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The Improvement of Conveyancing in Montana by Legislation—A Proposal

By GARDNER CROMWELL*

INTRODUCTION

Lewis Mallaleiu Simes, former Professor of Law at Montana State University and former member of the Montana Bar, has added another title to a long list of accomplished professional works. The most recent publication is The Improvement of Conveyancing by Legislation, prepared under the auspices of the American Bar Association and the Law School of the University of Michigan. The treatise, as it is called, offers specific suggestions for improvement, including model acts for consideration and adoption. The purpose of this article is to discuss some of the suggestions, to relate them to problems which appear in Montana, and to offer for consideration a model marketable title act.

THE PROBLEM

The Foreword to the treatise provides a careful statement of the problem which the work concerns:

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

It is obvious that a relatively young state such as Montana will not now have chains of title as long as those in Michigan or New York, and that, therefore, now lawyers, abstracters, buyers, and sellers may find the quotation an overstatement. The emphasis, however, is on "now." It is the passage of time, the aging process, which produces the problems noted. The young state enjoys the favored position of being able to learn from the experience of those which have gone before. It seems short-sighted to ignore an opportunity to avoid some hurdles which are far in the future, but cer-

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Id. at xi.
IMPROVEMENT OF CONVEYANCING

tainly there. One of the purposes of this article is to urge consideration of the workable solutions so well presented in Professor Simes’s work.

In the two years given by Professor Simes to the tasks of research and drafting model legislation, every effort was made to recognize the interests and special problems of all concerned with conveyancing, from seller and buyer to the general public. The conclusions reached and the solutions offered accept the fact that the recording act (like the automobile and the jet aircraft and spacecraft) is here to stay. In the words of Professor Simes, “this treatise proposes no basic changes in the recording acts. Rather it offers legislative improvements. . . .”

The principles selected to guide such an approach were these:

1. The record should include, as nearly as possible, all the facts required to determine the state of the title.
2. So far as practicable, the record should be self-proving.
3. The length of the record required for a marketable title should be shortened.
4. Stale claims should be eliminated.
5. Some future interests should be restricted in duration.

The result of the attack upon the problem along the lines indicated is a volume which “is an attempt to propose legislative remedies which will either reduce risks now assumed by parties interested in title transactions or lighten the task of the title examiner, or both.” The selection of subject-matter for the discussion which follows was made upon the basis of two considerations: 1) the obvious one of space available for publication; 2) judgment of the relevance of particular subject-matter to Montana. In some cases, section titles are identical to those employed by Professor Simes.

A MARKETABLE TITLE ACT

At least one title examination standard employed in this state establishes marketability of title as the basis of the examination and defines a marketable title as “one free from grave defects and doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record.” The standard states a principle which has resulted in the adoption by nine states of so-called marketable title acts. The purpose of such acts is to cut off adverse interests which originated earlier than some time in the past (say 40 years) unless the holders of such interests record notices of them. While the result of such a provision is not to end all search back of the period stated, it does appreciably lessen the task of the title examiner, and decrease the number of possible clouds on the title. In order to facilitate examination and discussion of the proposal, there is here

*Id. at xvi.
*Id. at xxi.
6Standard 60, Montana Bar Association Title Examination Standards.
set out (section by section, with comment following each) the text of the "Model Marketable Title Act."

Section 1. Marketable Record Title. 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 forty years or more, shall be deemed to have a marketable record title to such interest as defined in Section 8, subject only to the matters stated in Section 2 hereof. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in

(a) the person claiming such interest, or

(b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest;

with nothing of record, in either case, purporting to divest such claimant of such purported interest.

The phrase "marketable title," as it is used in Section 1 and as it is defined in Section 8 (infra) does not act as a substantive rule that the vendee in a land contract which calls for "marketable title" is obliged to accept a title which fits the definition in this act. It means that, if the exceptions which are stated in Section 2 do not exist, all interests which are prior to the forty-year title are extinguished. If the practical effect of such extinguishment is to end all other claims, then the title may be "marketable" in the contract sense.

It is obvious, of course, that, in order to reach the root of title, it may be necessary to search farther back than forty years. It would be rare to find a transaction exactly forty years earlier than the date upon which the search begins. However, once the date of the root of title is found, claims not filed as required by Section 4 (infra) within forty years after that date are extinguished. Hence, a search begun in 1960 may find the root of title in a transaction not in 1920, exactly forty years ago, but in an instrument recorded in 1914. Forty years later, in the year 1954, claims not properly protected by recording are lost.

*The Model Act is printed on pages 6-10 of the treatise, which will not be cited hereafter when sections of the Act are quoted. The Model Act is based upon the Marketable Title Act of Michigan, Mich. Stat. Ann. §§ 26.1271-.1279 (so cited in the treatise), which the authors believe to be the best of its kind. The comments on the Act in this article draw extensively upon the discussion in the treatise.

*A number of Montana cases have considered the question of what is merchantable title for the purposes of a contract to convey, but all of them rely on Ogg v. Herman, 71 Mont. 10, 227 Pac. 476 (1924). There the court decided that the terms "clear title," "good title," and "merchantable title" are synonymous, and that "merchantable" and "marketable" are interchangeable. It defined a good title as one free from litigation, palpable defects and grave doubts, and one fairly deducible from the public records. See Conner v. Helvik, 105 Mont. 437, 73 P.2d 541 (1937); Silfvast v. Asplund, 93 Mont. 554, 20 P.2d 631 (1933); Williams v. Hefner, 89 Mont. 361, 297 Pac. 492 (1931); Gantt v. Harper, 82 Mont. 393, 267 Pac. 296 (1928).
The Model Act protects "any interest," as does the Michigan statute, in contrast to, for example, the Minnesota statute, which refers to "a claim of title based upon a source of title, which source has been of record at least forty years." This language was held, in 

\[Wichelman v. Messner,\]

to protect only a recorded fee simple ownership. The editors point out that in most cases, the value of the Act is to clear title to fees simple, so limiting the operation to such estates would not do harm.

Although the marketable title acts in Iowa, Nebraska, North Dakota, and South Dakota require that the person claiming the protection of the statute be in possession, the Model Act does not so provide. The reason for this choice is the principle stated earlier that the record ought to be self-proving. Requiring notice of the physical fact of possession bases determination of the quality of "marketability" upon matters which can not be recorded. However, the result is that there can exist two marketable record titles to the same land at the same time— that is, there may exist two chains which meet the standards of the statute. The practical answer, states the treatise, is that "the case will rarely arise where there are two independent chains of title, each being 'marketable' under the terms of marketable title legislation, and it is believed that alternative is preferable to a universal requirement of possession."

Finally, in consideration of the first section of the Act, it is pertinent to examine the length of the period. The Model Act specifies forty years; the periods of the other acts run from 19 to 75 years. The evidence which the authors had before them indicated that under a long-term statute, there are few notices of adverse claims filed. The Act then demonstrates one of its practical effects— making certain that stale claims will not be asserted. A relatively short period, however, may have the effect of cutting off live and timely claims (easements or mortgages, for example) simply because the holders failed to record a notice. The purposes of the act, to lessen the burdens assumed by the vendee and to ease the task of the title examiner, are well served by selection of a period sufficiently long that it will not accidentally cut off valid claims while putting an end to old conflicts.

Section 2. Matters to Which Marketable Title is Subject. Such marketable title shall be subject to:

(a) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided, however, that a general reference in such muniments, or any of them, to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction or other interest.

\[MICH. STAT. ANN. § 26.1271.\]

\[MINN. STAT. § 541.023 (1957).\]

\[250 Minn. 88, 83 N.W.2d 800 (1957).\]

\[SIMS & TAYLOR 351-52.\]

\[IOWA CODE § 614.17 (1958); NEB. REV. STAT. § 76-288 (Supp. 1949); N.D. REV. CODE § 47-19A01 (Supp. 1957); S.D. CODE § 51-16B01 (Supp. 1952).\]

\[See the text following note 5, supra.\]

\[SIMS & TAYLOR 355.\]
(b) All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with Section 4 hereof.

(c) The rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title.

(d) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started; provided, however, that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of Section 3 hereof.

(e) The exceptions stated in Section 6 hereof as to rights of reversioners in leases, as to apparent easements and interests in the nature of easements, and as to interests of the United States.

It might be said that any marketable title act is as strong as its weakest link, and that the weakest link is the portion of the statute which excepts any interests from the operation of the statute. If the chief purpose of the act is to shorten title examinations, the purpose is defeated if exceptions to the operation of the statute require the examiner to go, for any reason, back of the time limited. Suppose, for example, that subsection (a) did not include the proviso concerning general references. The result would be that the title examiner who found a general reference to easements of record in the instrument which was to be the root of title would be required to search “back to the beginning” for any such interests. So, the effect of subsection (a) is to require either specific references (and this requirement is quite obviously prospective in nature) to encumbrances or (as will appear from the next subsection) filing of a claim within the forty-year period. If, however, the instrument which constitutes the root of title also creates, for example, an easement in the grantor, that easement will not be cut off no matter how long the period because it is inherent in the muniment which is in the chain of title.

The exceptions noted in subsection (b) anticipate the provisions of Section 4 of the Act, which is discussed hereinafter. Subsection (c) protects the rights of an adverse possessor which begin either before or after the date of the root of title, but which come to fruition thereafter. The Act, then, does not affect the doctrine of adverse possession; it does not act as a statute of limitation. Although the object of the Model Act is to restrict the determination of relevant facts to the public record, the facts which constitute adverse possession can never be found there. In one situation, a title gained by adverse possession is cut off just as would be any other title. If such title has been perfected prior to the date of the instrument which constitutes the root of title, it is extinguished forty years after that date. If the holder of the adverse title fails to file notice of his claim as required by Section 4 (infra), his interest ends.

The effect of subsection (d), put quite simply, is to give precedence to the later of two roots of title (two separate chains), if it has not already
been extinguished. Consider the examples put in the treatise:7 A grants to B in fee simple by deed recorded in 1912. However, in 1915, Y records a deed to the same land in fee simple to him from X (a separate chain). In 1925, B grants to C in fee simple, the deed being recorded that year. Under the terms of subsection (d), Y, at the end of his forty-year period in 1955, takes subject to C's interest, the result being the same as if C had filed a notice in 1925. If, however, the transaction between B and C took place in 1957, the proviso would function: The completion of the forty-year period for Y in 1955 extinguishes B's interest, and the transaction with C does not revive it.8

Section 3. Interests Extinguished by Marketable Title. Subject to the matters stated in Section 2 hereof, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

This section underlines the proposition stated in the proviso in subsection (d) of Section 2 - such interests are extinguished and are not revived in any way. Without such straightforward language, of course, the effectiveness of the Act would be lost. In addition, the provision relieves the purchaser of any risk of loss which he might carry as the result of the practice existing in some jurisdictions9 of examiners limiting their search to some arbitrary period. When the Act makes the interests null and void, there is no risk that the vendee will some day be obliged to engage in a quiet title action over matters more than forty years old. It was noted in the discussion of Section 1 that the experience of states was that few claims are filed if the period is relatively long. This experience underlines an observation which is relevant to the final cutting-off provided for by Section 3. Practically speaking, probably nothing is really cut off. The effectiveness of the Section lies in its “cleaning up” of titles, and in ending concern over theoretically possible claims which will actually never be raised.

Section 4. Effect of Filing Notice or the Equivalent.

(a) Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said forty-

7Id. at 14, 15.
8See id. at 355-57 for additional discussion of the exception question.
9See 4 AMERICAN LAW & PROPERTY § 18.16 (Casner ed. 1952), especially note 2.
Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is

(1) under a disability,
(2) unable to assert a claim on his own behalf, or
(3) one of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(b) If the same record owner of any possessory interest in land has been in possession of such land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him or on his behalf as provided in Subsection (a), and such possession continues to the time when marketability is being determined, such period of possession shall be deemed equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in Subsection (a).

Perhaps the meat of this section is contained in the second sentence of subsection (a): "No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said forty-year period." Commonly, the running of any statute of limitation is suspended for the period of specified disabilities, and this is virtually always the case with limitations of actions concerning land. However, the Model Act, pursuing the stated objects of shortening title searches and eliminating stale claims, provides no exception for disabilities. Subsection (a) avoids hardship by allowing any person to file for a claimant who is under a disability. To the contention that such a provision adds to the burdens of one not sui juris, one may answer that, as with the requirement that one seeking to preserve an interest file a claim, it is but a little burden. Professor Simes likens it to the burden of recording which recording acts placed upon the grantee in a deed. Originally, the first grantee took because he was prior in time. The recording acts changed this by requiring him to take his deed to the recorder, else a subsequent grantee get there first. In any event, we revert to the experience of other states with marketable title acts that few claims are ever filed.

As was noted, subsection (b) of Section 4 is related to subsection (b) of Section 2. In practice, as the treatise points out, the situation which this provision concerns is not likely to arise. "But if such a situation should arise, it would seem to be unfair to deprive B [the possessor] of his title as against Y (who may have been a grantee under a wild deed) merely because B failed to file a notice of claim." Only in this connection is the fact of possession significant in the operation of the Model Act, and it must
be connected with a recorded instrument which goes back at least forty years.

Section 5. Contents of Notice; Recording and Indexing. To be effective and to be entitled to record the notice above referred to shall contain an accurate and full description of all land affected by such notice which description shall be set forth in particular terms and not by general inclusions; but if said claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in such recorded instrument. Such notice shall be filed for record [with the county clerk] of the county or counties where the land described therein is situated. The [county clerk] of each county shall accept all such notices presented to him which describe land located in the county in which he serves and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded and each [county clerk] shall be entitled to charge the same fees for the recording thereof as are charged for recording deeds. In indexing such notices in his office each [county clerk] shall enter such notices under the grantee indexes of deeds under the names of the claimants appearing in such notices. Such notices shall also be indexed under the description of the real estate involved in a book set apart for that purpose to be known as the "Notice Index."  

The concluding sentence of Section 5 is intended to be used in jurisdictions where there is no tract index, in order to assist the searcher in locating such notices. This kind of provision is in the Iowa statute. An additional device for simplifying the search is contained in the Indiana act which requires the person filing a notice of claim to recite the name of the present owner of the land. The notice is then indexed under that name.

Section 6. Interests Not Barred by Act. This Act shall not be applied to bar any lessor or his successor as a reversioner of his right to possession on the expiration of any lease; or to bar or extinguish any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use; or to bar any right, title or interest of the United States, by reason of failure to file the notice herein required.

This section joins with Section 2 to constitute the only exception to operation of the Act. The reason for exclusion of the lessor is that, since he is not in possession, he may not learn of adverse interests in time to protect himself by filing. The lessee, of course, does not run the risk. Although their discovery necessitates looking outside the record, easements or similar interests visible on the ground are excepted. And interests of the United States would probably not be cut off whether or not they were
specifically mentioned." Future interests such as the possibility of reverter or remainder are not excepted from operation of the Act unless they fall within the provisions of subsection (a) of Section 2." The drafters of the Model Act note that, if a relatively long period (40 years) is chosen as the basis for determining marketability, many future interests will not be affected. In addition, the growth in the attitude that lengthy lives of such future interests may not be good policy is an influence." As with any other outstanding interest, of course, the holder of a future interest may protect it by filing a claim as provided in Section 4. There remains but one type of interest which is not excepted — that of the state or municipality. The drafters of the Model Act have not excepted such interests because they believe the practice undesirable, and they point out that the state or city can file a claim." This attitude should receive welcome in Montana, in view of the policy which subjects the state to the operation of statutes of limitation concerning land."

Section 7. Limitations of Actions and Recording Acts. Nothing contained in this Act shall be construed to extend the period for the bringing of an action or for the doing of any other required act under any statutes of limitations, nor, except as here-in specifically provided, to affect the operation of any statutes governing the effect of the recording or the failure to record any instrument affecting land.

This provision emphasizes that a Marketable title act is not a substitute for a statute of limitations for actions concerning land or for usual recording practices. Many rights may be cut off by the operation of a statute of limitations long before the end of the forty-year period recommended for the Act. Likewise, the purpose of the Act is not to alter the substantive results provided for in present recording statutes. The grantee, in order to be protected, must still win the race to the courthouse. If he does not, his recording under this Act will not revive any claim he may have had. If he asserts a claim, he must record it within the forty-year period.

Section 8. Definitions. As used in this Act:

(a) "Marketable record title" means a title of record, as indicated in Section 1 hereof, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in Section 3 hereof.

(b) "Records" includes probate and other official public records, as well as records in the registry of deeds.

"SIMES & TAYLOR 15, 357.
See the text following note 16, supra.
There is no such policy apparent in Montana. R.C.M. 1947, §§ 67-406 and -407 concern suspension of the power of alienation. Traditionally, future interests, because vested, have not been subject to the Rule Against Perpetuities.
"SIMES & TAYLOR 357.
R.C.M. 1947, § 93-2501. In a decision applying the predecessor of this Code section, the Montana Supreme Court held that statutes of limitation are applicable to the state. Newton v. Weller, 87 Mont. 184, 286 Pac. 133 (1930).
See, e.g., R.C.M. 1947, § 93-2504.
See sections 2 and 4, respectively, of the Act.
(c) "Recording," when applied to the official public records of a probate or other court, includes filing.

(d) "Persons dealing with land" includes a purchaser of any estate or interest therein, a mortgagee, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon.

(e) "Root of title" means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.

(f) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, referee's, guardian's, executor's, administrator's, master in chancery's, or sheriff's deed, or decree of any court, as well as warranty deed, quitclaim deed, or mortgage.

It is only at this point that I would disagree with the drafters about the organization of the Act. The treatise does not reveal any reason for placing the definitions of terms used in the Act at the end of it, nor is any immediately apparent. It would seem far more helpful, especially when the matter presents a new approach — really a new legal theory — to define terms at the beginning. This would save, among other things, the effort required to leaf backward to definitions while proceeding through new material. While precedent need not always govern, it is true that placing definitions first is the method usually followed in model and uniform acts.\(^{**}\)

The phrase "registry of deeds" which appears in subsection (b) of Section 8 has not been changed, although the same phrase was deleted from Section 5. The reason for the difference in treatment is that the phrase seems to have been used by the drafters in two different ways. To say file for record "with the county clerk," in order to relate the language of the Model Act to the Montana recording statutes, is different from using the phrase "registry of deeds" to denote a place where records will be found.

The last sentence of subsection (e) of Section 8 provides that the date of the root of title is the date upon which the instrument which constitutes the root is recorded. This would not ordinarily appear to be a source of difficulty. However, a Montana statute\(^{**}\) provides that an instrument is deemed to be recorded when it is deposited in the county clerk's office. In addition, the notice provision\(^{**}\) states that an instrument is notice to subsequent purchasers and encumbrancers "from the time it is filed with the county clerk for record." The California Supreme Court has held that the statute which is the parent of the first one referred to must be construed

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\(^{**}\) See, e.g., the UNIFORM ADOPTION ACT, 9 U.L.A. 29; the MODEL BUSINESS CORPORATION ACT, 9 U.L.A. 115; the UNIFORM CIVIL LIABILITY FOR SUPPORT ACT, 9 U.L.A. 219; the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 9 U.L.A. 233.

\(^{**\text{R.C.M. 1947, § 73-201.}}\)
with another and that the result is that an instrument is not notice until it has been transcribed into the proper record book. On the other hand, the Supreme Court of Montana, in Guerin v. Sunburst Oil and Gas Co., held that the option involved in that case gave constructive notice of its contents from the time it was filed with the county clerk. It is to be noted, however, that the option was filed and transcribed on the same day, and that the case concerned not the time of recording but the place of transcribing.

For certainty, and to avoid irrelevant hairsplitting arguments about time, adoption of the Model Act language is recommended. Since this is specific legislation, it would appear not to be subject to the conclusive presumption noted heretofore. The words "the date on which it is recorded," then, would be construed as meaning the date when the instrument was transcribed upon the proper record. It is only when one can see the copy of the instrument that he has notice. Furthermore, when establishing a matter so conclusive as a root of title, it seems wise to provide a method which is sure.

The recommendation contained in the preceding paragraph is in accordance with the intent expressed in the next section of the Act.

Section 9. Act to Be Liberally Construed. This Act shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 1 of this Act, subject only to such limitations as appear in Section 2 of this Act.

The concluding section of the Model Act contains its constitutional basis, a subject which will be considered in the next portion of this article.

Section 10. Two-Year Extension of Forty-Year Period. If the forty-year period specified in this Act shall have expired prior to two years after the effective date of this Act, such period shall be extended two years after the effective date of this Act.

The effect of this provision is that if the Model Act is effective on July 1, 1961, any forty-year period which began after July 1, 1921, and before July 1, 1923, will run something longer than forty years, or until July 1, 1963. The purpose of this extension is to provide an opportunity for filing for those who have claims. Providing such an opportunity avoids constitutional objections concerning arbitrary cutting off of interests.

CONSTITUTIONALITY

Appendix A of the treatise is an extensive article discussing generally the constitutionality of model legislation and drawing specific conclusions about the acts offered. After discussion of the problems involved in federal constitutional law, the authors conclude:


63 Mont. 365, 218 Pac. 949 (1923).

SIMS & TAYLOR 271-72.
Since the Supreme Court of the United States has sustained the constitutionality of rent legislation, mortgage moratorium statutes, zoning laws, and many other kinds of regulatory statutes having a dramatic impact upon property, we may confidently expect that it will also sustain any reasonable legislation having as its objective the marketability of land titles and that all enlightened state courts will do likewise.

Then, although recognizing the difficulty of stating general principles, they consider some recognized doctrines, citing cases in support thereof. 

1. The constitutional prohibitions are not absolute. In each case, the public interest to be advanced by a statute is balanced against the extent and importance of the deprivation of property or the impairment of contract rights.

2. A statute which modifies, restricts or abolishes property interests to be created in the future, and which, therefore, is not retroactive, is rarely unconstitutional on this ground.

3. If an existing property interest is unsubstantial, retroactive legislation to restrict or extinguish it is not necessarily in violation of due process provisions.

4. Courts go farther in sustaining the constitutionality of statutes which modify the use of existing property interests than statutes which restrict or extinguish existing ownership.

5. A change in the rules of evidence is not unconstitutional on the ground that it operates retroactively.

6. Curative acts, which necessarily operate retroactively, are not unconstitutional for that reason.

7. Statutes of limitations which operate retroactively are not unconstitutional for that reason.

8. Legislation in the nature of a recording act is constitutional even though it requires the recording or re-recording of instruments executed before the effective date of the act.

The authors of the treatise take the position that the retrospective action of the Model Act is justified under principles 1 and 8. In addition, as they point out, the two jurisdictions which have been called upon to pass upon the constitutionality of marketable title acts have upheld them. Both Minnesota and Iowa, the latter in two decisions, have held their respective acts constitutional. And the Supreme Court of Minnesota employed language much like that suggested in principle 1, noted heretofore.

What can be said about the future of any such legislation in Montana? The Montana constitutional provisions which might be involved in any determination are as follows:

Article III, section 11. No ex post facto law nor law impairing the obligation of contracts, or making any irrevocable grant of spe...
cial privileges, franchises, or immunities, shall be passed by the legislative assembly.

Article XV, section 13. The legislative assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already passed.

In addition, this statute has some bearing on the problem: "No law contained in any of the codes or other statutes of Montana is retroactive unless expressly so declared." 

It is submitted that none of these provisions prevents adoption of the Model Act. The retrospective operation of the Act is this: An action (recording of an instrument) performed forty or more years in the past is, by the Act, given a significance which it did not have when it was performed. It becomes, instead of being just one of any number of instruments in a chain, a special kind of instrument, called a "root of title." And, because it happened to have been accomplished at a particular point in time, it has the effect of cutting off all interests antagonistic to it which were created prior to that point in time. This will be true, however, only of instruments recorded before the date of passage of the Act. Any transaction consummated after the date of the Act will be subject to the provisions of the Act as it would be subject to all pertinent law; therefore, as to it, the Act does not operate retrospectively. The only question is, then, whether the effect of the Act upon transactions which were completed prior to its passage is to impair the obligation of the contract or to benefit retrospectively a corporation or an individual or an association of individuals.

As was already noted, the last section of the Model Act provides a two-year extension of the basic forty-year period in certain circumstances. The effect of the provision is to give notice to all who may have interests to protect that they have two years after the date of passage to re-record them. There is no Montana holding on the constitutionality of the statute requiring recording of instruments, but decisions from other jurisdictions would seem to lay the matter at rest. Early in the nineteenth century, the Supreme Court of the United States decided *Jackson ex dem. Hart v. Lanphire.* Passing on an early recording statute, the Court held that a state legislature had the power to make an older deed void in the face of a junior deed if the older were not recorded within a reasonable time after passage of the act. Such an act, said the Court, did not impair the obligation of contract.

Somewhat later, the Supreme Court of California came to a similar
conclusion. The parent of Montana’s recording statute is section 1214 of the California Civil Code. Its predecessor was an act passed in 1850, which required that conveyances made prior to that date (as well as those made thereafter) be recorded. In an 1857 case, Stafford v. Lick," it was held that an act which requires recording of conveyances made prior to the date of the act does not divest vested rights.

A much more recent decision states a similar conclusion. The Colorado constitution contains a provision much like those quoted above from Montana: “No . . . law impairing the obligation of contracts, or retrospective in its operation . . . shall be passed. . . .” In a 1932 case," the matter for decision was the effect of an unrecorded deed which the grantee received eight years before a recording act was passed. The grantee contended that it was not obliged to record since the deed was effective before the act was passed. Any other result, it argued, would impair its contract and cause the statute to operate retrospectively in contravention of the constitution. Not so, said the court. The act did not impair the grantee’s contract because that had already been performed. It was not retrospective in operation because the grantee had had time after the statute was passed to record and protect itself. It had not chosen to do so; whatever it lost, it had thrown away.

These decisions have concerned only the effect of statutes which required recording originally; the Model Act would require re-recording. A recent decision very much in point is *Opinion of the Justices.* The New Hampshire Senate proposed a measure, known as Senate Bill 80, which provided that mortgages on record more than forty years were void unless re-recorded within that period. The Senate sought an advisory opinion of the supreme court, the question being whether the bill violated the prohibition of Article 23 of the New Hampshire Bill of Rights against retrospective laws. The opinion stated that, while the particular bill was unconstitutional, one which gave a mortgagee a reasonable time to re-record after the effective date of the act would be constitutional. This is just the provision which the Model Act contains. It would appear, therefore, that, with regard for Montana, the opinion of the drafters of the Model Act that it is constitutional is a good one.

It is appropriate, before leaving this subject, to consider briefly two decisions which have some relevance. Neither concerned a marketable title act, and the drafters of the Model Act state that “each is readily distinguishable.” Each case considered an act which required the bringing of a suit rather than re-recording, and the cutting off of interests resulted from failure to bring suit. In a Kansas case the act was designed to prevent having to trace title back of a recorded plat, and required bringing a suit to protect an adverse claim. The Kansas Supreme Court relied upon

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*7 Cal. 479 (1857).*
*Colo. Const. art II, § 11.*
*Moore v. Chalmers-Galloway Live Stock Co., 90 Colo. 548, 10 P.2d 950 (1932).*
*101 N.H. 515, 131 A.2d 49 (1957).*
*Simms & Taylor 273.*
a statement by Justice Cooley that a limitation law cannot require one who is already enjoying all he claims to resort to legal proceedings. In a decision concerning a similar situation, the Supreme Court of Pennsylvania held unconstitutional a statute which extinguished certain mortgages and other claims if suit were not brought within one year after the date of the act. Neither of these cases involved provisions which required re-recording; both required bringing an action. The differences between such a requirement and that of the Model Act are clear.

CONCLUSION

It need hardly be said that a discussion of such brief compass is no substitute for careful study of the treatise. The purpose of this article has been to submit for consideration a workable and scholarly solution for some conveyancing problems. It has not treated all possible bases for discussion of the Model Act; it does not pretend to an exhaustive treatment of relevant cases, either in Montana or in other states. If it serves to excite interest or discussion, if it leads to the asking of questions which are not treated within it or, what is far more remote, in the treatise, then it has served its purpose. And, while this is not proposed upon such brief examination, should the Model Act receive careful consideration for submission to the legislature, the endeavors of the drafters will have been to the best purpose. In that event, it will be proper to note that the treatise does not propose a code of model acts, all of which ought to be adopted. The point is made clear in the introduction to the work in this sentence: "Each act is complete in and of itself and can be separately enacted."

This observation is pertinent, however. The treatise also offers a Model Real Property Limitations Act, and notes that Montana's legislation on limitations of action is subject to criticism. Briefly put, the problem is that, although Chapter 25 of Title 93 concerns "Limitations of Actions for Recovery of Real Property," Chapter 27, "Time of Commencement of Actions—General Provisions Concerning," is apparently also applicable. These provisions were apparently intended to be only procedural, but, if the provisions of Chapter 27 are applied to actions relating to real property, the results are very uncertain. In fact, the drafters comment that if the latter provisions are applicable, they "inject such an element of uncertainty into the length of the period as to make the statute of very little value for title purposes." Accordingly, it is recommended that any effort to enact marketable title legislation in Montana include a proposal to clear up the ambiguity suggested. This could be accomplished by a bill repealing the present Chapter 25 of Title 93, substituting therefor the

The court cited Cooley, CONSTITUTIONAL LIMITATIONS 365 (1st ed. 1868). The statement also appears in 2 Cooley, CONSTITUTIONAL LIMITATIONS 762 (8th ed. 1927), citing cases later than 1868.


If it leads to a run on the bookselling facilities of the University of Michigan Law School, I do not expect any commission beyond the pleasure that this remarkable treatise has received the attention it deserves.

Simes & Taylor xxiii.

Id. 39.

R.C.M. 1947.

See note 61, supra.
Model Real Property Limitations Act," and limiting the application of the present Chapter 27 to actions other than those concerning real property."

Finally, it may be noted that the advent of a marketable title act has had little adverse affect on either attorney-abstract jurisdictions or those in which title insurance is widely used. One commentator from Minnesota," a title insurance executive, stated that the effect of the marketable title act in his state was to eliminate "fly-specking," and that the title insurance business continued to grow. With regard to attorney-abstract states, the only comment necessary is a quotation from the authors of the treatise: "The nine states in which marketable title acts have been enacted are Midwestern states in which the attorney-abstract system is dominant and in some of which the length of chains of title back to the governmental source results in lengthy and complicated abstracts.""