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The Minnesota Marketable Title Act: Analysis and Argument for Revision

I. INTRODUCTION

The passage of time with its consequent lengthening of title records, and the preservation of minor recorded deed defects—a basis for objections by meticulous title examiners—spur the need to reform both the mechanics and substantive law embracing the examination of titles. Such reform has been initiated by the so-called “marketable title acts,” which attempt to stabilize the record by extinguishing ancient irregularities in the chain of title. Generally the acts provide that claims or interests arising prior to a designated period are extinguished unless the claimant has filed a preserving notice before the statutory

1. These record errors have become especially troublesome since the case of Douglass v. Ransom, 205 Wis. 439, 237 N.W. 260 (1931), which held that such trifling discrepancies as the spelling of names, failure of wives to join in conveyances, unsatisfied or defectively satisfied old mortgages, and improper descriptions in the record made the title unmarketable.


4. See Swenson, The Utah Marketable Title Act, 8 Utah L. Rev. 201 (1963). Thus, overly cautious title examiners will at least have to confine their “fly-specking” to a comparatively short period of time.

period has run. Marketable title acts are of two types. The limitations-type acts disallow the commencement of any action on a claim arising prior to a designated time in the past, unless the claim has been preserved by filing notice. The effectiveness of such acts is somewhat incomplete in that instead of destroying ancient claims, they only bar the remedy otherwise available to the claimant.

The marketable-type acts declare the record owner the holder of a marketable title which is free of all interests arising more than a specified number of years ago, providing such interests have not been kept alive by the recording of a preserving notice. The marketable title defined by these acts is not necessarily one that will satisfy a contract of sale; that is, it is not the type of title which one could force on a vendee through specific performance, as these acts provide for a number of exceptions which will not appear on the record. However, when such acts operate in favor of a fee simple and none of the exceptions exist, the 40 year chain of title is commercially marketable in all respects.


8. One commentator suggests that these acts are not really statutes of limitations at all since (1) the person who is barred by the particular act’s provisions may never have had any cause of action at all, and (2) the period of the statute may not start from the accrual of any cause of action. See L. Simes, A Handbook for More Efficient Conveyancing 43 (1961).


10. E.g., Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957) (where the rights of the holders of certain easements, mortgagors, and the reversioners of leases are exempted from operation of the Act); Minn. Stat. § 541.023(6) (1967) (where the rights of the federal government and persons in possession of real estate are exempted from the Act).

11. See Simes & Taylor at 305; Simes, supra note 6, at 2359.
It has been more than 20 years since the Minnesota Marketable Title Act was adopted in its current form. The Act is generally accepted as an aid in examining title, due to title examiners' reliance on a search of the record covering only the

12. Minn. Stat. § 541.023 (1967) [hereinafter referred to as Act]:

1. Commencement. 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 by a person, partnership, corporation, state, or any political division thereof, after January 1, 1948, to enforce any right, claim, interest, incumbrance or lien founded upon any instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded in the office of the register of deeds or filed in the office of the registrar of titles in the country in which the real estate affected is situated, a notice sworn to by the claimant or his agent or attorney setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance or lien is mature or immature. If such notice relates to vested or contingent rights claimed under a condition subsequent or restriction it shall affirmatively show why such condition or restriction is not, or has not become nominal so that it may be disregarded under the provisions of Minnesota Statutes 1945, Section 500.20, Subdivision 1.

2. Application. This section shall apply to every right, claim, interest, incumbrance or lien founded upon any instrument, event or transaction 40 years old at the date hereof, or which will be 40 years old prior to January 1, 1948, except those under which the claimant thereunder shall file a notice as herein provided prior to January 1, 1948.

5. Abandonment presumed. Any claimant under any instrument, event or transaction barred by the provisions of this section shall be conclusively presumed to have abandoned all right, claim, interest, incumbrance or lien based upon such instrument, event or transaction; and the title in the name of any adverse claimant to the real estate which would otherwise be affected thereby shall not be deemed unmarketable by reason of the existence of such instrument, event or transaction; it being hereby declared as the policy of the State of Minnesota that, except as herein provided, ancient records shall not fetter the marketability of real estate.

6. Limitations; certain titles not affected. This section shall not affect any rights of the Federal government; nor increase the effect as notice, actual or constructive, of any instrument now of record; nor bar the rights of any person, partnership or corporation in possession of real estate.

7. Source of title. For the purposes of this section, the words "source of title" as used in subdivision 1 hereof shall mean any deed, judgment, decree, sheriff's certificate, or other instrument which transfers or confirms, or purports to transfer or confirm, a fee simple title to real estate, including any such instrument which purports to transfer, or to confirm the transfer of, a fee simple title from a person who was not the record owner of the real estate. However, any such instrument which purports to transfer, or to confirm the transfer of, a fee simple title from a person who was not the record owner of the real estate to the grantee or transferee named in such instrument...
Such reliance is often not justified, however, as numerous exceptions are either expressed in the Act or judicially incorporated. In addition, an ancient preservation notice may remain effective for a period exceeding 40 years. Also, certain conceptual and practical difficulties pervade the Act. This Note will point out the difficulties both inherent in the Act and resultant from judicial interpretation. The Note will also recommend replacing the current Act with the Model Marketable Title Act and specified variations thereof.

II. THE MINNESOTA ACT—INCONGRUOUS RESULTS

The Minnesota Act provides that an action to “enforce any right, claim, interest, incumbrance or lien” which is more than 40 years old, may not be brought against a “claim of title based upon a source of title” which is also at least 40 years old. If neither an action has been commenced nor a preserving notice filed within the 40 year period, the claim or interest is pre-
sumed to have been abandoned. Assume that in 1920, O conveys to A a fee simple subject to a condition subsequent. A enters possession and subsequently violates the condition in 1968. Unless O has filed a preserving notice of the condition subsequent within the 40 year period beginning in 1920, he is now barred from asserting the claim and is presumed to have abandoned it.

The Act received substantial interpretation in *Wichelman v. Messner*. In this leading case, O conveyed in 1897 a portion of his farm to a school district with a provision for reverter should the land cease to be used for school purposes. The school district discontinued its use of the land for school purposes in 1946, and in 1952 sold the land to the defendant, Messner. Wichelman, the plaintiff, then solicited and obtained releases of deeds from O’s heirs and instituted an action to determine adverse claims. Reversing a judgment for the plaintiff, the Minnesota Supreme Court held that since no preserving notice had been filed within 40 years from the creation of the condition, plaintiff was barred from asserting the claim.

The *Wichelman* court went further, however, concerning itself with many problems expressed by *amicis curiae* counsel and the Minnesota Bar. The court delineated three classes of persons immune from the Act: those whose right, claim, interest, incumbrance or lien arose within 40 years prior to the commencement of the action; those who had filed preserving notices of their claims within 40 years after their inception; and those excepted from the Act’s operation, including those in possession of the property. In its present form, the Act is a combination

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16. *Id.* § 541.023(5).
18. The court stated that it was immaterial whether the provision was deemed a fee simple subject to a condition subsequent or a fee simple determinable, since the Act applied with equal force to both types of restrictions, *Wichelman v. Messner*, 250 Minn. 88, 96-97, 83 N.W.2d 800, 810 (1957).
19. A petition for rehearing was filed and supported by counsel *amicis curiae* from all over the state. The court affirmed its decision but substituted for its earlier opinion the one which was eventually reported. The reported opinion fully discusses the Act.
21. *Id.* at 112, 83 N.W.2d at 819-20.
23. *Id.*
of the limitations-type act and the marketable-type act. It operates as the former in that it requires the filing of notice to preserve a right of action which is over 40 years old. It operates as the latter since all claims or interests to which the statute applies are conclusively presumed to be abandoned absent the filing of any notice. Thus, in addition to precluding actions resting on ancient claims, the Act embraces a curative function by extinguishing interests not seasonably filed.

This combination can lead to possible absurdities if the statute is literally applied. For example, assume two claimants each have interests of equal duration over 40 years old, neither being in possession and neither having filed notice of his claim. Both claimants would be barred under subdivision 1, the limitations section. Therefore, subdivision 5, the abandonment section, would become applicable and if literally applied both parties would be presumed to have abandoned their interests. Furthermore, the mere application of subdivision 1 leads to results equally undesirable. Hereunder, a party attempting an action for determination of title will automatically lose his interest. Thus, in such a situation, the party maneuvering himself into the position of a defendant is always the victor. This difficulty is illustrated by adjusting the Wichelman facts to a slightly different setting. Assume that in 1946 the school board discontinued using the land for school purposes and thereafter merely abandoned possession rather than selling to Messner. Since neither party is in possession nor has filed a notice preserving his claim, a presumption would lie under subdivision 5 that both parties have abandoned their interests. If Wichelman, plaintiff in the actual case, had subsequently entered possession, the school board would then have had to commence an action to remove him and would have been barred by subdivision 1 of the Act. Therefore, Wichelman, in the position of a defendant, would automatically prevail.

There are situations, however, in which the Act, rather than merely barring claims, operates as a true marketable title act. Assume X has a claim which is based upon a title of record for more than 40 years, and he has either filed notice of his interest or is in possession. If Y has an adverse interest which is also

25. See MINN. STAT. § 541.023(1) (1967).
26. Id. § 541.023(5).
27. SIMES & TAYLOR at 336.
older than 40 years, but has failed to file notice of his interest, subdivision 5 extinguishes his claim since he would be barred from suing X by subdivision 1. It is not necessary that a suit be brought by either party as the adverse claim is automatically extinguished.28

Another situation in which the Act operates as a marketable-type occurs when X has an interest less than 40 years old but based upon a source of title of record at least 40 years, while Y has a conflicting interest which is over 40 years old. X is not barred by the Act from bringing suit, since his interest is less than 40 years old. However, it is not necessary for X to commence an action, since if Y is not in possession of the land and has not filed notice of his claim, his interest is automatically extinguished by subdivision 5 of the Act as he would be barred from bringing suit under subdivision 1. Thus, if literally read, the Act operates to extinguish ancient claims without the need to commence an action.

The case of B. W. & Leo Harris Company v. City of Hastings29 illustrates the above point. There plaintiff had an interest in land which was less than 40 years old, but the source of his title had been of record over 40 years. He was not in possession. The defendant, claiming to have acquired title to the same land by adverse possession more than 40 years before, had not filed notice of its claim within the statutory period. The court, assuming that the defendant had acquired fee simple title by adverse possession, proceeded to discuss the applicability of the Minnesota Marketable Title Act. Since the defendant based his claim of title upon an event—adverse possession—over 40 years old and had neither filed a preserving notice, nor been in possession,30 the conclusive presumption of abandonment under subdivision 5 was applicable to him. Since plaintiff's interest was less than 40 years old31 he could not have been barred from bringing an ac-

28. See B.W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 49, 59 N.W.2d 813, 816 (1953), where the court said:
   It is apparent from a reading of the statute that it was not intended as a mere procedural device to limit the time for commencing such action but was intended to bar the right itself for subd. 5 provides a conclusive presumption that the claimant has abandoned his right.
29. 240 Minn. 44, 59 N.W.2d 813 (1953).
30. The presumption of abandonment can be avoided if the claimant is in possession. Minn. Stat. § 541.025(6) (1987).
31. There may indeed be a question of why plaintiff's interest in Harris was not deemed to be more than 40 years old when the action was brought in 1950, since it was opposed to the city's claim of adverse possession which purportedly arose in 1908. Apparently the court dis-
tion by subdivision 1 and therefore subdivision 5 could not have extinguished his claim as it had defendant’s.32

The above illustrations suggest the dubious nature of the Minnesota Act which renders it unreliable for uniform results. In some situations the Act operates only as a statute of limitations, barring only plaintiffs, while in others the Act ensures a true marketable title by extinguishing old claims regardless of whether such claims are asserted. Furthermore, when the claims of two parties are of equal duration,33 and neither has filed a

32. For a discussion of Harris, see Wichelman v. Messner, 250 Minn. 88, 112-13, 83 N.E.2d 800, 820 (1957).

33. Subdivision 5 can still be operative, however, when the claims are of unequal duration, and neither party is in possession or has filed a preserving notice, since once the earlier claim becomes over 40 years old, the latter would still be less than 40 years old, and subdivision 5 could operate without literally extinguishing both claims.
preserving notice or is in possession, subdivision 5 cannot be applied to extinguish either claim and the fortuitous defendant always prevails by virtue of the bar to the plaintiff under subdivision 1. When one of the parties has either filed a preserving notice or is in possession when the claim becomes 40 years old, subdivision 5 can operate, making it irrelevant whether a suit is brought or who is plaintiff or defendant.

III. THE MODEL MARKETABLE TITLE ACT—A CURE

The Model Marketable Title Act provides that an unbroken chain of title from the present back to the “root of title” will extinguish interests created and existing prior to that root. The root of title is the most recent transaction in the claimant's chain which has been recorded at least 40 years prior to the time marketability is being determined. A quitclaim deed, a probate decree, a quiet title decree, a sheriff's deed or a mortgage may all serve as the root of title if recorded more than 40 years from the time marketability is called into question. With certain exceptions, claims and interests existing prior to the root of title are declared void.

The operation of the Model Act may be illustrated by the following hypothetical situation: Suppose in 1899, O conveys to X a 99 year lease which is then duly recorded. In 1900, O conveys a fee simple to A, the deed being recorded and containing a recitation that it is subject to X's lease. In 1925, A conveys to B, and in 1946, B conveys to C, both deeds being recorded, but neither mentioning the lease. Under the Model Act, in 1965, if X had not filed a preserving notice of his lease, C's

34. For a copy of the text, see SIMES & TAYLOR at 6-16 [The Model Marketable Title Act is hereinafter cited as Model Act].
35. The Michigan Act, MICH. COMP. LAWS § 565.101 (1967), and the Model Act (section 1) added more than just the extinguishment of ancient interests. They placed primary emphasis on the concept of marketability. Thus they begin: “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 marketable record title to such interest. . . .”
36. Model Act § 8(e). The Michigan Act does not contain the same concept, but has been interpreted by the Michigan Bar to encompass the same meaning.
38. See text accompanying notes 45-48 infra.
40. See Barnett, supra note 2, at 52-54.
41. Model Act § 4. In Michigan, however, the lease would still be
title to Blackacre would be free and clear thereof. C's root of title, the most recent transaction in his chain which is at least 40 years old, is the 1925 deed, and since that time he has had an unbroken chain of title for at least 40 years. In 1986, C or his successor will have as a new root of title the 1946 deed from B to C, since it will be the most recent transaction in C's chain which is at least 40 years old. Any claims and interests created and existing prior to the recording of the 1946 deed will be extinguished. Hence, the title becomes "cleansed" every time 40 years elapse from the recording of a transaction capable of serving as a root of title.

The 1900 deed from O to A did not serve as the root of title so as to extinguish the lease in 1940, since its reference to the lease preserved it from extinguishment under an exception to the Model Act for "interests and defects which are inherent in the muniments of which such chain of record title is formed." Assume, for example, that A conveyed a determinable fee simple to B prior to the 40 year period, thus leaving a possibility of reverter in A. If there have been no further conveyances, A's possibility of reverter is not extinguished by the passage of 40 years, since it is contained in the deed of which such chain of record title is formed. This is comparable to Wichelman, where both plaintiff and defendant were claiming under the same deed. Thus, the interest sought to be extinguished, which was either a reverter or a condition subsequent, was inherent in the muniments of which such chain of record title was formed—the 1897 deed—and would not have been nullified under the Model Act. This seems a more equitable result. If Messner would have searched the record, he would have found the condition recited in the 1897 deed, the most recent transaction of record. Since marketable title acts are supposed to promote reliance on the record rather than on extraneous facts, conditions and interests which clearly appear should not be extinguished. Although this may preserve old claims, such a preservation occurs anyway if notice is seasonably filed. In fact, if the school district


43. 250 Minn. 88, 83 N.W.2d 800 (1957).


45. Marketable title acts have a co-equal purpose of extinguishing stale claims. Such a purpose normally cannot be accomplished as long
in *Wichelman* had filed a preserving notice prior to the recording of the deed, but after it had been executed, the interest presumably would have been kept alive by a recording older than the deed, even though it could not be preserved by the deed.

The Model Act contains other interests to which marketable record title is subject. Interests are preserved by the filing of notice within the 40 year period following the effective date of the root of title or by continuous possession by the same owner for at least 40 years. Marketable title is also subject to "the rights of any person arising from a period of adverse possession or use, which was in whole or in part subsequent to the effective date of the root of title." Finally, the Model Act does not extinguish rights of reversioners in leases, easements which are clearly observable, and interests of the United States.

IV. MINNESOTA ACT—INTERESTS AFFECTED

A. TITLE

The *Wichelman* court determined that the word "title" in the phrase "claim of title based upon a source of title" meant fee simple title. Thus the court felt that the only persons deserving of the Act's protection were those claiming fee simple title. Some commentators agree that the Act protects only such interests. However, since the Act was amended in 1959 defining "source of title" as a fee simple, it may well be argued that *Wichelman* does not foreclose the possibility of interpreting the amended version of the Minnesota Act to include in its protection less than fee simple interests, as long as the claimant's chain of title can be traced back to a fee simple source of title as the exception herein discussed is in force. For this very reason, the *Oho Rev. CODE Annu.* § 5301.49(A) (Page's Supp. 1967) provides that "possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only [by filing]," since a time limitation on these interests is desirable. See Smith, supra note 37, at 719.

46. Model Act §§ 2(b), 4(a).
47. Id. § 2(c).
48. Id. §§ 2(e), 6.
49. Wichelman v. Messner, 250 Minn. 88, 105, 83 N.W.2d 800, 815 (1957).
51. *MINN. STAT.* § 541.023(7) (1967).
of record at least 40 years. For example, assume O conveys a fee simple to A in 1920. In 1930, A grants B a life estate with a remainder to C. Assume also that X has a hostile claim based on a transaction which occurred in 1915. In 1960 both B and C are protected against an adverse claim of X even though B’s claim is less than fee simple, since his source of title is a fee simple of record over 40 years.

Even though the Minnesota Act may be interpreted as protecting less than fee simple interests, this should be made clear in the Act. At present the Act is ambiguous as to which types of interests receive its protection.

The purpose of marketable title acts should not only be to clear titles of those persons claiming a fee simple, but to make any interest in land marketable. If the acts are limited to fees, a title examiner searching something less cannot rely on records covering a mere 40 years.

The Model Act avoids this confusion by providing that the holders of “any interest” shall be deemed to have marketable title to “such interest.” Under this language it is possible for estates and interests other than fees simple to be cleared of old claims that have not been preserved. Under the Model Act, if a life tenant can trace his record interest back to a root of title at least 40 years old, he can claim the benefit of the Act to protect his life interest. This provision renders a greater number of titles marketable and lessens the burden of title search for interests less than fee simple.

B. EASEMENTS

The Wichelman court stated that party walls, utility easements, and right-of-way easements are not extinguished by the Act when they involve “actual occupancy or use of part or all of the real property,” since they are impliedly exempted under

52. Such interests include easements, profits à prendre, licenses, life estates, reversions and remainders, and conditional or determinable fees and their attendant future interests both legal and equitable, possessory and nonpossessory.


54. Model Act § 1. See also IND. STAT. ANN. § 56-1101 (Burn’s Supp. 1968); MICH. COMP. LAWS § 565.101 (1967); OHIO REV. CODE ANN. § 5301.48 (Page’s Supp. 1967).


56. Wichelman v. Messner, 250 Minn. 88, 103, 83 N.W.2d 800, 814 (1957).
the possession exception of the Act.\textsuperscript{57} The court, however, lacks support in this approach. The Act does not expressly exclude easements from its filing requirements, and furthermore, since easements are nonpossessory interests,\textsuperscript{58} they should not be excepted under the possession exception.\textsuperscript{59}

Easements are excepted from the filing provisions of most marketable title acts\textsuperscript{60} and the Minnesota Act should also provide for limited exceptions. Easements\textsuperscript{61} are likely to go unrecorded either because the owner is ignorant of the necessity of recording,\textsuperscript{62} feeling its use is adequate notice, or because the easement arose by prescription.\textsuperscript{63} However, an exception for all easements tends to weaken the beneficial effects of an act which otherwise frees land from remotely created interests. It would seem desirable to exempt clearly observable easements,\textsuperscript{64} such as roads and ditches, since a vendee can discover these potential defects in his title without examining the record. Such an exception would protect that easement-holder who assumes his visible use is adequate notice and that filing is not necessary. It would also make treatment of visible easements consistent with general property law which provides that they retain their priority even though unrecorded.\textsuperscript{65}

On the other hand, holders of non-observable easements, such as drains and pipelines, should be subjected to the notice filing requirement because of the difficulty in ascertaining the existence of such interests by visual examination. Also, these holders are generally large and sophisticated businesses knowl-

\textsuperscript{57} MINN. STAT. § 541.023(6) (1967).
\textsuperscript{58} 5 RESTATEMENT OF PROPERTY § 450(b) (1932).
\textsuperscript{59} See 51 MINN. L. REV. 355, 358-59 (1966).
\textsuperscript{60} For some representative statutes which except easements see Barnett, supra note 55, at 72-74.
\textsuperscript{62} This justification is analogous to the justification behind the exception in the Model Act for possession; viz, the person in possession is not likely to know of threats to his title and of the necessity of recording notice. See Comment, supra note 55, at 856.
\textsuperscript{63} See Barnett, supra note 55, at 72.
\textsuperscript{64} See Model Act § 6. The Florida Act, which exempts easements "in use," is felt to be too broad. "It removes from the operation of the act a varied and ubiquitous group of interests without so much as a requirement that the easement be observable." Boyer & Shapo, Florida's Marketable Title Act: Prospects and Problems, 18 U. MIAMI L. REV. 103, 106 (1963). The Michigan, Ohio and Indiana acts except any easement the existence of which "is evidenced by the location beneath, upon, or above any part of the land" whether or not observable. See Barnett, supra note 55, at 72-74.
\textsuperscript{65} See MINN. STAT. § 507.34, comment 12 (1947).
edgeable of the law and its requirements for filing notice. Such a treatment of these easements would also be consistent with general property law which provides that when a non-observable easement is unrecorded it does not have priority over a subsequent purchaser for value who had no actual notice thereof.66

C. MORTGAGES

The Wichelman court exempted from the requirement of filing notice those mortgages which are represented by a current active relationship with the fee owner.67 But such a construction is questionable, since the Act's use of the word "liens" seems to encompass mortgages.68

Although there is a recent trend to long-term mortgages, they seldom extend beyond 40 years.69 Consequently, there is no need for excepting mortgages from the Act. It would not only be unnecessary to file a preserving notice for most mortgages, since their duration is less than 40 years, but mortgagees holding the relatively few mortgages of over 40 years would tend to be rather sophisticated institutions which could reasonably be required to know of the need to file. Thus, considering the need to examine the entire record for abnormally long-term mortgages,70 it is arguable that no mortgages of any kind should be excepted from the operations of the Act.

D. REVERSIONS AND REMAINDERS FOLLOWING LIFE ESTATES AND LEASES

The Wichelman court concluded that the title to be protected by the Act was a fee simple.71 Thus, reversions and remainders are not currently subject to extinguishment. A life tenant or a lessee, whose interests have lasted over 40 years, cannot claim that his remainderman or reversioner loses his interest for failure to file. Title searches beyond the statutory period are therefore necessary, since many life estates and long-term leases continue beyond 40 years.72

68. Minn. Stat. § 541.023(1) (1967).
69. Payne, supra note 61, at 226.
70. SIMES & TAYLOR at 356.
71. See text accompanying notes 49-56 supra.
72. The most common examples arising from the court's language involving reversions and remainders are leases and life estates, and it
Similarly, the Model Act fails to extinguish the interest of a lessor or his reversioner on the expiration of a lease.\textsuperscript{73} This exception is justified on the grounds that a lessor, not being in possession, might not be informed of hostile claims and might reasonably overlook the requirement of filing notice.\textsuperscript{74} However, this justification applies with equal force to many other future interest holders, such as reversioners following life estates and persons with rights of entry or possibilities of reverter whose interests are not excepted by the Model Act.\textsuperscript{75} A better justification is that long-term leases, which are generally commercial transactions and thus much more common and important than noncommercial future interests, deserve protection.\textsuperscript{76} However, since nonessential exceptions operate to nullify many of the basic purposes of a marketable title act, it seems desirable to remove even this exception.\textsuperscript{77} As long as the owner of a reversion following a lease is allowed to file notice of his claim, his interest will not be extinguished after 40 years. Long-term lessors, similar to long-term mortgagees,\textsuperscript{78} will usually be sophisticated business concerns which know of the need to file.

E. The Problem of Wild Deeds

The Minnesota Supreme Court has rejected the contention that the grantee of a stray or interloping deed might become an absolute owner, stating that "the statute does not operate to provide a foundation for a new title."\textsuperscript{79} Under the literal terms of the Act, however, this could easily occur. If a non-possessing owner has failed to file notice, he is barred from disturbing the possession of the vendee of an interloping conveyance of record is true that reversions and remainders following these interests cannot be extinguished by the Act. However, this general rule is not applicable to all reversions and remainders. Assume, for example, that A conveys a life estate to X with a remainder to Y. A also conveys a fee simple to B who enters possession. After 40 years, if Y has not filed notice of his claim, his interest will be cut off by B's fee simple interest. See Comment, Marketable Title Acts, 10 ALA. L. REV. 415, 424 (1958).\textsuperscript{73} Model Act §§ 2(e), 6. MICH. COMP. LAWS § 565.104 (1967) contains the same exception.

74. SIMES & TAYLOR at 357.
76. Id.
77. Id.
78. See text accompanying notes 67-73 supra.
of at least 40 years. For example, assume that in 1925 O conveys a fee simple to X who immediately records. In 1926 A, a stranger to the land, executes a warranty deed and conveys to B, who does not examine title but who immediately records. In 1966, if X is not in possession and attempts to assert his rights to the land, he will be barred by subdivision 1 of the Act and under subdivision 5 will be presumed to have abandoned his interest. B will then have title free and clear of X's interest. Certainly it is rare that someone sells the land of another, or that the owner sells it twice, but wild deeds often arise in mistaken land descriptions. Competing chains of title result where land is sold by a common grantor in which the descriptions in the deeds overlap and where the grantor conveys his land by warranty deed to one person and by quitclaim deed to another.

In 195981 the Minnesota Legislature attempted to solve the wild deed problem by amending the Minnesota Act to require that when an instrument purports to convey a fee simple title from a person who was not the record owner of the real estate, two conditions must be fulfilled within the 40 year period after the instrument's recording to render the conveyance a source of title: (1) another conveyance must be recorded which transfers a fee simple title from the first grantee, and (2) there can be no recorded conveyance of any interest by the person who was record owner immediately before the 40 year period. Although this provision is a step in the right direction, it does not go far enough. The first condition could be satisfied by a conveyance to a "straw" man. Furthermore, if there was an inconsistent conveyance under the second condition, unless a tract index was used such conveyance would not appear in the chain of title of the grantee in the second "stray" chain83 and thus a purchaser from such grantee would not be put on notice by the record.

The Model Act handles the problem more satisfactorily. Marketable record title becomes subject to any interest arising out of a title transaction recorded subsequent to the root of title, provided, however, than an interest which has previously been

80. This occurs in the following situation: In 1925 O sells Blackacre to A, and in 1926 O sells the same land to B. Under the Model Act, B will have "marketable record title" in 1966, thereby divesting the senior grantee of his title. The same type of analysis may be applied in this "double chain" situation as was applied in the "wild" deed hypothetical.

82. MINN. STAT. § 541.023(7) (1967): "The purpose . . . is to limit the effect of erroneous descriptions or accidental conveyances."
83. See SIMES & TAYLOR at 340.
extinguished may not be revived by such recording. If a wild deed is recorded, the title it creates, although becoming marketable after 40 years elapse, is subject to any interest which is recorded during the 40 year period. For example, assume X conveyed to Y in 1920, the deed immediately being recorded. In 1925 A conveyed the same land to B. Assume further that in 1930 each grantee made another conveyance, Y to Z and B to C, each party recording his respective deed. By 1965 both Z and C would have marketable record titles, their chains being more than 40 years in length. Each chain is subject to “any 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.” Therefore, neither chain of title extinguishes the other, and common-law principles will be applied to settle the rights of the parties. Furthermore, this provision, in effect, imposes the second condition of subdivision 7 of the Minnesota Act—that in order to prevent formation of a new title based upon a wild deed, an interest must be conveyed by the senior grantor during the 40 year period beginning with the second or “stray” chain of title. Thus, the same criticism applied against the Minnesota Act, in this regard, may be applied against the Model Act.

Notwithstanding such criticisms, both titles in both chains are marketable record titles in that they are free of ancient claims. The result is consistent with the purpose of marketable title acts, which is to extinguish those claims which are over 40 years old and which have not been preserved by filing. The acts do not purport to deal with the quality of title conveyed by the root. It is necessary only that the interest is purportedly conveyed by an instrument denominated as the root of title.

84. Model Act § 2(d).
85. If the 1925 conveyance from A to B falsely stated that X had died intestate and A is his sole heir at law, then the 1925 conveyance warrants an inference that X has been divested of his interest pursuant to section 1 of the Model Act, and Y cannot thereafter claim the benefits of a marketable record title.
86. Model Act § 2(d).
88. See Barnett, supra note 55, at 57. This result exemplifies the distinction between marketable record title as provided by the Model Act and derivatives thereof, and a commercially marketable title in which the former is cleansed of only pre-root interests and defects, while failing to clear the title of post root claims and interests. See Note, supra note 75, at 28.
The Minnesota Act, along with most others, contains a provision excepting persons in possession of real estate from the requirement of filing notice of their interests. The existence of such provision necessitates an inspection of real estate by potential vendees. Although the utility of the Act is thereby diminished, making it necessary to go outside the record to search for title defects, the exception seems justified in that possession is ample evidence of a possessor's claim and is almost always investigated. Also, persons in possession are normally not aware of any need to file notice thereof.

Even though a possession exception is justifiable, the extent of possession needed to invoke the Act's protection, as determined by the Minnesota Supreme Court, is such that persons may be precluded from benefiting by the exception if unable to prove continuous possession for the necessary period of time. In *B.W. & Leo Harris Company v. City of Hastings* the court determined that the possession required to be exempt from filing under the Act must be "present, actual, open, and exclusive and must be inconsistent with the title of the person who is protected. . ." The court determined that since the defendant had not filed notice, and was not in continuous possession from the time the statute took effect until the time the action was commenced, his claim of title was extinguished by the statute.

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90. *Minn. Stat.* § 541.023 (6) (1967). The original version of the Minnesota Act protected the rights of an owner in possession by expressly excluding from its scope "any action commenced by any person who is in possession of the real estate involved as owner. . ." Ch. 124, § 1, [1945] Minn. Laws 182. This is also the form of possessory exception provided in *Wis. Stat. Ann.* § 893.15(4) (1966). The Wisconsin exception was interpreted in *Herzog v. Bujaniewicz*, 32 Wis. 2d 26, 145 N.W.2d 124 (1966).
91. See *Barnett*, *supra* note 55, at 63; Comment, 10 *Ala. L. Rev.* 415 (1958) 418; Comment, *supra* note 55, at 856.
92. See *Tulane, Title to Real Property—Thirty Year Limitations Statute*, 1942 *Wis. L. Rev.* 258; Comment, *supra* note 55, at 856.
93. 240 Minn. 44, 59 N.W.2d 813 (1953).
94. Id. at 49, 59 N.W.2d at 816-17. The court said at note 5 that, "this is the same type of possession which constitutes constructive notice under the real estate recording act. . . ."
95. It should be pointed out that while the *Hastings* court held that in order for the city to invoke the possession exception of subdivision 6, thereby avoiding the conclusive presumption of abandonment of subdivision 5, it must show continuous possession from the effective date of the Act to the commencement of the action, the necessary possession need not always run from the effective date of the act. In
The Minnesota Supreme Court has also denied easement holders the benefit of the possession exception by concluding that the easements involved were not manifested by actual and continuous use or occupancy.97

A harsh ramification of the Minnesota court's standard of continuous possession is that a non-filing holder of a 40 year old easement could lose it if he leaves possession for only a brief period of time. Assume, for example, that in 1920 a gas company has an easement for an underground pipeline granted by X. The easement has been in constant use since 1920, but no preserving notice has ever been filed.98 In 1969, as a result of a gas explosion, a portion of the pipeline is destroyed. Should the gas company attempt to repair the pipeline, and should X refuse to allow the company entry to do so, the gas company arguably could be precluded from establishing its right to the easement under a literal continuous possession standard.99

_Hastings_ the city's claim was already over 40 years old on January 1, 1948, the effective date of the Act. Thus, in order to invoke the possession exception it was necessary to be in possession at the effective date. But where a party's claim does not become 40 years old until after January 1, 1948, the claimant need only commence his possession prior to the time his claim will become 40 years old. See id. at 50, 59 N.W.2d at 816-17.

96. Id. at 50, 59 N.W.2d at 817. The evidence of possession was that the defendant erected a skating rink and warming house for use during the winter; defendant's park commissioner cleaned up the tract every spring and after certain celebrations; defendant's employees hauled dirt from the city streets to the tract; and a baseball backstop was erected by the defendant's employees on the tract.

97. See United Parking Stations, Inc. v. Calvary Temple, 257 Minn. 273, 277, 101 N.W.2d 208, 211 (1960), where the court held that "[o]nly right-of-way easements 'which are manifested by actual use or occupancy' are protected [by subdivision 3] if the requirement of filing notice is not met." The evidence was clear that the easement was not in use during the critical period. See also Caroga Realty Co. v. Tapper, 274 Minn. 164, 143 N.W.2d 215 (1966), noted in 51 MNN. L. REV. 355 (1966), where the court held evidence showing that a right-of-way easement which was used by the tenant's package customers for parking when there was no room at the curb was not sufficient to establish possession under subdivision 6 of the Act because the possession was not continuous.

98. This easement is not excepted from the notice filing requirement since it was not clearly observable from physical evidence of its use.

99. If the claim is based upon an instrument, event, or transaction which was 40 years old on January 1, 1948, the claimant's possession must have begun at least by that date and must continue until the action is commenced; if it is based upon an instrument, event or transaction which becomes or became 40 years old after January 1, 1948, the claimant's possession must begin or have begun at the end of the 40
The standard of possession should be redefined and relaxed. Possession should be such that a reasonable man investigating the property at any time is put on notice that the land is being used. As applied to easements, this standard should require only that the easement be clearly observable. Continuity of use seems an undesirable standard.

G. FILING PROVISIONS

The Minnesota Act has presented a number of ambiguities in reference to the manner and effect of filing notice. The effect of initially filing notice is unclear. The Act requires that a notice of the claim or interest be filed within 40 years after the execution or occurrence of the instrument, transaction, or event by which it was created. No provision is made for re-recording. Thus, a holder of an interest can file his notice one day after his interest was created, and, although the filing will probably not be effective indefinitely, it will prevent the extinguishment of certain claims for periods far in excess of 40 years.

The Michigan and Model Acts present the best approaches to the problem of notice duration. The Michigan Act, in effect, requires filing every 40 years by providing that notice, to be effective, must be recorded within the 40 year period representing the title holder's chain of title. The Model Act requires a filing of notice within the 40 year period beginning with the effective date of the record title holder's root of title.

year period and must continue until the action is commenced. See B.W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 49, 59 N.W.2d 813, 816 (1953).

100. See text accompanying note 64, supra.
101. See Minn. Stat. § 541.023(1) (Supp. 1967).
102. The interest probably will not be perpetuated indefinitely, since the Act provides that "... does not extend the right to commence any action beyond the date at which such right would be extinguished by any other statute." Minn. Stat. § 541.023(3) (Supp. 1967). Presumably the other statute referred to is Minn. Stat. § 500.50 (1947) which provides that conditions or restrictions which have become nominal may be disregarded.
103. This result has been criticized. See Simes & Taylor at 335; P. Bayse, Clearing Land Titles § 176 (1953); Comment, 61 Nw. U.L. Rev. 841, 859 (1968).
Another undesirable feature of the Minnesota Act's filing provisions is that the deed of conveyance does not act as notice. This is evidenced by the fact that in Wichelman, the claim which was barred was based on the same deed that the record title holder relied on for his chain of title. If the deed had been deemed a notice, the plaintiff would have prevailed.\textsuperscript{106} Thus, under the current Act, in order to be entitled to bring an action on a claim over 40 years old, a separate "notice" must be filed, since the ordinary deed does not meet the statutory requirements of a "notice."

While allowing a deed to be notice of indefinite duration would certainly frustrate the purpose of a marketable title act, the same is also true whenever a separate notice is effective indefinitely, especially when that separate notice is filed simultaneously with the deed. Thus, under the present Minnesota Act there is no logical reason for distinguishing a deed reciting a condition from a separate notice.

The Model Act obviates the need for filing a notice in addition to the deed by providing in effect that interests inherent in the muniments from which a root of title is formed are sufficient notice of such interests.\textsuperscript{107} Assuming that Minnesota restricts the duration of a preserving notice, then the only circumstance under which a deed should ever be given the effect of a notice is if the Model Act's "root of title" approach is adopted.

A further problem with the Minnesota Act is the absence of any provision for late filing. Undoubtedly there are a number of claims for which no notice has been filed which could be lost if their holder leaves possession and the time for filing has passed.\textsuperscript{108} Minnesota should remedy this problem by making late filing effective to preserve the claimant's interest so long as there has been no intervening transaction recorded.\textsuperscript{109}

A final difficulty with the Minnesota Act involves its inability to provide for filing by a wide range of persons. The Act provides for execution and verification of notice only by the claimant, his agent or attorney.\textsuperscript{110} However, in cases involving

\textsuperscript{106} The same situation occurred in United Parking Stations, Inc. v. Calvary Temple, 257 Minn. 273, 101 N.W.2d 208 (1960), where the interest reserved in the deed was an easement.
\textsuperscript{107} Model Act § 2(a).
\textsuperscript{108} See P. Bayse, \textit{supra} note 103, at ch. 9.
\textsuperscript{109} See, e.g., REV. ONT. STAT. ch. 186, § 2(a) (1950); WIS. STAT. ANN. § 893.15 (1966).
\textsuperscript{110} MINN. STAT. ANN. § 541.023(1) (Supp. 1967).
contingent or future interests it is sometimes impossible to know or ascertain the person who will be entitled to the land at a future date. Consequently, unborn or unascertained persons may be unable to protect their interests. Minnesota should expressly provide for persons to file notice of their own interests or on behalf of any person who is under a disability or who is unborn or unascertained at the time necessary for filing.\footnote{See P. Bayse, \textit{supra} note 103, at § 176; Comment, 10 \textit{ Ala. L. Rev.} 415, 425 (1958).}

V. CONCLUSION

Although the Minnesota Act has done much to reduce the burdens in examining title, it is still far from accomplishing its stated purpose of preventing ancient interests from fettering the marketability of real estate.\footnote{MINN. STAT. § 541.023 (5) (1967).} The confusing format of the Act—the limitations concept of subdivision 1 and the marketability concept of subdivision 5—raises much doubt as to when the Act operates only as a statute of limitations and when it operates to render titles marketable. In addition, the numerous implied exceptions to the Act prevent substantial reliance on a 40 year title examination without allowing the title examiner the benefit of knowing which exceptions to search. Finally, the notice filing system is replete with drawbacks. The Minnesota Supreme Court, attempting to solve some of the problems, has confused the Act even more. It is time, therefore, for the Minnesota Legislature to repeal the Minnesota Act in favor of a form of the Model Marketable Title Act.

\footnote{111. See P. Bayse, \textit{supra} note 103, at § 176; Comment, 10 \textit{ Ala. L. Rev.} 415, 425 (1958).}