability continues to depend upon the legality of those instruments and the interests created by them.³⁶

Defining marketability in affirmative terms does, however, exemplify true marketable title legislation by expressly eliminating old inconsistent claims while statute of limitations acts do so only by implication through barring a remedy.³⁷ Subsection (c) which states that "all rights, estates, interests, claims or charges whatsoever" that arose prior to the root of title are extinguished carries this cleansing process one step further and adds a curative provision to remove all doubt that old claims are eliminated. Significantly, the incapacity of a claimant eligible to assert an old claim will not prevent its elimination as a cloud upon title.³⁸ This is another improvement over acts that function as a statute of limitations because the effectiveness of the act is more important than the infrequent deprivation of property from one under disability.³⁹

Subsection (d) states that the establishment of marketable record title pursuant to the act shall be prima facie evidence of ownership in actions for the recovery of real property, to quiet title, or to recover damages for trespass. This provision, unique among marketable title acts, is in answer to a dilemma that typically arose in disputes over large stands of timber in rural areas. Under preexisting law, a stranger could move into a remote tract and begin to harvest the trees. In order to prevent this practice judicially, the true owner was forced to institute a trespass suit where validity of his title was essential to recovery.⁴⁰ Since proof of a complete chain of title from the sovereign usually proved impossible,⁴¹ violent remedies often replaced judicial ones.

Section 47B-3, which lists thirteen items excepted from the act's coverage, radically departs from the pristine concept of marketable title legislation that title transfer should be facilitated by reference to recent records only. Each encumbrance excepted remains a cloud upon title even if it arose prior to the root of title.⁴² While exceptions are charac-

³⁶P. BASYE, *supra* note 5, § 172, at 371; L. SIMES & C. TAYLOR, *supra* note 12, at 11.

³⁷P. BASYE, *supra* note 5, § 173, at 372. Under a statute of limitations a plaintiff loses a right because he fails to sue within a designated time. Under a marketable title act the plaintiff loses his right because he fails to file a preserving notice.

³⁸N.C. GEN. STAT. § 47B-2(c) (1973 Advance Legislative Service, pamphlet no. 3).

³⁹Webster, *supra* note 4, at 115-16. Some might question the constitutionality of an act that can extinguish the property rights of those under disability.

⁴⁰*E.g.*, *Andrews v. Bruton*, 242 N.C. 93, 86 S.E.2d 786 (1955).

⁴¹"In an action for the recovery of land and for trespass thereon a denial by defendant of plaintiff's title places upon plaintiff the burden of proving title in himself and the trespass of defendant." *Cutts v. Casey*, 271 N.C. 165, 167, 155 S.E.2d 519, 521 (1967).

⁴²*Barnett*, *supra* note 4, at 86-87.

teristic of all the marketable title acts,⁴³ the greater their frequency, the more drastic is the reduction of the act's utility.⁴⁴

Subsection 47B-3(3), recognizing the right of those in present possession, is the first actual exception.⁴⁵ The precept that title searches should be limited to recent records collides headlong here with the deference the common law accorded possession. Possession, absent marketable title legislation, has always been important because it may ripen into full title under adverse possession and because possession inconsistent with record title serves as constructive notice of an unrecorded right.⁴⁶

Although this exception will require a trip to view the property in addition to the record search,⁴⁷ it serves two functions. First, inquiry into possession protects the adverse possessor who has not relinquished possession before marketability is established.⁴⁸ Secondly, it hinders a claimant who asserts title under a "wild deed".⁴⁹ Assume that in 1913,

⁴³See, e.g., CONN. GEN. STAT. ANN. § 47-33(h) (Supp. 1973); FLA. STAT. ANN. § 712.03 (1969); IND. ANN. STAT. § 56-1106 (Supp. 1972).

⁴⁴ Another problem marketable title acts are supposed to solve is that posed by old recorded interests less than a fee simple, to which the title of the fee simple owner is subject. . . . Easements, equitable servitudes, liens, mineral rights, leases, possibilities or reverter, and powers of termination are typical examples. If the objective is to ease the burden of title examination, no really sound argument can be made for cutting off some of these interests disclosed only in the pre-root chain, unless all so situated are cut off.

Barnett, *supra* note 4, at 86.

⁴⁵Subsections (1), (2) and (10), although listed among the exceptions, are, in reality, descriptions of the operation of the act.

⁴⁶Barnett, *supra* note 4, at 60. In another statute relating to the possession of real property with respect to color of title, the 1973 North Carolina General Assembly provided that by distinctly marking the physical boundaries, by recording a survey, and by listing and paying taxes on the property so marked, one can acquire prima facie evidence of possession. N.C. GEN. STAT. § 1-38(b)-(c) (1973 Advance Legislative Service, pamphlet no. 3), *amending* N.C. GEN. STAT. § 1-38 (1966). This statute eliminates much former uncertainty for those claiming title by possession. Other 1973 legislative innovations affecting real estate transfer include a statute preventing real estate title insurance companies from providing information or insurance without a title examination and the opinion of a North Carolina attorney, N.C. GEN. STAT. § 58-132 (1973 Advance Legislative Service, pamphlet no. 2), *amending* N.C. GEN. STAT. § 58-132 (1966), and another providing that the tax collector's certificate of assessment is conclusive. The certificate removes real estate taxes and special assessments as liens upon the property covered against those who rely on the certificate by paying the taxes and assessments, purchasing or leasing the property, or lending money secured by the real property. N.C. GEN. STAT. § 105-361 (1973 Advance Legislative Service, pamphlet no. 7), *amending* N.C. GEN. STAT. § 105-361 (1966).

⁴⁷Barnett, *supra* note 4, at 63-64; Webster, *supra* note 4, at 109-10.

⁴⁸Webster, *supra* note 4, at 108.

⁴⁹*Id.* at 109.

O conveys Blackacre to X who takes possession and remains there until the North Carolina Act is implemented in 1973. Assume further that in 1915, *Rascal*, a stranger, purports to convey Blackacre to Y. Both X and Y will have muniments of title that meet the statutory scheme and give each marketable title, but an orthodox search by a purchaser from X will fail to reveal the other independent chain. An inquiry that would reveal the possession of X greatly reduces the likelihood that Y, holding under a "wild deed" would prevail in asserting his false claim.

Subsection (4) requires an inquiry into the county tax records when marketability is to be established and answers a second problem that arises from the wild deed dilemma. If, under the previous set of facts, X had moved from Blackacre in 1970, with Y moving in as soon as X was out of sight, nothing would alert a purchaser from Y of X's superior right. However, a check of the county tax records revealing that X instead of Y paid the real property taxes would place the purchaser on notice of the inconsistency and frustrate the "late squatter's" bid for full title.⁵⁰ Although wild deeds occur infrequently, their potential consequences are so disastrous that an exception requiring inquiry into facts extrinsic to the record is deemed justified.

Subsections (4) through (8) exempt interests, primarily easements in favor of mining⁵¹ and railroad enterprises and water, sewage, gas, electrical and telephone utilities, from the operation of the act. Here the policy of the act arguably conflicts with the burden and expense accruing to the holders of these vested interests should they be required to re-record their claims every thirty years. It is also argued that the public services provided by these entities entitles them to remain beyond the operation of the statute⁵² and that their easements are usually intended to remain permanently outstanding.⁵³ Although these compelling reasons have prompted exceptions for easements in almost every marketable title act,⁵⁴ the scope of the easement exception provision in the North

⁵⁰*Id.* at 110-11.

Wild deeds also arise where a grantor executes a second unrecorded conveyance of the same land. The situation is most apt to arise where one owner, through mistaken land description, attempts to convey part of another's land. See generally Case Comment, *Marketable Record Title Act: Wild, Forged, and Void Deeds as Roots of Title*, 22 U. FLA. L. REV. 669 (1969).

⁵¹Although North Carolina is not a major mining state, the lack of specificity in the exception for mining interests could prove troublesome. See Payne, *supra* note 3, at 186-93.

⁵²Barnett, *supra* note 4, at 72.

⁵³*Id.*

⁵⁴E.g., CONN. GEN. STAT. ANN. § 47-33(h) (Supp. 1973); FLA. STAT. ANN. § 712.03(5) (1969); IND. ANN. STAT. § 56-1106 (Supp. 1972).

Carolina act is its most serious impediment.

The rationale for extinguishing these interests far outweighs the reasons for excepting them. No title examiner can certify a title unless he checks the record for these interests back to the original grant, thus undermining the purpose of the act.⁵⁵ Also, the holders of these interests are primarily large and sophisticated businesses knowledgeable in the law and financially equipped to integrate the notice filing system into their business operation.⁵⁶ Even if the argument for exempting these interests should prevail, only those easements observable by physical inspection should escape the re-recording requirement for, even under general property law, non-observable easements that are unrecorded cannot be asserted against a subsequent purchaser.⁵⁷ Observable easements, however, are called to the vendee's attention when he inspects the property as he is required to do under the present possession exception.⁵⁸

Subsection (9), excepting interests held by the United States, recognizes that no property interest can be divested from the federal government without its consent.⁵⁹ Unlike the acts of several other states,⁶⁰ the North Carolina act does not except interests held by the state. Subsection (11) excepts mortgages, deeds of trust, and security interests from the statute's operation, and, like the easement exceptions, greatly reduces the act's utility. Since most security interests have a duration of less than thirty years and are held by large financial institutions with ample opportunity to adapt to the notice filing system, the advantages accruing to these interests fail to warrant their exception from the thirty year limitation.⁶¹

In theory, subsection (12), excepting interests registered under the Torrens system, is compatible with the marketable title act concept because it also facilitates safe land transfer. By registering the title to land, instead of recording the evidence of title, the widespread use of

⁵⁵Barnett, *supra* note 4, at 86.

⁵⁶Note, *The Minnesota Marketable Title Act: Analysis and Argument for Revision*, 53 MINN. L. REV. 1004, 1016-17 (1969).

⁵⁷*Id.*

⁵⁸N.C. GEN. STAT. § 47B-3(3) (1973 Advance Legislative Service, pamphlet no. 3).

⁵⁹Three United States Supreme Court cases have held that state recording statutes do not apply to federal tax liens. *United States v. Estate of Donnelly*, 397 U.S. 286 (1970); *United States v. Union Cent. Life Ins. Co.*, 368 U.S. 291 (1961); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1916).

⁶⁰*E.g.*, OHIO REV. CODE ANN. § 5301.53(G) (Page 1970); S.D. COMPILED LAWS ANN. § 43-30-13 (1967); VT. STAT. ANN. tit. 27, § 601(b) (Supp. 1973).

⁶¹Note, 53 MINN. L. REV., *supra* note 56, at 1017.

the Torrens system could make title transfer safer than marketable title legislation. Since this laudable concept has found few adherents, however, its exception from the act will be significant only in the few eastern counties that use it.⁶²

The last exception, subsection (13), excepts equitable servitudes that restrict property to residential use. By including this exception, preservation of uniform residential sections through equitable servitudes, patterned to function like zoning ordinances, prevailed over notions favoring individual aspects of private ownership and court reluctance to honor titles encumbered by equitable servitudes.⁶³

Section 47B-4 details the procedure by which claimants of extinguishable interests must affirmatively re-record them. This provision avoids deprivation of property without due process by preventing the arbitrary extinction of property rights.⁶⁴ Practically, it serves to insure that only stale claims encumbering title needlessly will be eliminated by allowing "live" ones to be preserved.⁶⁵ Its diminution of the act's utility is negligible because the claims re-recorded are still discoverable among the recent records. Significantly, holders under disability can have their claims re-recorded by others.⁶⁶ Also, the claim must contain "the name of any record owner of the real property at the time the notice is registered" and be recorded in the grantor index under that name.⁶⁷ This assures that a title search beginning with the root of title will uncover the re-recorded interest.⁶⁸

⁶²Whitman, *supra* note 6, at 460-61.

⁶³Swietek, *The Law of Restrictions on Land in Wisconsin*, 41 MARQUETTE L. REV. 227, 337-38 (1957). Mecklenburg County was influential in the exception of equitable servitudes from the operation of the act since large residential areas surrounding Charlotte fall outside the city limits and beyond the jurisdiction of city zoning ordinances. Residential uniformity is maintained by incorporating restrictions in individual deeds.

⁶⁴For a discussion of the constitutionality of marketable title legislation see L. SIMES & C. TAYLOR, *supra* note 12, at 253-92. The constitutionality of the original Iowa statute was tested and upheld in *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 299 N.W. 553 (1941) and again in *Tesdell v. Hanes*, 248 Iowa 742, 82 N.W.2d 119 (1957). See *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957).

⁶⁵"The proposed statute, in promoting the public interest that land should be made more freely marketable and that the status of land titles should be more easily ascertainable, seeks to 'let the dilatoriness of human nature take its toll' in extinguishing interests not seasonably re-recorded." Webster, *supra* note 4, at 114. "It has been the experience of states with longterm marketable title acts that few if any notices of claim are filed, thus indicating that few claims actually exist." L. SIMES & C. TAYLOR, *supra* note 12, at 4.

⁶⁶N.C. GEN. STAT. § 47B-4(a) (1973 Advance Legislative Service, pamphlet no. 3).

⁶⁷*Id.*

⁶⁸P. BASYE, *supra* note 5, at 376.

The final four provisions provide stiff penalties for those who file false claims under the act,⁶⁹ state that the act will not disrupt the operation of existing statutes of limitation,⁷⁰ define terms and those to whom the act applies,⁷¹ and conclude that the act should be liberally construed.⁷²

CONCLUSION

The General Assembly's response to the conveyancing crisis by passage of the North Carolina Marketable Title Act will render invaluable service to all involved in real estate transactions. "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 the modernized system of conveyancing."⁷³ Prior to passage of the act, the title lawyer had to choose either to extend his search back to a remote period and reduce the risk that an undiscovered exception would later arise to haunt him or to risk a shorter search and save the valuable time that perusal of ancient records demands. Since the latter approach generally prevailed,⁷⁴ the new act will drastically reduce the likelihood of liability by assuring prima facie fee title after a thirty year search. The concept of marketability will be more clearly defined and conform more readily to modern needs of title transfer. The frequency of quiet title suits and the requirement of quitclaim deeds to remove old encumbrances will be greatly reduced.

Unfortunately, the quest to assure victory for the marketable title legislation resulted in the loss of major battles to vested interests and the concession of numerous and broad exceptions to the thirty year limitation. As the act is implemented, however, and its value to those engaged in real property transfer is recognized, advocates of the marketable title act should take up arms once again and attempt to remove these impediments to the full utility of the act.

EDWARD S. FINLEY, JR.

⁶⁹N.C. GEN. STAT. § 47B-6 (1973 Advance Legislative Service, pamphlet no. 3).

⁷⁰*Id.* § 47B-7 (1973 Advance Legislative Service, pamphlet no. 3).

⁷¹*Id.* § 47B-8 (1973 Advance Legislative Service, pamphlet no. 3).

⁷²*Id.* § 47B-9 (1973 Advance Legislative Service, pamphlet no. 3).

⁷³L. SIMES & C. TAYLOR, *supra* note 12, at 3.

⁷⁴Whitman, *supra* note 6, at 424-29. "When [title] insurance is to be obtained, nearly three-quarters of the attorneys follow the insurance firm's suggested sixty-year search. When no insurance is involved, the sixty-year search becomes less popular, and most attorneys who forsake it drop back to a forty-year search." *Id.* at 426.

