



6-1-1980

USLTA: Marketable Record Title Act - A New Title Theory and Its Effect on Texas Law.

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Recommended Citation

Sue Ortman, *USLTA: Marketable Record Title Act - A New Title Theory and Its Effect on Texas Law.*, 12 ST. MARY'S L.J. (1980).

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**USLTA: MARKETABLE RECORD TITLE ACT—A NEW TITLE
THEORY AND ITS EFFECT ON TEXAS LAW**

SUE ORTMAN

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To meet the needs of today's urban, highly mobile society, a land transfer system must provide for simple, secure, and inexpensive transfers.¹ Individuals involved in real estate transactions agree that present conveyancing systems fail to achieve these goals.² Pragmatically, title examination becomes increasingly difficult as public records grow and title histories lengthen.³ Responding to this dilemma, commentators have continuously expressed support for improvement of conveyancing laws.⁴

Recommendations for conveyancing reforms center upon replacing the current recordation system with the Torrens System of title registration⁵ or enacting legislation to strengthen the present system.⁶ Opposition by special interest groups, the technicalities of training personnel, and the large, initial implementation cost associated with the Torrens System⁷

1. See Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 261 (1962); Catsman, *Function of a Marketable Title Act*, 34 FLA. B.J. 139, 139 (1960); Committee On Residential Real Estate Transactions of the ABA, *Residential Real Estate Transactions: The Lawyer's Role—Services-Compensation*, 14 REAL PROP., PROB. & TR. J. 581, 581, 595 (1979).

2. See P. BASYE, CLEARING LAND TITLES § 1, at 4 (2d ed. 1970); Payne, *The Crisis In Conveyancing*, 19 MO. L. REV. 214, 214 (1954). "It is more and more apparent that the system employed is clumsy, wasteful, inefficient and out of keeping with our demands for social institutions of reasonable effectiveness, and there is general agreement among competent, disinterested observers that conventional procedures, if left unmodified, will soon break down of their own weight." *Id.* at 214-15. See generally Cosby, *Closing the Closing Gap*, 12 U. RICH. L. REV. 607, 607-11 (1978); Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, 6 J. LEGAL STUD. 213, 213-14 (1977); Lobel, *A Proposal for a Title Registration System for Realty*, 11 U. RICH. L. REV. 501, 501-03 (1977); Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 GEO. L.J. 1311, 1311-13 (1974).

3. P. BASYE, CLEARING LAND TITLES § 171, at 366-67 (2d ed. 1970); Catsman, *Function of a Marketable Title Act*, 34 FLA. B.J. 139, 139 (1960).

4. See Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 45-47 (1967); Basye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1097-98 (1949); Cribbet, *Conveyancing Reform*, 35 N.Y.U. L. REV. 1291, 1298-99 (1960); Comment, *Improving Marketability of Real Property in Texas: Affidavits, Recitals, and the Evidentiary Effect of Recording*, 49 TEXAS L. REV. 747, 747 (1971).

5. See Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 92-93 (1967); Lobel, *A Proposal for a Title Registration System for Realty*, 11 U. RICH. L. REV. 501, 516 (1977). The Torrens System registers title of land instead of evidence of title. In an *in rem* proceeding, a judge adjudicates the state of the title and a certificate of title is issued. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 317 (2d ed. 1975). See generally Lobel, *A Proposal for a Title Registration System For Realty*, 11 U. RICH. L. REV. 501, 513-17 (1977).

6. See, e.g., P. BASYE, CLEARING LAND TITLES § 5, at 33 (2d ed. 1970); Cribbet, *Conveyancing Reform*, 35 N.Y.U. L. REV. 1291, 1316 (1960); Ruemmele, *The North Dakota Marketable Record Title Act*, 41 N.D. L. REV. 475, 476-77 (1965).

7. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 318 (2d ed. 1975); Basye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1135 (1949); Cribbet, *The Lawyer and Title Insurance, The Lawyer's Role*, 1 REAL PROP., PROB. & TR. J. 355, 356 (1966).

make reform of the present system the more viable alternative.⁸ While many states have taken ameliorative steps toward reform through curative⁹ and limitation statutes,¹⁰ a number of states have further supplemented their systems by adopting marketable title legislation.¹¹ Marketable title legislation is designed to provide a concept of title allowing a title examiner to trace the title history for a limited number of years and be reasonably certain of its security.¹² Studies indicate the lack of marketable title legislation is a key factor contributing to the complexity and expense of title examination.¹³

Attempting to simplify land transfers, the National Conference of Com-

8. P. BASYE, *CLEARING LAND TITLES* § 1, at 5 (2d ed. 1970); Cribbet, *Property In the Twenty-first Century*, 39 OHIO ST. L.J. 671, 673 (1978).

9. See, e.g., FLA. STAT. ANN. § 694.08 (West Supp. 1980) (defective acknowledgment or lack of witnesses); OHIO REV. CODE ANN. § 2719.01 (Baldwin 1971) (omissions or defects in execution or acknowledgment); OKLA. STAT. ANN. tit. 16, § 27a (West 1953) (defects in execution or acknowledgment). A curative statute is a form of retrospective state legislation reaching into the past and validating an attempted transaction which would otherwise fail for technical reasons. P. BASYE, *CLEARING LAND TITLES* § 8, at 60 (2d ed. 1970).

10. See, e.g., FLA. STAT. ANN. § 95.18 (West Supp. 1980) (adverse possession for seven years without color of title); N.C. GEN. STAT. § 1-40 (1969) (twenty year adverse possession); N.D. CENT. CODE § 28-01-08 (1974) (twenty year adverse possession based upon written instrument). Statutes of limitation bar the assertions of claims and are not restricted to those claims based upon technical irregularities. Basye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1127 (1949).

11. See CONN. GEN. STAT. ANN. §§ 47-33b to -33f (West 1978 & Supp. 1980); FLA. STAT. ANN. §§ 712.01-.06 (West 1969 & Supp. 1980); ILL. ANN. STAT. ch. 83, §§ 12.1-.4 (Smith-Hurd 1966 & Supp. 1979); IND. CODE ANN. §§ 32-1-5-1 to -6 (Burns 1973); IOWA CODE ANN. §§ 614.29-.38 (West Supp. 1980); KAN. STAT. ANN. §§ 58-3401 to -3412 (1976); MASS. ANN. LAWS ch. 184, §§ 26-30 (Michie/Law. Co-op 1977 & Supp. 1980); MICH. STAT. ANN. §§ 26.1271-.1279 (1970); MINN. STAT. ANN. § 541.023 (West 1947); NEB. REV. STAT. §§ 76-288 to -298 (1976); N.C. GEN. STAT. §§ 47B-1 to -9 (1976 & Supp. 1979); N.D. CENT. CODE §§ 47-19-01 to -11 (1978); OHIO REV. CODE ANN. §§ 5301.47-.56 (Baldwin 1971); OKLA. STAT. ANN. tit. 16, §§ 61, 71-80 (West Supp. 1979); S.D. COMP. LAWS ANN. §§ 43-30-1 to -15 (1967 & Supp. 1980); UTAH CODE ANN. §§ 57-9-1 to -10 (1974); VT. STAT. ANN. tit. 27, §§ 601-06 (1975 & Supp. 1980); WIS. STAT. ANN. § 893.33 (West Supp. 1980).

12. See P. BASYE, *CLEARING LAND TITLES* § 172, at 368 (2d ed. 1970); R. BOYER & C. SMITH, *SURVEY OF THE LAW OF PROPERTY* 260-61 (2d ed. 1971).

13. See Committee on Improvement & Modernization of Land Records, *Modernization of Local Record Keeping of Land Title Information*, 11 REAL PROP., PROB. & TR. J. 343, 345-46 (1976); Committee on Residential Real Estate Transactions of the ABA, *Residential Real Estate Transactions: The Lawyer's Role—Services—Compensation*, 14 REAL PROP., PROB. & TR. J. 581, 581, 595, 605 (1979). A Housing of Urban Development/Veteran's Administration (HUD/VA) Report found the closing cost for real estate transactions lower in states having marketable record title legislation. See U.S. DEP'T OF HOUSING AND URBAN DEV. & VETERANS ADMINISTRATION HUD-F-5, REPORT ON MORTGAGE SETTLEMENT COSTS 49 (1972). The states with marketable title legislation are Connecticut, Florida, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont, and Wisconsin. *Id.* at 49.

missioners on Uniform State Laws promulgated the Uniform Simplification of Land Transfers Act (USLTA).¹⁴ Article 3, part 3 of USLTA contains a complete Marketable Record Title Act (MRTA) similar to marketable title laws currently in effect in other jurisdictions.¹⁵ Since conveyancing reform in Texas has been limited to the adoption of curative¹⁶ and limitation statutes,¹⁷ adoption of USLTA's Marketable Record Title Act would significantly alter Texas' present conveyancing system. This comment presents an overview of USLTA's Marketable Record Title Act and examines its potential effect on the current Texas recording system.

I. RECORDING SYSTEM

A. Recording Act

The common law doctrine of "first in time, first in right" encouraged fraudulent conveyances of real property and worked a hardship on subsequent purchasers unaware of the earlier conflicting interest.¹⁸ As early as

14. UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT (1977) (USLTA). The Act is published in pamphlet form by the National Conference of Uniform State Laws. USLTA was approved and recommended for submission to state legislatures by the National Conference of Commissioners on Uniform State Laws in 1976 and the American Bar Association in 1978. The objective of USLTA is to facilitate and unite state laws affecting conveyances, recordation, priorities, marketable titles, mechanics liens, public records, and curative provisions. *Id.*, Prefatory Note, at 3. See generally Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 696-732 (1978).

15. USLTA art. 3, part 3 (1977). The Marketable Record Title Act (MRTA) in USLTA is a modified version of the Model Marketable Record Title Act. The Model Marketable Record Title Act was derived from legislation adopted earlier in Michigan; Wisconsin; and Ontario, Canada. Professors Lewis M. Simes and Clarence B. Taylor, using the Michigan Act as a basis, prepared the Model Act for the Real Property, Probate, and Trust Law Section of the American Bar Association and the University of Michigan Law School. See *id.*, Introductory Comment, at 44. Seventeen states have adopted some form of marketable title legislation. See P. BASYE, CLEARING LAND TITLES §§ 176-89, at 386-461 (2d ed. 1970) & §§ 176-93, at 52-88 (Supp. 1979) (containing a digest of legislation enacted in each state and the Model Marketable Record Title Act). Connecticut, Florida, Indiana, Iowa, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Utah, and Vermont's marketable title acts are derived from the Model Act. USLTA art. 3, part 3, Introductory Comment, at 44 (1977).

16. See, e.g., TEX. REV. CIV. STAT. ANN. art. 5507 (Vernon 1958) (three year adverse possession statute under color of title); *id.* art. 5509 (five year adverse possession statute under a deed); *id.* art. 5523(a) (ten year statute to cure technical defects, but not for recovery of land).

17. *Id.* art. 5510 (adverse possession for ten years); *id.* art. 5518 (Vernon Supp. 1980) (adverse possession for twenty-five years); *id.* art. 5519 (Vernon Supp. 1980) (adverse possession for twenty-five years under a claim of right); *id.* art. 5519a (Vernon 1958) (dominion over land for twenty-five years).

18. See Cribbet, *Conveyancing Reform*, 35 N.Y.U. L. REV. 1291, 1295 (1960). The theory behind the common law doctrine was that the grantor had nothing left to convey to the

1627, Plymouth Colony enacted statutes requiring recordation to give the public notice of real property transfers.¹⁹ Establishing public records and written evidence of real estate transactions, recordation acts became the basis of the American title assurance system.²⁰

Adopted in 1836, the Texas Recording Act²¹ insures against secret titles.²² Creditors and purchasers are protected from prior unrecorded interests by the notice provisions of the Texas recording statutes.²³ To be

later grantee. See 1 R. & C. PATTON, PATTON ON TITLES § 8, at 31-32 (2d ed. 1957).

19. See Cribbet, *The Lawyer and Title Insurance, The Lawyer's Role*, 1 REAL PROP., PROB. & TR. J. 335, 335 (1966). See generally 1 R. & C. PATTON, PATTON ON TITLES §§ 3-23, at 3-128 (2d ed. 1957).

20. *Hancock v. Tram Lumber Co.*, 65 Tex. 225, 232 (1885); see Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 45 (1967); Cribbet, *Conveyancing Reform*, 35 N.Y.U. L. REV. 1291, 1294-95 (1960). See generally 3 F. LANGE, TEXAS PRACTICE § 251, at 384-86 (1961); Olds, *Recording Act—The Object of Search and The Period of Search*, 2 HOUS. L. REV. 169, 170 (1964). The purpose of a recording act is to make public the status of a title by requiring each person receiving conveyances of real property to record his interest or risk losing the interest to an innocent purchaser for value without notice. The effect of a recording act is that a person entering into a real estate transaction can check the records and discover any outstanding or conflicting interests. *Smith v. Crosby*, 86 Tex. 15, 22, 23 S.W. 10, 13 (1893); *Anderson v. Barnwell*, 52 S.W.2d 96, 101 (Tex. Civ. App.—Texarkana 1932), *aff'd on other grounds*, 126 Tex. 182, 86 S.W.2d 41 (1935).

21. J. & H. SAYLES, EARLY LAWS OF TEXAS art. 263, §§ 35-40 (1888) (general laws from 1836 to 1879); 3 F. LANGE, TEXAS PRACTICE § 251, at 387 (1961). The present statute, article 6627, is derived from Act of February 5, 1940. J. & H. SAYLES, EARLY LAWS OF TEXAS art. 748, § 4 (1888) (general laws from 1836 to 1879).

22. *Edwards v. Brown*, 68 Tex. 329, 337 (1887); see *Turrentine v. Lasane*, 389 S.W.2d 336, 337 (Tex. Civ. App.—Waco 1965, no writ); *Popplewell v. City of Mission*, 342 S.W.2d 52, 56 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.). Article 6646 states "the record of any grant, deed or instrument of writing authorized or required to be recorded, which has been duly proven or acknowledged for record and duly recorded in proper county, shall be taken and held as notice to all persons of the existence of such grant, deed, or instrument." TEX. REV. CIV. STAT. ANN. art. 6646 (Vernon 1969).

23. See TEX. REV. CIV. STAT. ANN. arts. 6626, 6627 (Vernon Supp. 1980); 1 R. & C. PATTON, PATTON ON TITLES § 9, at 37-38 (2d ed. 1957); cf. *White v. McGregor*, 92 Tex. 556, 559-60, 50 S.W. 564, 565-66 (1899) (Texas law protects a subsequent purchaser without notice); Olds, *Recording Act—The Object of the Search and the Period of Search*, 2 HOUS. L. REV. 169, 170 (1964). See generally *Symposium—Texas Land Titles—Registration of Deeds*, 6 ST. MARY'S L.J. 824, 824-33 (1975).

The theory underlying the Texas recording statutes is that until the grantee records his conveyance as required by statute, a power is left in the grantor to displace the prior conveyance. See Olds, *The Scope of the Texas Recording Act*, 8 SW. L.J. 36, 46 (1954). Texas has two recording statutes. See TEX. REV. CIV. STAT. ANN. art. 6626 (Vernon Supp. 1980) (the "may" statute: no penalty for failure to record); *id.* art. 6627 (the "must" statute: penalty for failure to record). Article 6627 is the primary statute and all references hereinafter are directed solely to it. The pertinent part of article 6627 is set out below:

All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other

secure the creditor or purchaser must be without notice, either actual or constructive.²⁴ Actual notice consists of those facts known to a person and those which a reasonably diligent inquiry would reveal.²⁵ Constructive notice includes all facts revealed by instruments recorded in the grantor-grantee's chain of title.²⁶ Additionally, Texas courts have held that notice of title established by open, actual, and visible possession is equivalent to constructive notice given by the recording system.²⁷ Consequently, to secure the status of a bona fide purchaser without notice, thereby obtaining protection under the Texas recordation statutes, one should require a title examination and a physical inspection of the premises before consummating a real estate transaction.²⁸

personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration shall be valid and binding;

Id. art. 6627. See generally Olds, *The Scope of the Texas Recording Act*, 8 Sw. L.J. 36, 46 (1954).

24. See *Watkins v. Edwards*, 23 Tex. 443, 448 (1859); *Wethered v. Boon*, 12 Tex. 143, 150 (1856).

25. See *Woodward v. Ortiz*, 150 Tex. 75, 79, 237 S.W.2d 286, 289, 291 (1951) (knowledge suit has been filed sufficient to put on inquiry notice); *O'Ferral v. Coolidge*, 225 S.W.2d 582, 584 (Tex. Civ. App.—Texarkana 1949) (failure to discover discrepancy between deed of trust and financial statement not actual notice), *aff'd*, 149 Tex. 61, 65-66, 228 S.W.2d 146, 148-49 (1950).

26. See, e.g., *White v. McGregor*, 92 Tex. 556, 558, 50 S.W. 564, 565 (1899); *Matthews v. Rains County*, 206 S.W.2d 852, 854 (Tex. Civ. App.—Amarillo 1947, writ ref'd n.r.e.); *Martin v. Texaco Co.*, 89 S.W.2d 260, 269 (Tex. Civ. App.—Fort Worth 1935, writ dismissed by agr.). See generally Olds, *The Scope of the Texas Recording Act*, 8 Sw. L.J. 36, 45 (1954); Williams, *Recordation Hiatus and Cure by Limitations*, 29 TEXAS L. REV. 1, 4-10 (1950). "Chain of title is the successive conveyances, commencing with the patent from government, each being a perfect conveyance including the conveyance of present holder." *Havis v. Thorne Inv. Co.*, 46 S.W.2d 329, 332 (Tex. Civ. App.—Amarillo 1932, no writ).

27. See, e.g., *Bell v. Smith*, 532 S.W.2d 680, 686 (Tex. Civ. App.—Fort Worth 1976, no writ) (living in house sufficient possession); *Aurelius v. Steward*, 219 S.W. 863, 865 (Tex. Civ. App.—Fort Worth 1919, no writ) (fencing alone insufficient possession); *League v. Buena Ventura Stock Co.*, 21 S.W. 307, 308 (Tex. Civ. App. 1893, no writ) (fencing and grazing sufficient possession).

28. See *White v. McGregor*, 92 Tex. 556, 558, 50 S.W. 564, 565 (1899) (purchaser takes subject to interest within his grantor's chain); *Whitaker v. Felts*, 137 Tex. 578, 581-82, 155 S.W.2d 604, 606 (1941) (possession is equivalent to constructive notice).

Texas courts have held that actual notice includes those facts which would be disclosed by a reasonably diligent investigation. See, e.g., *Portman v. Earnhart*, 343 S.W.2d 294, 297 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.); *O'Ferral v. Collidge*, 225 S.W.2d 582, 584 (Tex. Civ. App.—Texarkana 1949), *aff'd*, 149 Tex. 61, 228 S.W.2d 146 (Tex. 1950); *Master-son v. Harris*, 83 S.W. 428, 429 (Tex. Civ. App. 1904, no writ). Actual notice will prevent a subsequent purchaser from obtaining title. See *Woodward v. Ortiz*, 150 Tex. 75, 79, 237

B. Title Examination

The purpose of a title examination is to ascertain the present ownership and marketability of the title.²⁹ The mechanics of a title examination include establishing the chain of title back to sovereignty,³⁰ studying the claims in the chain,³¹ and determining the legal effect of identifiable title defects.³² The number of transactions and length of the chain of title affect the difficulty and amount of time required for the examination.³³

C. Problems Encountered

1. *Inherent Defects in Recording Acts.* When the recording statutes were first enacted, transfers were minimal and title histories limited, therefore, title examination was simple.³⁴ The mere passage of time, however, has complicated the title search by extending the period for the

S.W.2d 286, 289 (Tex. 1951); *Crosswhite v. Moore*, 248 S.W.2d 520, 524 (Tex. Civ. App.—Austin 1952 writ ref'd); *Hays v. Morris*, 204 S.W. 672, 673 (Tex. Civ. App.—Texarkana 1918, no writ).

29. See P. BASYE, *CLEARING LAND TITLES* §§ 1, 3, at 4-5, 16 (2d ed. 1970); 1 R. & C. PATTON, *PATTON ON TITLES* §§ 1, 49, at 23, 155 (2d ed. 1957); Johnson, *Examining an Abstract*, 46 N.D. L. REV. 175, 180 (1975).

30. See Mazel, *How to Examine Title in Virginia*, 11 U. RICH. L. REV. 471, 472-73 (1977). See generally 3 F. LANGE, *TEXAS PRACTICE* §§ 292-323, at 479-523 (1961).

31. The examiner determines whether there is a break in the chain, defects in the instrument, or outstanding claims. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 45-46 (1967).

32. See P. BASYE, *CLEARING LAND TITLES* § 3, at 16 (2d ed. 1970); 1 R. & C. PATTON, *PATTON ON TITLES* § 45, at 155 (2d ed. 1957); Johnson, *Examining the Abstract of Title*, 10 N.D. L. REV. 175, 180 (1975); Comment, *Improving Marketability of Real Property in Texas: Affidavits, Recitals, and the Evidentiary Effect of Recording*, 49 TEXAS L. REV. 747, 747 (1971). There are several methods for title searches and appraisals. See P. BASYE, *CLEARING LAND TITLES* § 3, at 13-14 (2d ed. 1970). One method is for the buyer's attorney to render an opinion on marketability by examining an abstract prepared by an abstracting company or after performing a personal search of the public land records. See *id.* § 3, at 13-14; Lobel, *A Proposal for a Title Registration System for Realty*, 11 U. RICH. L. REV. 501, 504 (1977). Another method of assuring marketability of title is for the attorney to acquire a title insurance policy. See Balbach, *Bar-Related Title Insurance, The Texas Lawyer's Answer To Lay Competitors*, 37 TEX. B.J. 241, 241-42 (1974); Thau, *Protecting the Real Estate Buyer's Title*, 3 REAL EST. REV. 71, 76 (1974). See generally P. BASYE, *CLEARING LAND TITLES* § 3, at 13-14 (2d ed. 1970); H. WILLIAMS, *CASES AND MATERIALS ON COVENANTS FOR TITLE, ESTOPPEL BY DEED, AND RECORDATION* 86 (1951); Lobel, *A Proposal for a Title Registration System for Realty*, 11 U. RICH. L. REV. 501, 504 (1977).

33. See P. BASYE, *CLEARING LAND TITLES* § 3, at 16 (2d ed. 1970); Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 264 (1962); Note, *Kansas' Marketable Record Title Act*, 13 WASHBURN L.J. 33, 37 (1974).

34. P. BASYE, *CLEARING LAND TITLES* § 2, at 6 (2d ed. 1970); Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 263 (1962).

search while increasing the number of transactions in each chain.³⁵ Furthermore, since there is no procedure for the removal of claims from the record, a claim, once recorded, is preserved forever.³⁶ To assure that ancient claims do not exist,³⁷ title examiners must check the records evaluating claims back to sovereignty each time the realty is transferred.³⁸ As a result, this cumbersome procedure of tracing and examining titles back to sovereignty has rendered the present recording system less effective.³⁹

The discovery of ancient claims creates another dilemma as these interests have to be cleared.⁴⁰ In Texas, elimination of an outstanding interest requires an action to quiet title.⁴¹ Such suits are often accompanied by delay due to the difficulty in serving judicial notice upon appropriate parties.⁴² Alternatives, such as securing releases of the interest or conveyanc-

35. Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 262, 264 (1962); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 69 (1973); Payne, *The Crisis in Conveyancing*, 19 MO. L. REV. 214, 214 (1954). See generally Cribbet, *Conveyancing Reform*, 35 N.Y.U. L. REV. 1291, 1293-96 (1960).

36. J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 325 (2d ed. 1975); Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 263 (1962).

37. Many antiquated claims, preserved by recordation, remain a cloud on the title although "no longer of any beneficial or practical importance". Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 94 (1973). The recording acts accompanied by substantive real property law preserve certain non-possessory property interests for generations. Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 101 (1965); see, e.g., *Cook v. Caswell*, 81 Tex. 678, 679, 17 S.W. 385, 387 (1891) (statutes of limitation does not run against non-possessory future interests); *Bryson v. Connecticut Gen. Life Ins. Co.*, 196 S.W.2d 532, 533, 542 (Tex. Civ. App.—Austin 1946, writ ref'd) (deed conveying life estate to grantor's son with remainder to his children or their descendants did not violate the Rule Against Perpetuities); *Rosson v. Bennett*, 294 S.W. 660, 662 (Tex. Civ. App.—Waco 1927, no writ) (possibility of right to re-entry for breach of condition subsequent in mineral lease not subject to Rule Against Perpetuities).

38. 1 R. & C. PATTON, *PATTON ON TITLES* § 51, at 190-92 (2d ed. 1957); cf. *Breen v. Moorehead*, 104 Tex. 254, 255, 136 S.W. 1047, 1048-49 (1911) (title search does not extend beyond patent or certificate from government); *Harris v. Thorne Inv. Co.*, 46 S.W.2d 329, 332 (Tex. Civ. App.—Amarillo 1932, no writ) (chain of title consists of successive conveyances beginning with patent from government until present). See generally Payne, *The Crisis in Conveyancing*, 19 MO. L. REV. 214, 226-33 (1954).

39. See, e.g., Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 264 (1962) ("recording system slowly but inevitably bogging down"); Lobel, *A Proposal for a Title Registration System for Realty*, 11 U. RICH. L. REV. 501, 501 (1977) (system has reached senility); Payne, *The Crisis in Conveyancing*, 19 MO. L. REV. 214, 214, 216 (1954) (the system is "clumsy, wasteful, and inefficient").

40. Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 101 (1965).

41. See *Symposium—Texas Land Titles: Part II—Procedural Aspects of Land Title Suits*, 7 ST. MARY'S L.J. 112, 118 (1975).

42. See *Finke v. Wheatfall*, 565 S.W.2d 386, 388 (Tex. Civ. App.—Houston [14th Dist.]

ing by quitclaim deeds, are complicated by difficulty in locating fractional interests of distant heirs and the possibility of overlooking some outstanding interest.⁴³

2. *Inadequacies of the Statutes of Limitation.* Statutes of limitation often may be relied upon to clear land titles of stale claims.⁴⁴ These provisions, however, do not eliminate the necessity of tracing and examining the title back to its origin.⁴⁵ They do not operate to remove non-possessory future interests,⁴⁶ restrictions,⁴⁷ mineral estates severed before adverse possession began,⁴⁸ or claims by the state.⁴⁹ Furthermore, before a

1978), *reformed and remanded*, 581 S.W.2d 152 (1979) (writ of partition under which grantee had received title was set aside due to lack of service of true owner); *Cates v. Alston's Heirs*, 61 S.W. 979, 980 (Tex. Civ. App. 1901, writ ref'd); *Symposium—Texas Land Titles: Part II—Procedural Aspects of Land Title Suits*, 7 ST. MARY'S L.J. 112, 118 (1975). See generally Wilford, *Judgments of Texas Courts Respecting Real Estate Titles*, 15 TEXAS L. REV. 41, 54-56 (1936).

43. Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 102 (1965).

44. The Texas statutes of limitation vesting title to land are: TEX. REV. CIV. STAT. ANN. art. 5507 (Vernon 1958) (possession under color of title for more than three years); *id.* art. 5509 (possession for five years under registered deed coupled with payment of taxes and cultivation); *id.* art. 5510 (possession, cultivation, use, and enjoyment for ten years); *id.* art. 5518 (Vernon Supp. 1980) (possession for twenty-five years after accrual of cause of action); *id.* art. 5519 (Vernon Supp. 1980) (possession for twenty-five years under claim of right and good faith); *id.* art. 5519a (Vernon 1958) (dominion over land for twenty-five years, payment of property taxes, and failure of owner to exercise dominion over the land or pay taxes for twenty-five years). Articles 5518 and 5519 run against legal disabilities. See *id.* art. 5518 & 5519.

45. Payne, *The Crisis in Conveyancing*, 19 MO. L. REV. 214, 222 (1954). "[R]eason for the conventional prolonged title search is the legal norms permitting the indefinite duration of interests in land which, because of their non-possessory character, are unaffected by . . . statutes of limitation." *Id.* at 222; see Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 266 (1962); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 70 (1973); Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 123 (1965). See generally P. BASYE, *CLEARING LAND TITLES* § 5, at 35-36 (2d ed. 1970); Basye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1097-98 (1949); Mosburg, *Statutes of Limitation and Title Examination*, 13 OKLA. L. REV. 125, 127 (1960).

46. See *Ferguson v. Johnston*, 320 S.W.2d 906, 910 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.) (lack of possessory interest protects remainderman from adverse possessors); *Evans v. Graves*, 166 S.W.2d 955, 958-59 (Tex. Civ. App.—Dallas 1942, writ ref'd w.o.m.) (statutes of limitation do not run against remainderman without possession). See generally Basye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1100-02 (1949).

47. See *Walton v. Harigel*, 183 S.W. 785, 787 (Tex. Civ. App.—Galveston 1916, no writ).

48. *Rio Bravo Oil Co. v. McEntire*, 128 Tex. 124, 136-37, 95 S.W.2d 381, 387-88 (1936). See generally 1 W. SUMMERS, *THE LAW OF OIL AND GAS* § 138, at 307-13 (2d ed. 1954);

title acquired by adverse possession can extinguish any interests, the claimant must prove all the elements of a limitation title by facts extrinsic to the record.⁵⁰

3. *Determining Marketability.* A marketable title in Texas is defined to be one reasonably free of defects and acceptable to a prudent purchaser who has knowledge of any defects.⁵¹ One problem with this standard is that determining marketability becomes more difficult to ascertain⁵² as flaws within the chain of title accumulate.⁵³ Another problem

Masterson, *Adverse Possession and the Severed Mineral Estate*, 25 TEXAS L. REV. 139 (1946); Masterson, *Severance of the Mineral Estate by Grant of Land by the Sovereign and Adverse Possession*, 30 TEXAS L. REV. 323 (1952).

49. *Lewis Cox & Son, Inc. v. High Plains Underground Water Conservation Dist. No. 1*, 538 S.W.2d 659, 663 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.) (state and its instrumentalities immune from limitations); TEX. REV. CIV. STAT. ANN. art. 5517 (Vernon 1958) (state not barred by limitation).

50. See *Kirby Lumber Co. v. Connecticut*, 114 Tex. 104, 110, 263 S.W. 902, 903 (1924). For the period required by statute, the adverse possessor must prove that he has been in exclusive, open and notorious, continuous and peaceful, hostile, and adverse possession. See, e.g., *Southern Pine Lumber Co. v. Hart*, 161 Tex. 357, 366, 340 S.W.2d 775, 782 (1960) (exclusive possession); *Simonds v. Stanolind Oil & Gas Co.*, 134 Tex. 332, 340, 114 S.W.2d 226, 232 (1938) (continuous and peaceful possession); *West Prod. Co. v. Kahanek*, 132 Tex. 153, 157-58, 121 S.W.2d 328, 331 (1938) (open and notorious). The burden is on the adverse possessor to prove all the elements of adverse possession. See *Vaughan v. Anderson*, 495 S.W.2d 327, 331-32 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.); *Winchester v. Porretto*, 432 S.W.2d 170, 174 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.). Since a title acquired by adverse possession is not recordable, litigation is necessary to determine its marketability. See *Kirby Lumber Co. v. Connecticut*, 114 Tex. 104, 110, 263 S.W. 902, 903 (1924); *Alexander v. Glasscock*, 271 S.W.2d 333, 335 (Tex. Civ. App.—Texarkana 1954, no writ); *Smith v. Jordan*, 220 S.W.2d 481, 483 (Tex. Civ. App.—Dallas 1949, no writ). Although TEX. REV. CIV. STAT. ANN. art. 5519 (Vernon Supp. 1980) states one claiming under it "[s]hall be held to have good marketable title. . .," the Texas courts have held that such a title is not marketable. *Alexander v. Glasscock*, 271 S.W.2d 333, 335 (Tex. Civ. App.—Texarkana 1954, no writ); *Owens v. Jackson*, 35 S.W.2d 186, 187-88 (Tex. Civ. App.—Austin 1931, writ dismissed). See generally *Larson, Limitations on Actions for Real Property: The Texas Five-Year Statute*, 18 Sw. L.J. 385, 391 (1964); *Larson, Texas Limitations: The Twenty-Five Year Statutes*, 15 Sw. L.J. 177, 195-96 (1961); *Symposium—Texas Land Titles: Part II—Adverse Possession: The Three, Five, and Ten Year Statutes of Limitation*, 7 ST. MARY'S L.J. 78, 78-81 (1975).

51. *Lund v. Emerson*, 204 S.W.2d 639, 641 (Tex. Civ. App.—Amarillo 1947, no writ); see, e.g., *Levine v. Turner*, 264 S.W.2d 478, 479 (Tex. Civ. App.—El Paso 1954, writ dismissed) (title unmarketable due to restriction); *McCurdy v. Morgan*, 252 S.W.2d 264, 266 (Tex. Civ. App.—San Antonio 1952, no writ) (outstanding gas lease is a defect); *Temple Trust Co. v. Logan*, 82 S.W.2d 1017, 1019 (Tex. Civ. App.—Amarillo 1935, no writ) (a deed of trust creating a lien is a defect). The rationale behind the definition of marketable title is one should not be forced to buy a lawsuit. See *Moser v. Tucker*, 195 S.W. 259, 260 (Tex. Civ. App.—Amarillo 1917, no writ).

52. P. BASYE, *CLEARING LAND TITLES* § 5, at 31 (2d ed. 1970).

53. See *Basye, Trends and Progress—The Marketable Title Act*, 47 IOWA L. REV. 261,

stems from the fact that marketability is based upon the personal judgment of the examiner.⁵⁴ To avoid challenges by a subsequent owner, each title examiner becomes overcautious⁵⁵ in distinguishing between serious and minor defects and determining which ones should be disregarded.⁵⁶ This practice results in title opinions stressing trivialities, thereby increasing expense and delay.⁵⁷

Even after searching a title back to sovereignty, defects may exist which are not discoverable by examining the title records or investigating the premises and which are not barred by limitations.⁵⁸ Although title insurance may be acquired to protect the owner against liability for specific defects,⁵⁹ insurance does not always clear the defect. Title to the property, therefore, is still in jeopardy and subject to total divestment or to being rendered unmarketable.⁶⁰ What is needed is legislation providing

267 (1962). It has been noted that "[a]n apparently perfect title or chain may, on scrutiny and investigation, contain defects: . . ." Leopold, *Introduction to Symposium—Texas Land Titles: Part II*, 7 ST. MARY'S L.J. 59, 59 (1975).

54. See P. BASYE, *CLEARING LAND TITLES* § 4, at 22 (2d ed. 1970); Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47, 49 (1958); Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 265 (1962).

55. Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47, 49-50 (1958); Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 265 (1962); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 70-71 (1973).

56. Omission of seals or spouses' signatures, insufficient attestation, property description inaccuracy, misspelled names, improperly appointed executors, or absence of an affidavit of death and heirship are considered minor title flaws. Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 98, 100 (1965).

57. See J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 316 (2d ed. 1975); Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47, 50 (1958).

58. See, e.g., *Southwest Title Ins., Co. v. Woods*, 449 S.W.2d 773, 774 (Tex. 1970) (deed out of chain of title); *Leyva v. Pacheco*, 163 Tex. 638, 642, 358 S.W.2d 547, 550 (1962) (fraudulent circumstances surrounding execution of deed); *Meyer v. Worden*, 575 S.W.2d 366, 369 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (boundary dispute). The Texas Commission of Appeals listed risks assumed by a purchaser in Texas as follows: deed in chain may be a forgery; grantor of prior grantee may not be true person executing the deed; grantor may have been mentally incompetent, a minor, married; lack of delivery of a deed; boundary dispute; and conflicting rights of persons in possession. *Pure Oil Co. v. Swindall*, 58 S.W.2d 7, 10 (Tex. Comm'n App. 1933, holding approved).

59. Thau, *Protecting the Real Estate Buyer's Title*, 3 REAL EST. REV. 71, 76 (1974). Title insurance "insures against loss or damage to the insured by reason of defects, liens, or other incumbrances on his title that are not specifically excepted from or excluded by the policy." *Id.* at 76.

60. *Id.* at 76; see Hamner, *Title Insurance Companies and the Practice of Law*, 14 BAYLOR L. REV. 384, 391 (1962). Many purchasers who rely upon the services of title companies are unaware that the company has no duty to explain the nature of the title. *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565, 569 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.); see Hamner, *Title Insurance Companies and the Practice of Law*, 14 BAYLOR

an affirmative approach to determine marketability based upon a limited time period.⁶¹ USLTA's Marketable Record Title Act offers such an approach, attempting to solve problems inherent in title examination under Texas' present recording system and to alleviate the inadequacies of limitation statutes.⁶²

II. USLTA'S MARKETABLE RECORD TITLE ACT

A. Objectives and Operation

In addressing the basic objectives of USLTA to secure land titles as well as simplify and reduce the cost of real estate transactions, MRTA attempts to limit the time period of a title search to recent title history.⁶³ Under MRTA the scope of a title search is restricted to recorded interests and those interests of which the purchaser has actual knowledge or which would be revealed upon reasonable inquiry.⁶⁴ The act is based upon the principle that when one has clear record title for at least thirty years, all interests recorded prior to this period should be cut off unless the interest is preserved by refiling.⁶⁵ To effectuate this principle MRTA focuses upon the concepts of "root of title"⁶⁶ and "marketable record title."⁶⁷

B. Root of Title

Root of title is "a conveyance or other title transaction" within the record chain purporting to create the interest claimed.⁶⁸ Any title transac-

L. REV. 384, 391 (1962). See generally Cribbet, *Conveyancing Reform*, 35 N.Y.U. L. REV. 1291, 1302-06 (1960).

61. Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 265 (1962).

62. See USLTA art. 3, part 3, Introductory Comment, at 45 (1977); P. BASYE, *CLEARING LAND TITLES* § 172, at 368 (2d ed. 1970).

63. See USLTA § 1-102 (1977). Purposes and policies of USLTA addressed by MRTA include the need "to simplify, clarify, and modernize the law governing land transfer;" *id.* § 1-102(1), "to further the security and certainty of land titles; . . .," *id.* § 1-102(2), and to reduce the high costs of real estate transactions. *Id.* Prefatory Note, at 4.

64. *Id.* Prefatory Note, at 4, § 3-306(3); Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. L. REV. 359, 379-81 (1978).

65. USLTA art. 3, part 3, Introductory Comment, at 45 (1977). See also Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 267 (1962); Smith, *The New Marketable Title Act*, 22 OHIO ST. L.J. 712, 712 (1961). Since MRTA is based upon marketable title legislation adopted in a number of states, see USLTA art. 3, part 3, Introductory Comment, at 45 (1977), related literature has been used for interpretation and analysis. When focusing upon parallel provisions of MRTA and other marketable title laws, caution has been exercised to depict variations in exemptions and limitations.

66. See USLTA § 3-301(4) (1977).

67. See *id.* § 3-302.

68. *Id.* § 3-301(4); see Pedowitz, *Uniform Simplification of Land Transfers Act—A*

tion may serve as the root of title if it is the most recent transaction in the claimant's chain recorded at least thirty years prior to the date marketability is determined.⁶⁹ This is true even when the instrument is void if it contains sufficient language to transfer the interest.⁷⁰

C. Marketable Record Title

Section 3-302 of the act states that a marketable record title exists when there is an unbroken chain of record title to real estate for at least thirty years and nothing recorded in the chain purports to divest title.⁷¹

Commentary, 13 REAL PROP., PROB. & TR. J. 696, 710 (1978). MRTA defines title transaction as "any transaction purporting to affect title to real estate, 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 a court, as well as a warranty deed, quitclaim deed, or security interest." USLTA § 3-301(5) (1977).

69. USLTA § 3-301(4) (1977). For instance assume O conveys Blackacre to X in 1940, X conveys to Y in 1948, and Y conveys to Z in 1973. All three deeds are duly recorded. In 1980, Z is establishing marketability. The root of title is the 1948 deed from X to Y since it is the most recent transfer in the claimant's thirty year chain of title of record at least thirty years. *See id.*

70. *Id.* MRTA expands the definition of root of title "to make it clear that a quitclaim deed or a forgery can be a root of title." *Id.* § 3-301, Comment, at 46. *Compare id.* § 3-301(4) (a void title transaction may be a root of title) *and id.* § 3-301(5) (quitclaim deed may be a root of title) *with* FLA. STAT. ANN. § 712.01(3) (West 1969) (marketable record title legislation does not specify void title transaction may constitute root of title) *and id.* § 712.06(3) (marketable record title legislation does not specify quitclaim deed may constitute root of title). *See generally* Wilson v. Kelley, 226 So. 2d 123, 128 (Fla. Dist. Ct. App. 1969) (quitclaim purporting to grant all grantor's interest invalid as root of title).

71. *See* USLTA § 3-302 (1977). MRTA specifically sets out what constitutes marketable record title.

A person who has unbroken chain of title of record to real estate for 30 years or more has a marketable record title to the real estate, subject only to the matters stated in Section 3-303. A person has an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than 30 years at the time the marketability is to be determined, and the conveyance or other title transaction, whether or not it was a nullity, purports to create the interest in or contains language sufficient to transfer the interest to either:

- (1) the person claiming the interest, or
- (2) some other person from whom, by one or more conveyances or other title transactions of record, the purported interest has become vested in the person claiming the interest; with nothing appearing of record, in either case, purporting to divest the claimant of the purported interest.

Id.; *cf.* Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 74 (1973) (gaps of unrecorded links in the thirty year chain render title unmarketable).

"Purporting to divest" as used in section 3-303(2) is not defined by USLTA. The Oklahoma Title Examination Standards interpreting the state's marketable title legislation have defined matters "purporting to divest" as those which "if taken at face value warrant the interpretation that the interest has been divested." OKLA. STAT. tit. 16, ch. 1, App. (West Supp. 1980) (Oklahoma Title Examination Standard 19.3, Comment). Paralleling the

The unbroken chain may consist of only the root of title or several transactions of record purporting to vest the interest in the claimant.⁷³ The chain examined, however, may be greater than thirty years if root of title has been of record longer than thirty years.⁷³ Once marketable record title is established, all interests prior to the effective date of the root of title are extinguished⁷⁴ unless preserved under sections 3-303⁷⁵ or 3-306.⁷⁶

Section 3-302 upholds the basic policy of MRTA by eliminating ancient interests which hinder and complicate title examination.⁷⁷ Marketable record title legislation like MRTA effects every type of real property inter-

Oklahoma interpretation, "purporting to divest," as used in USLTA § 3-302, may be illustrated by the following example: Suppose X is the last grantee of record in the regular chain of title to Blackacre as recorded in 1950. A deed from A to B conveying Blackacre, dated and recorded in 1968, recites that X died intestate in 1956 and A is the sole heir. The deed from A to B, therefore, purports to divest X's interest. Regardless of whether the facts from A to B are correct, it nonetheless "purports to divest." See OKLA. STAT. ANN. tit. 16, ch. 1, App. (West Supp. 1980) (Oklahoma Title Examination Standard 19.3, Comment).

72. See USLTA § 3-302 (1977); cf. OKLA. STAT. ANN. tit. 16, ch. 1, App. (West Supp. 1980) (Oklahoma Title Examination Standard 19.3).

73. If no title transaction is recorded exactly thirty years prior to the time marketability is ascertained, the root of title may be older than thirty years. Cochran, *The Root of Title Concept or How to Use Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 287 (1978). The chain of title, therefore, will be greater than thirty years. See USLTA § 3-302 (1977).

74. See USLTA § 3-302, Comment, at 46 (1977); Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. L. REV. 359, 364 (1978). "The effective date of the root of title is the date on which it is recorded." USLTA § 3-301(4) (1977).

75. USLTA § 3-303 (1977) (setting out specific exceptions to the MRTA); see Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 709 (1978).

76. USLTA § 3-306 (1977) (defining specific interests not affected by MRTA); see Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 709 (1978).

77. See USLTA § 3-302, Comment, at 46 (1977); Comment, *The Uniform Simplifications of Land Transfers Act: Areas of Departure from State Law*, 73 NW. L. REV. 359, 380 (1978). The following example illustrates the operation of section 3-302. Assume O is the record owner of Blackacre under a deed recorded in 1950. In 1960, O conveyed Blackacre to A who duly recorded the deed. In 1975, A transferred Blackacre to B who duly recorded the deed. In 1980, B's "root of title" is in the 1950 deed and B has an unbroken record chain of title for thirty years. See OKLA. STAT. ANN. tit. 16, ch. 1, App. (West Supp. 1980) (Oklahoma Title Examination Standard 19.3, Comment). B, therefore, has a marketable record title free of any interest prior to 1950 not preserved by sections 3-303 and 3-306. See USLTA § 3-302 (1977); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 709 (1978). If O had conveyed to A in 1945 rather than 1950, the deed from O to A would still be the root of title. When necessary the title examination may go back further than thirty years if there is no conveyance recorded exactly thirty years from the date of marketability. See USLTA art. 3, part 3, Introductory Comment, at 45 (1977); *id.* § 3-301(4).

est and applies to every entity claiming an interest in real property unless specifically excepted by the act.⁷⁸ Such exceptions, therefore, must be scrutinized since they could thwart the objectives of MRTA.

D. *Interests Not Subject to MRTA*

Ideally, marketable record title legislation limits a title search to recent title history.⁷⁹ Exemptions from the act, however, may cause the title search to extend beyond the root of title.⁸⁰ The effectiveness of marketable title legislation depends upon the array of interests excepted.⁸¹ Consequently, the drafters of MRTA designed the exceptions to be as limited as possible while offering protection against the fraudulent use of MRTA.⁸²

1. *Interests and Defects in the Root of Title and Other Muniments.* Section 3-303(1) of the act exempts from extinguishment "all interests and defects which are apparent in the root of title or inherent in the other muniments of which the chain of record title is formed. . . ."⁸³ The purpose of this section is to preserve interests and defects created by the root of title and subsequent muniments forming the chain of record title.⁸⁴ Restrictions, easements, encumbrances, and other interests created

78. See *id.* § 3-304. "This section is designed to make absolutely clear what has already been indicated in Section 3-302, that all interests except those indicated in Section 3-303 are extinguished by marketable record title." *Id.* § 3-304, Comment, at 47. See Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 710 (1978); cf. *Presbytery of Southeast Iowa v. Harris*, 226 N.W.2d 232, 237 (Iowa 1975) (marketable title act extinguished right of revision), *cert. denied*, 423 U.S. 830 (1977); *Chicago & Northwestern Ry. v. City of Osage*, 176 N.W.2d 788, 794 (Iowa 1970) (marketable title legislation extinguished reversionary interest of city).

79. See USLTA art. 3, part 3, Introductory Comment, at 45 (1977). Marketable recorded title legislation "is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that he need search no further back in the record." *Id.*; cf. Cochran, *The Root of Title Concept or How to Use the Florida Marketable Title Act*, 52 FLA. B.J. 287, 288 (1978) (when marketable title legislation was first enacted many thought that only a search to the root of title was required).

80. See USLTA §§ 3-303, 3-306 (1977).

81. See *id.* art. 3, part 3, Introductory Comment, at 45. "Any major exception largely defeats the purpose of marketable title legislation, by forcing the title examiner to search back for an indefinite period for claims falling under the exception." *Id.* "The primary value of limited title search is proportionately decreased with each exception." P. BASYE, *CLEARING LAND TITLES* § 173, at 376 (2d ed. 1970); see Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 112-13 (1965).

82. See USLTA § 3-306, Comment, at 49 (1977).

83. See *id.* § 3-303(1); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 710 (1978).

84. See Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 710 (1978).

prior to the root of title are not preserved unless specifically identified in the root of title or a later instrument in the chain of title.⁸⁵ The root of title and subsequent links in the chain, therefore, must be examined.⁸⁶

Section 3-303(1) distinguishes between instruments constituting the root of title and instruments forming the chain of title.⁸⁷ Interests and defects which are "apparent in" the instruments creating the root of title,⁸⁸ such as use restrictions, are preserved, while defects which are extrinsic to the record, such as forgery, are extinguished.⁸⁹ Defects "inherent in" instruments forming the chain of title include those disclosed on the face of an instrument and those surrounding its execution and deliv-

85. See USLTA § 3-303(1) (1977). A general reference is not sufficient to preserve the interest created prior to the root of title unless specific reference is made to the pre-root record location as required by USLTA section 3-207. Section 3-207(a) provides that "[u]nless a reference in a document is a reference to another document by its record location, a person by reason of its reference is not charged with knowledge of the document . . . , and the document is not in the record chain of title by reason of the reference to it." *Id.* § 3-207(a), see *id.* § 3-207(b) (setting out examples).

86. See Cochran, *The Root of Title Concept or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 282, 288 (1978); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 710 (1978).

87. See USLTA § 3-303(1) (1977). "The marketable record title is subject to (1) all interests and defects which are *apparent in* the root of title or *inherent in* the other muniments of which the chain of record title is formed; . . ." *Id.* (emphasis added). Jurisdictions relying upon parallel sections of the Model Marketable Record Title Act have confused what constitutes interests and defects inherent in the instruments forming the chain of title. Compare Model Marketable Record Title Act § 2(a), reprinted in P. BASYE, CLEARING LAND TITLES § 174, at 378 (2d ed. 1970) ("all interests and defects which are inherent in the muniments of which such chain is formed. . . .") with FLA. STAT. ANN. § 712.03(1) (West 1969) ("estates or interests, easement and use restrictions disclosed by and defects inherent in the muniments. . . ."). The problem is whether "inherent in" should be interpreted to preserve only defects on the face of the instrument, allowing a forged deed to be a root of title, or whether "inherent in" should be interpreted to preserve defects surrounding the execution of the instrument, preventing a forged deed from being a root of title. Compare *ITT Rayonier, Inc. v. Wadsworth*, 386 F. Supp. 940, 943 (M.D. Fla. 1975) (deed regular on its face has no inherent defects) and *Reid v. Bradshaw*, 302 So. 2d 180, 184 (Fla. Dist. Ct. App. 1974) (deed defective on its face was inherently defective) with *Marshall v. Hollywood, Inc.*, 224 So. 2d 743, 752 (Fla. Dist. Ct. App. 1969) (inherent defects are in body of a deed), *aff'd*, 236 So. 2d 114 (Fla. 1970). Distinguishing between interests and defects "apparent in" the root of title and interests and defects "inherent in" the other muniments, the drafters of USLTA prevented the possibility of contradictory interpretations by making it clear that a void deed could be used as the root of title. Compare USLTA § 3-303(1) (1977) (MRTA subject to interests and defects apparent in the root of title) with *id.* § 3-301(4) (root of title may be a null transaction) and *id.* § 3-301, Comment, at 46 (definition of root of title expanded to include a forged deed).

88. Apparent defects are those revealed by a simple inspection of the instrument. See BLACK'S LAW DICTIONARY 88 (5th ed. 1979).

89. See Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 709 (1978).

ery.⁹⁰ Such defects are preserved by section 3-303(1).⁹¹ As a result of the distinction between the two standards, apparent in and inherent in, forged deeds are valid roots of title operating to extinguish pre-root interests, but invalid links in the chain of title.⁹²

2. *Intent to Preserve an Interest.* Section 3-303(2) insures the protection of all viable interests by exempting "all interests preserved by the recording of proper notice of intent to preserve an interest."⁹³ During the two year grace period following the effective date of MRTA,⁹⁴ persons whose title is based solely on instruments recorded for more than thirty years must record a notice of intent to preserve the interest.⁹⁵ Once MRTA is in effect, refiling every thirty years is necessary to preserve such interests.⁹⁶ Refiling prevents "a later recorded document from cutting off

90. Cf. *ITT Rayonier, Inc. v. Wadsworth*, 386 F. Supp. 940, 943 (M.D. Fla. 1975) (husband executed deed violating Florida homestead laws; court construed deed as one with an inherent defect).

91. See USLTA § 3-303(1) (1977).

92. See *id.* § 3-302, Comment, at 46. The operation of section 3-303(1) is illustrated by the following: Assume X purportedly transferred Blackacre to A in 1930 by forged deed which was duly recorded in 1930. A conveyed Blackacre to B in 1975 by a deed duly recorded in 1975. O is the true record owner under a deed duly recorded in 1920. Under MRTA, B has marketable title in 1980 notwithstanding possession. The 1930 forged deed is the root of title because the only exempted defects are those which are apparent on the face of the instrument. B has an unbroken chain of title for thirty years with nothing in the chain purporting to divest him of his interest.

93. *Id.* § 3-303(2); see Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 710-11 (1978).

94. USLTA § 7-101(d) (1977).

95. See *id.* § 3-305. Notice of intent to preserve one's interest must be filed before a marketable record title is established by someone else. See *id.* §§ 2-308, Comment, at 33; 3-308, Comment, at 48. See also *Whaley v. Wotring*, 225 So. 2d 177, 181 (Fla. Dist. Ct. App. 1969); *Smith, The New Marketable Title Act*, 22 OHIO ST. L.J. 712, 717-18 (1961).

Section 3-303(2) may be illustrated by the following example: Assume A is the owner of Blackacre in 1945. In 1946 a mortgage from A to X was recorded. In 1949, a mortgage from A to Y was recorded. In 1950 a deed from A to B conveying Blackacre was executed without any reference to the mortgages. Y recorded a notice to preserve his interest as required by section 3-303(2); X, however, did not. In 1980, B has a marketable record title, see USLTA § 3-302 (1977), subject to Y's mortgage. See *id.* § 3-303(2). X had until 1980 to refile to protect his interest. See *id.* §§ 2-304, 3-303(2). See also OKLA. STAT. ANN. tit. 16, ch. 1, App. (West Supp. 1980) (Oklahoma Title Examination Standard 19.6, Comment).

96. See USLTA § 3-303(2) (1977); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 710 (1978). Remaindermen; owners of severed non-producing mineral rights, long term leases, mortgages; and other non-possessory interests must refile periodically to protect their interests. See USLTA § 3-303(2) (1977); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 710 (1978). See also *Lane v. Travelers Ins. Co.*, 299 N.W. 553, 555 (Iowa 1941) (contingent remainder terminated due to failure to refile); *Barnett, Marketable Title Act—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 84 (1967).

the effect of the documents" upon which current marketable record title is based.⁹⁷ Notice to preserve must be filed, however, before a marketable record title is established in someone else⁹⁸ or else the interest sought to be preserved is extinguished.

3. *Recorded Interests Subsequent to the Root of Title.* Interests arising from a title transaction recorded after the claimant's root of title are not subject to the provisions of MRTA.⁹⁹ Section 3-303(3), however, secures such interests even if the interests are wild ones arising out of instruments outside the claimant's chain of title.¹⁰⁰ As a result, this section operates to preserve interests not discoverable by examination of a grantor-grantee index.¹⁰¹ The mere recordation of a title transaction after an interest is extinguished, however, does not operate to revive the interest.¹⁰²

4. *Interests Specifically Excepted.*¹⁰³

a. Section 3-306(1): Restrictions "clearly observable by physical evidence of its use" are not extinguished by MRTA.¹⁰⁴ Obvious but unrecorded restrictions such as prescriptive easements, right of ways, and

97. USLTA § 3-305, Comment, at 48 (1977).

98. *Id.* § 3-305; see Smith, *The New Marketable Title Act*, 22 OHIO ST. L.J. 712, 717-18 (1961).

99. USLTA § 3-303(3) (1977). A title transaction means "any transaction purporting to affect title to real estate." *Id.* § 3-301(5).

100. *Id.* § 3-303(3); see Cochran, *The Root of Title Concept or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 289 (1978); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 84-85 (1973); 22 U. FLA. L. REV. 669, 671 (1970).

101. See Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 84 (1967); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 84-85 (1973).

102. See USLTA § 3-303(3) (1977). Subject to the exceptions set out in section 3-303, interests arising prior to the effective date of the root of title are extinguished by MRTA. *Id.* § 3-304. For example, assume that O executed a mortgage to X which was recorded in 1945. In 1950, O conveyed Blackacre in fee simple, without reference to the outstanding mortgage, to A who duly recorded his deed. In 1979, an instrument assigning X's mortgage to Y was recorded. In 1980, A had a marketable record title subject to the mortgage held by Y as it was recorded subsequent to A's root of title, thereby preserving the outstanding mortgage. If the instrument assigning X's mortgage to Y had not been recorded until 1981, A would have fee simple title as the mortgage would have been extinguished in 1980 and could not be revived. See *id.* § 3-303(3). See also OKLA. STAT. ANN. tit. 16, ch. 1, App. (West Supp. 1980) (Oklahoma Title Examination Standard 19.9, Comment).

103. USLTA section 3-303(4) provides that MRTA is subject to "the exceptions stated in Section 3-306." USLTA § 3-304(4) (1977).

104. *Id.* § 3-306(1). But see *id.* § 3-309. MRTA "does not preclude a court from determining that a restriction has been abandoned in fact, whether before or after a notice of intent to preserve the restriction has been recorded." *Id.* § 3-309.

water ways, therefore, are protected.¹⁰⁵ If the easement is not clearly observable, however, owners of such easements will have to periodically refile their interest.¹⁰⁶

b. Section 3-306(2): MRTA protects a person whose occupancy or use is inconsistent with the record title, but is discoverable by reasonable investigation.¹⁰⁷ The scope of the title search is limited to matters within the actual knowledge of the examiner resulting from a "reasonable inspection or inquiry of the premises."¹⁰⁸ The effect of this exemption is to "eliminate situations in which more than one person can claim marketable record title to the same property."¹⁰⁹

c. Section 3-306(3): MRTA protects the rights of persons who have been assessed taxes on the land in question during the three years prior to determining marketability.¹¹⁰ This provision automatically protects the taxpayer¹¹¹ even though he is not using or occupying the land and has failed to refile his interest.¹¹² When forged instruments or wild deeds are

105. See *id.* § 3-306(1). See also Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 72-74 (1967); Smith, *The New Marketable Title Act*, 22 OHIO ST. L.J. 712, 715-16 (1961).

106. See USLTA §§ 2-308, 3-305, 3-306(1) (1977). See also Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 91 (1967) (refiling should not be a problem since holder of such interests usually have legal assistance available to advise them of refiling requirements).

107. See USLTA § 3-306(2) (1977).

108. See *id.* The scope of the search is limited to interests of which a purchaser has actual knowledge. See *id.*, Prefatory Note, at 4.

109. *Id.* § 3-306, Comment, at 49. For instance, assume O was the record owner of Blackacre under a deed recorded in 1930. O conveyed Blackacre to A by a deed of record in 1945. A took possession in 1945 and remains in possession. In 1949, X, a stranger to title, purports to convey Blackacre to Y by a deed which was duly recorded. In 1980, both A and Y have marketable record titles. A search of the grantor-grantee index would not disclose the outstanding interest of either party. See Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 109 (1965). The effect of section 3-306(2) is that Y takes subject to A's use or occupancy, thereby preventing an interloper such as Y from divesting the true owner's title. See USLTA §§ 3-306(2), 3-306, Comment, at 49 (1977).

110. USLTA § 3-306(3) (1977).

111. See *id.*; Note, *The Marketable Record Title Act and the Recording Act: Is Harmonic Coexistence Possible?*, 29 U. FLA. L. REV. 916, 944 (1977). A search of the tax rolls for a three year period is required and "rights claimed by any person found on the tax roll must be cleared or excepted." Cochran, *The Root of Title Concept or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 290 (1978). Although this procedure is contrary to MRTA's policy of limiting title examination, see USLTA, Prefatory Note, at 4 (1977), the additional investigation is justified by the additional protection against wild or fraudulent deeds. See Note, *The Marketable Record Title Act and the Recording Act: Is Harmonic Coexistence Possible?*, 29 U. FLA. L.J. 916, 944 (1977); cf. USLTA § 3-306, Comment, at 49 (1977) (exception intended to eliminate fraudulent use of MRTA).

112. See USLTA § 3-306, Comment, at 45 (1977); Boyer & Shapo, *Florida's Marketa-*

recorded they will be picked up by the tax assessor and the new grantee will be duly taxed. Consequently, the lack of rendition notice and assessment should put the true owner on notice of conflicting interests.¹¹³ As a result, the true owner, within the three-year grace period, can file a notice of intent to preserve interest, thereby preventing the fraudulent divestment of his title.¹¹⁴

d. Section 3-306(4): "[A] claim of the United States not subjected by federal law to the recording requirements of this State" is exempt from extinguishment by MRTA.¹¹⁵ This exemption is necessary until federal legislation is adopted requiring federal claims to be subjected to MRTA.¹¹⁶ The effectiveness of MRTA would be enhanced, however, if such federal legislation was enacted.¹¹⁷

e. Section 3-306(5): MRTA sets forth an optional provision exempting

ble Title Act: Prospects and Problems, 18 U. MIAMI L. REV. 103, 118 (1963); Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 110-11 (1965). The following example illustrates the operation of section 3-306(3): Assume O (owner) conveyed Blackacre to A by a deed duly recorded in 1940. A took possession in 1940 and remained there until 1980 when he abandoned possession. In 1950, X, a stranger to the title, purported to convey Blackacre to Y by a deed which was duly recorded in 1950. Y went into possession of Blackacre in 1980 when A left possession. In 1980, both A and Y have marketable record titles. Section 3-306(3) of USLTA protects A's good marketable record title from extinguishment by X, "the late squatting possessor under a wild marketable record title," if A is listed on the tax assessor's roll. See Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 110-11 (1965).

113. See Note, *The Marketable Record Title Act and the Recording Act: Is Harmonic Coexistence Possible?*, 29 U. FLA. L. REV. 916, 944 (1977). See generally Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEXAS L. REV. 885, 889-92 (1973).

114. See USLTA §§ 2-308, 3-305 (1977).

115. *Id.* § 3-306(4).

116. *Id.* § 3-306, Comment, at 49; see Committee On Residential Real Estate Transactions of the ABA, *Residential Real Estate Transactions: The Lawyer's Role—Services—Compensation*, 14 REAL PROP., PROB. & TR. J. 581, 597 (1979).

117. See Cochran, *The Root of Title Concept or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 288 (1978). The Federal Tax lien would be subject to MRTA. See Uniform Federal Tax Lien Statute, 37 STAT. 1016 (1913) (filing notice of government tax lien is subject to state laws requiring registration); TEX. REV. CIV. STAT. ANN. art. 6644 (Vernon 1969) (county clerk authorized to file and record federal liens or claims). Before the Uniform Federal Tax Lien Statute, the Supreme Court in *United States v. Snyder*, 149 U.S. 210 (1893), held that government was not subject to state laws requiring the government tax liens to be recorded; therefore, these tax liens were superior to subsequent mortgages. *Id.* at 214-16. Consequently, for interests of the federal government, other than tax liens, a federal statute will have to be enacted in order to enhance the effectiveness of MRTA. See Cochran, *The Root of Title Concept or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 288 (1978).

mineral interests from extinguishment.¹¹⁸ A mineral exemption is a major exception lessening the effectiveness of MRTA because it requires a title search back to sovereignty to determine whether any outstanding mineral interest exists.¹¹⁹

III. EFFECT OF MRTA IN TEXAS

A. Modification of Texas Law

1. *Constructive Notice.* Adoption of MRTA will change the constructive notice doctrine in Texas.¹²⁰ Currently, once an interest is recorded in the grantor-grantee index constructive notice of that interest continues indefinitely.¹²¹ As a result, a subsequent purchaser of real property takes subject to all interests recorded within his chain of title.¹²² To achieve MRTA's objective of limiting a title search to recent title history,¹²³ constructive notice of interests within the chain of title will be limited by MRTA's refiling requirements.¹²⁴ Furthermore, interests recorded outside the claimant's chain of title will acquire a new significance under MRTA. Constructive notice will be extended to include interests recorded outside the chain of title after the root of title¹²⁵ as well as interests disclosed in

118. USLTA § 3-306(5) (1977).

119. *See id.* art. 3, part 3, Introductory Comment, at 45; Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 711 (1978).

120. *See* Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 54-55 (1967); Note, *The Marketable Record Title Act and the Recording Act: Is Harmonic Coexistence Possible?*, 29 U. FLA. L. REV. 916, 932 (1977).

121. *See, e.g.,* White v. McGregor, 92 Tex. 556, 558, 50 S.W. 564, 565 (1899); Clear Lake Apartments, Inc. v. Clear Lake Util. Co., 537 S.W.2d 48, 51 (Tex. Civ. App.—Houston [14th Dist.] 1976), modified on other grounds, 549 S.W.2d 385 (Tex. 1977); Davis v. Morley, 169 S.W.2d 561, 567 (Tex. Civ. App.—Amarillo 1943, no writ); cf. Cox v. Clay, 237 S.W.2d 798, 804 (Tex. Civ. App.—Amarillo 1951, writ ref'd n.r.e.) (grantee not required to check records after recording). Recording is valid once instrument is delivered to county clerk notwithstanding failure to properly index or record. *See* Throckmorton v. Price, 28 Tex. 600, 609-10 (1866); David v. Roe, 271 S.W. 196, 199 (Tex. Civ. App.—Fort Worth 1925, writ dismissed).

122. *See* White v. McGregor, 92 Tex. 556, 558, 50 S.W. 564, 565 (1899); Davis v. Morley, 169 S.W.2d 561, 567 (Tex. Civ. App.—Amarillo 1943, no writ). *See generally* Williams, *Recordation Hiatus and Cure by Limitations*, 29 TEXAS L. REV. 1, 4-10 (1950).

123. *See* USLTA art. 3, part 3, Introductory Comment, at 45 (1977).

124. *See id.* § 3-305, Comment, at 48.

125. *See id.* § 3-303(3). A purchaser claiming a marketable record title takes subject to "an interest arising out of a title transaction recorded after the root of title." *Id.* § 3-303(3). For example, assume O conveyed Blackacre in fee simple to A by a deed recorded in 1948; O conveyed Blackacre's mineral rights to X who duly recorded in 1952; and A conveyed Blackacre in fee simple to B by a deed recorded in 1963. In 1978, B's root of title is the 1948 deed. B has a marketable record title, subject to X's interest because X's deed is a result of a title transaction recorded subsequent to B's root of title. *See id.* §§ 3-302, 3-303(3). *See also*

the tax rolls during the three years prior to determining marketability.¹²⁶

2. *Void Instruments.* MRTA modifies Texas law concerning claims based upon void instruments. Texas law generally affords no protection to a subsequent purchaser claiming under a forged deed.¹²⁷ An individual asserting an interest under a forged deed who maintains possession for a statutory prescribed length of time, however, may establish title under the claim of right theory of adverse possession.¹²⁸ Under MRTA, a claim created by a forged deed may be a root of title operating to extinguish pre-root interests.¹²⁹ The distinguishing factor between the two systems involves notice. Under Texas law adverse possession gives constructive notice for a designated period of time prior to title being divested.¹³⁰ Under MRTA, however, title may automatically be divested by recording the forged deed without any previous notice being given.¹³¹

3. *Adverse Possession.* Claims based upon adverse possession will be significantly affected by MRTA. In Texas, once title is established by adverse possession it is lost by abandoning possession only when another party acquires title by adverse possession.¹³² MRTA protects interests of

Allen v. Farmers Union Coop. Royalty Co., 538 P.2d 204, 209-10 (Okla. 1975). The grantee of a one-sixteenth mineral, gold, and coal interest whose root of title was a 1938 deed was found to have a marketable title subject to an interest recorded in 1943. *Id.* at 208. Present Texas law would protect B as a subsequent purchaser without notice since a search of the grantor-grantee index would not reveal X's interest because it is not within B's chain of title. See TEX. REV. CIV. STAT. ANN. art 6627 (Vernon Supp. 1980). In the example, B would hold title free of X's interest because X's deed is outside B's chain of title. See White v. McGregor, 92 Tex. 556, 558, 50 S.W. 564, 565 (1899).

126. See USLTA § 3-306(3) (1977). See generally Cochran, *The Root of Title Concept or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 290 (1978); Note, *The Marketable Record Title Act and the Recording Act: Is Harmonic Coexistence Possible?*, 29 U. FLA. L. REV. 916, 944 (1977). Florida's marketable title legislation has an exception for tax rolls. Compare USLTA § 3-306(3) (1977) with FLA. STAT. ANN. § 712.03(6) (West 1969).

127. See Bibby v. Bibby, 114 S.W.2d 284, 287 (Tex. Civ. App.—El Paso 1938, writ dismissed) (general rule is that recording act does not protect purchaser claiming under forged instrument).

128. See TEX. REV. CIV. STAT. ANN. art. 5519 (Vernon Supp. 1980). See generally Gonzales v. Yturria Land & Livestock Co., 72 F. Supp. 280, 282 (S.D. Tex. 1947); Wilhite v. Davis, 298 S.W.2d 928, 934 (Tex. Civ. App.—Dallas 1957, no writ); *Symposium—Texas Land Titles: Part II—Adverse Possession: The Twenty-Five Year Statutes of Limitation and Disabilities Which Toll Limitations*, 7 ST. MARY'S L.J. 97, 101 (1975).

129. See USLTA §§ 3-301(4), 3-302, 3-302, Comment, at 46 (1977).

130. See Satterwhite v. Rosser, 61 Tex. 166, 171 (1884). To establish a claim by adverse possession the action must be so adverse, hostile, and inconsistent with the true owner's right to title as to place the owner on notice of the violation of his property interest. *Id.* at 171; see 5 F. LANGE, TEXAS PRACTICE §§ 870-73, at 400-06 (1961).

131. See USLTA § 3-302 (1977).

132. See MacGregor v. Thompson, 26 S.W. 649, 649 (Tex. Civ. App. 1894, no writ) (unrecordable legal title cannot be cut off by a bona fide purchaser for value without notice).

persons whose use and occupancy of the land is revealed by a reasonable inspection or inquiry.¹³³ A person who establishes title by adverse possession and remains in possession of the land, therefore, is protected.¹³⁴ One who establishes title by adverse possession and abandons possession, however, will be divested of title if not in possession when marketability is determined.¹³⁵ Under MRTA, therefore, to protect title acquired by adverse possession the adverse possessor must file a notice of intent to preserve interest¹³⁶ or continue to use and occupy the premise.¹³⁷

4. *Mineral Interests.* In Texas, the severance and transfer of a mineral interest creates a separate and distinct estate¹³⁸ which may be conveyed without reference to the surface estate.¹³⁹ In subsequent transfers of the surface estate the deeds in the chain need not indicate the previous severance of any mineral interest.¹⁴⁰ Consequently, under MRTA, the owner of the mineral estate must refile in order to preserve his interest¹⁴¹

But see Moran v. Alder, 570 S.W.2d 883, 887 (Tex. 1978) (purchaser cut off an unrecordable title acquired under equitable adoption). *See generally* Symposium—Texas Land Titles: Part II—Adverse Possession: The Twenty-Five Year Statutes of Limitation and Disabilities which Toll Limitations, 7 ST. MARY'S L.J. 97, 104 (1975).

133. *See* USLTA § 3-306(2) (1977).

134. *See id.* MRTA provides that existing statutes of limitation shall not be affected. *See id.* § 3-308.

135. Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 100, 108 (1975).

136. USLTA §§ 3-303(2), 3-306(2) (1977). The following illustrates the adverse possessor's dilemma: Assume O is the grantee of Blackacre by a deed duly recorded in 1950. In the same year P enters into possession, claims adversely, and continues in possession until 1977, thereby fulfilling the requirements of the adverse possession statutes. *See* TEX. REV. CIV. STAT. ANN. art. 5510 (Vernon 1958) (ten years for adverse possession); *id.* art. 5518 (Vernon Supp. 1980) (twenty-five years for adverse possession). P abandons Blackacre without filing a notice to preserve interest under section 3-303(2). If O conveyed Blackacre to A in 1960, A would have marketable record title in 1980 and would be able to extinguish P's title obtained through adverse possession. A's root of title is the 1950 deed and nothing in the thirty year chain of title purports to divest A's interest. *See* USLTA § 3-302 (1977). *See also* Harris County v. City of Hastings, 59 N.W.2d 813, 816 (Minn. 1953); Smith, *The New Marketable Title Act*, 22 OHIO ST. L.J. 712, 718 (1961).

137. USLTA § 3-306(2) (1977).

138. *See* Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 167, 254 S.W. 290, 292 (1923) (mineral estate and surface are distinct estates); Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649, 651 (Tex. Civ. App.—Amarillo 1941, writ ref'd) (oil and gas estate may be severed from surface estate); County School Trustees v. Free, 154 S.W.2d 935, 937 (Tex. Civ. App.—Texarkana 1941, writ ref'd) (severed minerals constitute separate estate).

139. Smith v. Sorelle, 126 Tex. 353, 357, 87 S.W.2d 703, 705 (1935) (mineral estates are governed by the same rules as conveyances of other realty).

140. *See* Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 78 (1967).

141. *See id.* at 78. A pre-root link may be preserved if a link in the thirty year chain of

or rely upon an exception for protection.¹⁴²

The interest in a mineral estate is similar to other specific interests in real estate subject to MRTA's refileing requirement.¹⁴³ The mineral estate, however, has additional protections of being on the real estate tax rolls,¹⁴⁴ of giving notice from use and occupancy if there is production,¹⁴⁵ of being referred to in instruments within the chain of title,¹⁴⁶ and of being recorded as a title transaction subsequent to the root of title.¹⁴⁷ Furthermore, exempting minerals from the extinguishment of MRTA requires a search back to the patent to determine if the state reserved any mineral interest.¹⁴⁸ Additionally, a search of the full title is required to determine whether any mineral interests have been conveyed previously.¹⁴⁹ Mineral

title referred to it. USLTA § 3-303(1) (1977). The following example provides an illustration: Assume O, the owner of Blackacre, conveys a mineral estate to A in a deed duly recorded in 1945. In 1950, O conveys Blackacre to B in fee simple without reference to the prior conveyance of minerals. B has marketable record title in 1980 and has extinguished A's interest. *Id.* § 3-302.

142. See USLTA §§ 3-303, 3-306 (1977).

143. *Id.* § 3-303(2) (notice to preserve interest based solely on documents); see Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 710 (1978).

144. USLTA § 3-306(3) (1977); see *Sheffield v. Hogg*, 124 Tex. 290, 298, 77 S.W.2d 1021, 1024 (1934) (royalty and leasehold are real property interests); TEX. CONST. art. XIV (mineral interest subject to real property taxes); TEX. REV. CIV. STAT. ANN. art. 7146 (Vernon Supp. 1980) (mineral interest is property interest for taxing purposes). See generally Comment, *Ad Valorem Taxation of Mineral Property*, 21 BAYLOR L. REV. 46, 56-57 (1969).

145. See USLTA § 3-306(2); Barrett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 78 (1967).

146. USLTA § 3-303(1) (1977).

147. *Id.* § 3-303(3).

148. See *Mathews v. Caldwell*, 248 S.W. 810, 813 (Tex. Comm'n App. 1924, judgment adopted) (patent in land office records is equivalent to notice under recording statute); *Havis v. Thorne Inv. Co.*, 46 S.W.2d 329, 332 (Tex. Civ. App.—Amarillo 1932, no writ) (chain of title encompasses all relevant transactions from the original patent from the state to the present deed). Until 1911, the General Land Offices in Austin issued patents without designating if the state had reserved a mineral interest. 3 F. LANGE, TEXAS PRACTICE § 151, at 274 (1961). A thorough title search will encompass an examination of the records of the General Land Office to ascertain whether the property was formally designated as a mineral interest at the time of sale. *Id.* § 151, at 261-74. Land in which mineral rights are reserved to the state come within the purview of the Relinquishment Act of 1919. TEX. NATURAL RESOURCES CODE ANN. §§ 52.171-53.185 (Vernon 1978). These acts provide for the surface owner to act as the agent for the state in leasing the underlying minerals. See *Wintermann v. McDonald*, 129 Tex. 275, 285, 102 S.W.2d 167, 172-73 (1937). See generally Symposium—*Texas Land Titles: Part II—Relinquishment of State Owned Minerals—The Agency Relationship Between the "Owner of the Soil" and the State*, 7 ST. MARY'S L.J. 62, 62 (1975).

149. See USLTA art. 3, part 3, Introductory Comment, at 45 (1977); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J.

interests, therefore, should not be excepted from the requirements of MRTA, otherwise the act's objective of limiting the title examination will be hampered.¹⁵⁰

B. *Recommended Changes in MRTA and the Texas Indexing System*

Enactment of MRTA in Texas under the present indexing system will significantly limit the opportunity to be an innocent purchaser for value *without notice*.¹⁵¹ MRTA imposes upon a purchaser of real property constructive notice of interests which may be recorded outside the purchaser's chain of title.¹⁵² Moreover, void instruments outside the purchaser's chain of title may serve as a root of title, thereby establishing a competing marketable record title.¹⁵³ As a result, under MRTA a purchaser takes subject to wild instruments which a search of the grantor-grantee index will not reveal.¹⁵⁴

Jurisdictions with grantor-grantee indexes adopting marketable title legislation have recognized the shortcomings of their indexing systems in giving notice, but have failed to revise the systems, thereby hindering the effective operation of the acts.¹⁵⁵ Use of a tract index or an abstract, since

696, 711 (1978). See generally Cochran, *The Root of Title Concept or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 288 (1978).

150. See USLTA art. 3, part 3, Introductory Comment, at 45 (1977); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 711 (1978). See generally P. BAYE, CLEARING LAND TITLES § 173, at 376 (2d ed. 1970). When enacting MRTA, a major consideration of the Texas Legislature would be whether the desirability of preserving valid mineral interests outweighs lessening the effectiveness of the act. Compare Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 711 (1978) (proponent of subjecting mineral interests to MRTA) with Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 98-99 (1973) (Oklahoma, a mineral-oriented state, specifically excepts minerals).

151. See USLTA § 3-303(3) (1977) (preserves subsequent title transaction); *id.* § 3-302, Comment, at 46 (root of title may be a void deed); Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 84 (1967); Comment, *The Marketable Record Title Act and the Recording Act: Is Harmonic Coexistence Possible?*, 29 U. FLA. L. REV. 916, 940 (1977).

152. See USLTA § 3-303(3) (1977); Comment, *The Marketable Record Title Act and the Recording Act: Is Harmonic Coexistence Possible?*, 29 U. FLA. L. REV. 916, 940 (1977).

153. See USLTA § 3-301(4), Comment, at 46 (1977); *id.* § 3-302, Comment, at 46; Cochran, *The Root of Title Concept or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 289 (1978); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 84-87, 96-99 (1973).

154. See 1 R. & C. PATTON, PATTON ON TITLES § 69, at 230-32 (2d ed. 1957).

155. See, e.g., *City of Miami v. St. Joe Paper Co.*, 347 So. 2d 622, 624 (Fla. Dist. Ct. App. 1977) (act applicable when claim is based on wild deed); *Exchange Nat'l Bank v. Lawndale Nat'l Bank*, 243 N.E.2d 193, 196 (Ill. 1968) (act is not applicable when claim based on wild deed); *Requarth Co. v. State*, 310 N.E.2d 581, 585 (Ohio 1974) (act does not

both reflect all transactions affecting a tract of land, are viable solutions to the notice problem created by preserving wild instruments under MRTA.¹⁵⁶ USLTA provides for the establishment of a tract index.¹⁵⁷ The tremendous expense of revising Texas' indexing systems to a tract index, however, makes this endeavor prohibitive.¹⁵⁸ One way to reduce the initial expense and minimize opposition to such a change is to adopt a tract index that is only prospective.¹⁵⁹

The immediate benefit of a tract system is that all recorded interests against a parcel of land are readily discoverable.¹⁶⁰ The crucial problem with a prospective tract index involves section 3-303(3) of MRTA which requires one claiming under the true owner to take subject to wild title transactions recorded after the root of title regardless of notice.¹⁶¹ To eliminate this problem, when the tract system is established prospectively, this section of the act should also be made effective only prospectively.¹⁶² One claiming under the true owner, therefore, would take sub-

operate when claim stems from interloping deed). See generally Cochran, *The Root of Title Concept or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 288 (1978) (search prior to the root of title required to search for wild deeds or multiple chains); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 84-87 (1973).

156. See J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 290 (2d ed. 1975); Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 56 n.36 (1967); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 87 (1973); Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245, 253-55 (1952). An abstract of title is a synopsis of all recorded conveyances relating to a particular tract of land. A tract index relates a transaction to parcels of property. All transactions affecting the land, therefore, appear on the index page and a bona fide purchaser searching the title history will find a wild deed. See 3 F. LANGE, *TEXAS PRACTICE* § 291, at 480 (1961); 1 R. & C. PATTON, *PATTON ON TITLES* § 67, at 224 (2d ed. 1957).

157. See USLTA § 6-102(1) (1977) (*defines geographic index*); *id.* § 6-207 (*establishes geographic index*).

158. Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245, 255 (1952); Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. L. REV. 359, 392 (1978).

159. See Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. L. REV. 359, 392 (1978).

160. See Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245, 253-55 (1952). Notices of intent must be filed so they can be located in a search, otherwise the operation of MRTA will be thwarted. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 81 (1967). Under the tract index system notices to preserve will be easily located. P. BASYE, *CLEARING LAND TITLES* § 173, at 367 (2d ed. 1970).

161. USLTA § 3-303 (1977); see Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 84 (1967); Note, *The Marketable Record Title Act and the Recording Act: Is Harmonic Coexistence Possible?*, 29 U. FLA. L. REV. 916, 938-40 (1977).

162. Chain of title problems created by wild instruments and multiple chains are disposed of by use of a tract index system. See J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY*

ject only to those transactions outside the chain of title recorded after the effective date of the tract system.

Although it is possible under MRTA for an interest in land to be divested by one claiming under a void instrument,¹⁶³ the act provides protections for true owners and notice to claimants through the exceptions for use and occupancy, interests reflected in the tax rolls, and recorded notices to preserve interests.¹⁶⁴ In most instances these exceptions should preclude more than one person from claiming marketable record title.¹⁶⁵ A tract index, however, will provide additional security by revealing wild instruments which may serve as roots of title.¹⁶⁶

Changing the indexing system in Texas to a prospective tract index with section 3-303(3) of MRTA applying only to transactions recorded after the effective date of the tract index will alleviate problems created by adoption of MRTA.¹⁶⁷ Through the use of this index a record search of title will reveal recorded interests arising out of a title transaction recorded after the root of title and void instruments recorded after adoption which may serve as a root of title. Consequently, a subsequent purchaser will be able to identify conflicting interests and the Texas recording system will be modernized without the expense of replacing the existing system.¹⁶⁸

It would seem desirable for the Texas legislature to consider the feasibility of enacting marketable title legislation as well as a prospective tract indexing system.¹⁶⁹ Furthermore, the legislation should provide that section 3-303(3) of MRTA operate only prospectively from the date of adop-

290 (2d ed. 1975); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 87 (1973); Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245, 253-55 (1952).

163. See *Marshall v. Hollywood Inc.*, 224 So. 2d 743, 749-52 (Fla. Dist. Ct. App. 1969) (upheld forged deed as root of title even though party divested of interest had no notice), *aff'd*, 236 So. 2d 114 (Fla. 1970); USLTA § 3-302, Comment, at 46 (1977).

164. USLTA § 3-303(2) (1977) (refiling to preserve interest); *id.* § 3-306(2) (use and occupancy); *id.* § 3-306(3) (tax rolls).

165. *Id.* § 3-306, Comment, at 49.

166. See P. BASYE, *CLEARING LAND TITLES* § 3, at 11-12 (2d ed. 1970); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 87 (1973).

167. See P. BASYE, *CLEARING LAND TITLES* § 3, at 11 (2d ed. 1970) (notice problems resulting from instruments outside chain of title do not arise under the tract system).

168. J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 329 (2d ed. 1975).

169. Tract indexes are preferable to grantor-grantee indexes since all transactions relating to a particular tract may be located in the index. See 1 R. & C. PATTON, *PATTON ON TITLES* § 67, at 225 (2d ed. 1957); Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245, 253-55 (1952). Use of a tract index simplifies the search and should reduce the cost. See Committee On Residential Real Estate Transactions of the ABA, *Residential Real Estate Transactions: The Lawyer's Proper Role—Services—Compensation*, 14 REAL PROP., PROB. & TR. J. 581, 596 (1979).

tion of such a tract system. One examining a title will use the current grantor-grantee index to the date of enactment of MRTA and then utilize the tract index. Eventually it will be possible to rely primarily on the tract index since MRTA limits the period of search to recent title history.¹⁷⁰

C. Constitutionality

MRTA was drafted to circumvent any constitutional attack for deprivation of property by providing for refile to prevent divestment and by limiting extinguishment to preserve contractual obligation.¹⁷¹ Marketable record title acts have been held to be constitutional in a number of states.¹⁷² Courts have found the legislative purpose of simplifying and facilitating land transfers outweighs the burden of rerecording imposed upon the owner of an interest in real estate.¹⁷³ In Texas, conflict may arise when MRTA operates to extinguish property interests involving constitutional homestead rights.¹⁷⁴ In *Reid v. Bradshaw*,¹⁷⁵ a Florida District Court of Appeals resolved this problem by finding a deed executed

170. J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 329 (2d ed. 1975).

171. USLTA § 3-303(2) (1977) (filing notice of intent to preserve); *id.* § 3-307 (extinguishment has no effect upon contractual liability between parties); *id.* § 7-101(d) (two years from effective date of MRTA to preserve one's claim). Marketable title legislation is criticized on the grounds that it extinguishes vested property rights and interferes with freedom of contract. See P. BASYE, *CLEARING LAND TITLES* § 175, at 384 (2d ed. 1970). The above sections are provided to minimize constitutional attacks. See USLTA § 3-307, Comment, at 49 (1977); P. BASYE, *CLEARING LAND TITLES* § 175, at 384-85 (2d ed. 1970). Section 3-307 is illustrated by the following example. Although a mortgage made more than thirty years ago may no longer be enforced against subsequent purchasers, the original contractual liability is not erased. See Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 *REAL PROB., PROP. & TR. J.* 696, 711 (1978).

172. Compare *Wichelman v. Messner*, 83 N.W.2d 800, 817 (Minn. 1957) (legislation with refile provision held constitutional) with *Murrison v. Fenstermacher*, 203 P.2d 160, 163-64 (Kan. 1949) (legislation without refile provision held unconstitutional). Although the United States Supreme Court has not yet considered the issue, it is believed marketable title legislation will withstand constitutional attack. See Aigler, *Constitutionality of Marketable Title Acts*, 50 *MICH. L. REV.* 185, 200 (1951); Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 *U. MIAMI L. REV.* 103, 123 (1963).

173. See, e.g., *Presbytery of Southeast Iowa v. Harris*, 226 N.W.2d 232, 242 (Iowa 1975) (withstanding due process attack; purpose of marketable title legislation to abolish ancient rights amply justified), *cert. denied*, 423 U.S. 830 (1977); *Tesdell v. Hanes*, 82 N.W.2d 119, 122 (Iowa 1957) (legislature had ample authority to enact legislation to secure land titles); *Wichelman v. Messner*, 83 N.W.2d 800, 825 (Minn. 1957) (upholding retroactive nature of the legislation) (public good of securing land transaction outweighs the burden and risk on landowner).

174. *TEX. CONST.* art. XVI §§ 50-51.

175. 302 So. 2d 180, 182 (Fla. Dist. Ct. App. 1974).

in violation of the state's homestead laws to be invalid as a root of title.¹⁷⁶ Arguably, the constitutionality of MRTA could be upheld in Texas with similar restrictions to protect the homestead laws.

IV. ADVANTAGES OF MRTA

MRTA is designed to restore effectiveness to the recording system by providing a title theory based on recent title history.¹⁷⁷ By automatically eliminating many of the ancient claims revealed in title abstracts,¹⁷⁸ suits to quiet title and releases, along with the problems of delay and service, should be reduced.¹⁷⁹ By limiting the time period for a title search as well as the potential number of defects,¹⁸⁰ MRTA provides a positive approach to determining marketability, to lessening the potential for hidden defects,¹⁸¹ and to creating surer titles.¹⁸²

Although Texas has curative statutes which eliminate certain technical flaws such as a defective acknowledgment,¹⁸³ the extinguishment power of

176. *Id.* at 182.

177. See USLTA art. 3, part 3, Introductory Comment, at 45 (1977); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 709 (1978); Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 125 (1965). The lawyer and title company should both be aided in their work by MRTA since both have to examine and evaluate the legal effect of all documents in the chain. P. BASYE, CLEARING LAND TITLES § 3 (2d ed. 1970). The complexities of the recording system have forced title examination in many areas of Texas to title companies. H. WILLIAMS, CASES AND MATERIALS ON COVENANTS FOR TITLE, ESTOPPEL BY DEED, AND RECORDATION 86 (1951); Thau, *Protecting the Real Estate Buyer's Title*, 3 REAL EST. REV. 71, 76 (1974). It is desirable that the recording system be reformed so that both title insurance companies and lawyer's title opinions can function coextensively competing to keep charges from inflating. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 316, 321, 323 (2d ed. 1975).

178. See USLTA § 3-302, Comment, at 46 (1977); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 709 (1978); Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. L. REV. 359, 380 (1978).

179. See Jossman, *The Forty Year Marketable Title Act: A Reappraisal*, 37 U. DET. L.J. 422, 424 (1960); Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C. L. REV. 89, 125 (1969).

180. Basye, *Trends and Progress—The Marketable Title Acts*, 47 IOWA L. REV. 261, 267 (1962).

181. Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 70 (1973).

182. USLTA § 1-102(2) (further security of land titles).

183. See TEX. REV. CIV. STAT. ANN. art. 5507 (Vernon 1969) (requires adverse possession and color of title for three years); *id.* art. 5509 (requires adverse possession for five years, deed duly registered, payment of taxes, and use); *id.* art. 5523(a) (ten year statute against technical defects on instrument, but not applicable to forged instrument). See gen-

MRTA is more extensive.¹⁸⁴ Additionally, the Texas adverse possession statutes secure land titles by eliminating extrinsic claims.¹⁸⁵ The Texas statutes, however, require litigation to prove the necessary elements of adverse possession.¹⁸⁶ Furthermore, the statutes do not run against non-possessory future interests¹⁸⁷ nor interests of the state.¹⁸⁸ MRTA operates against all interests without evidence of the elements of adverse possession.¹⁸⁹ Interests are cut off because of failure to file a notice to preserve, not for failure to sue.¹⁹⁰

The interests exempted by marketable title legislation are crucial to the effectiveness of the act because they may extend the title search beyond the root of title.¹⁹¹ With the exception of claims by the United States,¹⁹² all exempted interests under MRTA are reflected in the root of title and subsequent title history,¹⁹³ are discoverable by inspecting the premises¹⁹⁴ or upon inquiry, or are revealed in the tax rolls.¹⁹⁵ MRTA's exemptions

erally Burrow v. McMahan, 384 S.W.2d 124, 127 (Tex. 1964) (article 5523a does not apply to situations when the instrument is signed by a person misrepresenting himself as trustee); Leyva v. Pacheco, 163 Tex. 638, 642-43, 358 S.W.2d 547, 550 (1962) (invalid conveyance from father to daughter held to be without color of title under article 5507).

184. MRTA eliminates extrinsic interests resulting from fraud, forgery, and disabilities. See USLTA § 3-304 (1977). See also Barnett, *Marketable Title Act—Panacea or Pandemonium?*, 53 Cornell L. Rev. 45, 85 (1967).

185. See TEX. REV. CIV. STAT. ANN. art. 5519 (Vernon 1958). See generally Gonzales v. Yturria Land & Livestock Co., 72 F. Supp. 280, 282 (S.D. Tex. 1948); Wilhite v. Davis, 298 S.W.2d 928, 932 (Tex. Civ. App.—Dallas 1957, no writ); *Symposium—Texas Land Titles: Part 2—Adverse Possession: Twenty-Five Year Statutes of Limitation and Disabilities which Toll Limitations*, 7 ST. MARY'S L.J. 97, 101 (1975).

186. See, e.g., Kirby Lumber Co. v. Connecticut, 114 Tex. 104, 110, 263 S.W. 902, 903 (1924); Alexander v. Glasscock, 271 S.W.2d 333, 335 (Tex. Civ. App.—Texarkana 1954, no writ); Smith v. Jordan, 220 S.W.2d 481, 483 (Tex. Civ. App.—Dallas 1949, no writ).

187. See Ferguson v. Johnston, 320 S.W.2d 906, 910 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.); Evans v. Graves, 166 S.W.2d 955, 958 (Tex. Civ. App.—Dallas 1942, writ ref'd).

188. TEX. REV. CIV. STAT. ANN. art. 5517 (Vernon 1959); see Lewis Cox & Son, Inc. v. High Plains Underground Water Conservation Dist. No. 1., 538 S.W.2d 659, 663 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.) (state and its instrumentalities immune from limitations).

189. See USLTA §§ 3-304, 3-304, Comment, at 47 (1977).

190. L. SIMES & C. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 4 (1960).

191. See USLTA § 3-303, Comment, at 47 (1977); P. BASYE, *CLEARING LAND TITLES* § 173, at 376 (2d ed. 1970); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary* 13 REAL PROP., PROB. & TR. J. 696, 710 (1978).

192. USLTA § 3-306(4) (1977).

193. See *id.* § 3-303(1) (root of title and links in chain); *id.* § 3-303(2) (notices of intent to preserve); *id.* § 3-303(3) (title transactions recorded subsequent to root).

194. *Id.* § 3-306(1) (restrictions clearly observable); *id.* § 3-306(2) (use and occupancy).

195. *Id.* § 3-306(3).

are much more limited than exemptions of marketable title legislation currently enacted in a number of states.¹⁹⁶ These jurisdictions, however, recognize that exempting specific interests, such as minerals or the state's interests, prevents marketable title legislation from fully accomplishing its purpose because a complete title search is required.¹⁹⁷ Consequently, the exemptions enumerated in MRTA should not be extended as the primary value of the legislation, conserving time and expense in title examination, depends on the interests exempted.¹⁹⁸

V. CONCLUSION

The drafters of USLTA's marketable title provision sought to revitalize state recording systems, further the security of land titles, and reduce the high costs of real estate closings.¹⁹⁹ The adoption of MRTA by the Texas legislature would be controversial because the act attempts to revise a very complex and specialized area of the law while possibly divesting property interests.²⁰⁰ Inherent resistance is premised on the rationale that

196. See, e.g., NEB. REV. STAT. § 76-298 (1976) (excepting future interests); OKLA. STAT. ANN. tit. 16, § 76 (West Supp. 1979) (exception for mineral interest); UTAH CODE ANN. § 57-9-6 (1974) (exception for lessors reversionary right). Several states have also excepted all interest of states itself. See, e.g., FLA. STAT. ANN. § 712.04 (West 1977); MICH. COMP. ANN. § 26.1274; N.D. CENT. CODE § 47-19-01 to -11 (1960). MRTA's exemption for restrictions is limited to those "clearly observable by physical evidence of its use." USLTA § 3-306(1) (1977). Similar exceptions in many jurisdictions are not as limited. Exempted restrictions by these states include equitable servitudes, pipeline and cable easements, and easement rights of public utilities, transportation companies, and governmental agencies. See, e.g., FLA. STAT. ANN. § 712.03(5) (West Supp. 1980) (should not bar "recorded or unrecorded easements or rights . . . of a public utility of governmental agency"); N.C. GEN. STAT. § 47B-3(6) (1976) (shall not affect right of ways of any railroad company); *id.* § 47B-3(8) (shall not affect pipelines, cables, or any sewage or disposal system whether or not observable); OKLA. STAT. ANN. tit. 16, § 76 (West Supp. 1980) (should not bar any easement or interest). Often these exemptions require a record search beyond the root of title, a practice contrary to MRTA's primary objective of limiting the title search. See Cochran, *The Root of Title Conception or How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 288 (1978); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 100 (1973).

197. See Cochran, *The Root of Title Conception or How to Use the Florida Record Title Act*, 52 FLA. B.J. 287, 290 (1978) (exceptions within marketable title legislation mandate full search of chain of title); Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 100-01 (1973) (exemptions and limitations prevent legislation from being true panacea for problems within conveyancing system).

198. See USLTA Prefatory Note, at 3-4; *id.* § 3-303, Comment, at 47 (1977); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 710-11 (1978).

199. USLTA Prefatory Note, at 3 (1977).

200. See Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 709-10 (1978); Webster, *The Quest for Clear Land Ti-*

only title experts will understand the complete ramification of such legislative changes in Texas conveyancing laws.²⁰¹ In response to this opposition it should be pointed out that MRTA is not experimental but is based upon marketable title legislation in effect in a number of states.²⁰² In light of USLTA's endorsement by the Real Property section of the American Bar Association²⁰³ and the support of marketable title legislation in states where currently in effect,²⁰⁴ MRTA should be studied by the Real Property, Probate, and Trust Division of the Texas Bar Association and considered for enactment by the Texas legislature.

ties—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation, 44 N.C. L. REV. 89, 125 (1965).

201. See J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 312 (2d ed. 1975).

202. USLTA art. 3, part 3, Introductory Comment, at 45 (1977); see, e.g., FLA. STAT. ANN. §§ 712.01-.06 (West 1969 & Supp. 1980); N.D. CENT. CODE ANN. §§ 47-19-01 to -11 (1960); OKLA. STAT. ANN. tit. 16, §§ 61, 71-80 (West Supp. 1980).

203. Committee On Residential Real Estate Transactions of the ABA, *Residential Real Estate Transactions: The Lawyer's Proper Role—Services—Compensation*, 14 REAL PROP., PROB. & TR. J. 581, 597 (1979).

204. See, e.g., *Marshall v. Hollywood, Inc.*, 224 So. 2d 743, 748 (Fla. Dist. Ct. App. 1969) (pointed out the importance of marketable title act in facilitating land title transactions), *aff'd*, 236 So. 2d 114 (Fla. 1970); *Chicago & North Western Ry. v. City of Osage*, 176 N.W.2d 788, 793 (Iowa 1970) (noted goal of marketable title legislation to shorten searches and simplify recording system); *Semachko v. Hopko*, 301 N.E.2d 560, 563 (Ohio 1973) (emphasized marketable title act's purpose to simplify land transfers); Cribbet, *Property in the Twenty-First Century*, 39 OHIO ST. L.J. 671, 673 (1978). "[Michigan Marketable Title Act] has rendered a service to the bar and to the public by freeing land titles from ancient interest which might otherwise be cluttering up attorneys' opinions and holding up real estate deals. The great majority of bar are pleased with the statute and are endeavoring to make use of it." Jossman, *The Forty Year Marketable Title Act: A Reappraisal*, 37 U. DET. L.J. 422, 431 (1960).