Illinois Marketable Title Act

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CENTRAL TO AN UNDERSTANDING of the so-called Illinois Marketable Title Act, hereinafter referred to as the Act, is the concept of a marketable title. A concise definition of a marketable title, which can be applied to the endless variety of fact situations which occur, has not been formulated. However, it can be generally stated that marketable title is one so free from doubt that a court of equity will force it upon a reluctant contract purchaser.\(^2\)

Not infrequently, ancient records fetter marketability of real estate. Interests adverse to the holder of record title which have been of record for many decades may cause a buyer represented by able counsel to question the marketability of the title offered by the seller. This problem is not unusual today\(^3\) and will occur more frequently in the future as the size and complexity of the record continues to grow.\(^4\)

The Act was intended to alleviate this problem. The expressed purpose of the Illinois Legislature in enacting it was to simplify and facilitate land title transactions by allowing persons to place greater reliance on a forty year record chain of title. Thus the legislature intended to promote marketability by clear-


\(^2\) Basye, op. cit. supra note 1, § 4 at 6-15, § 5 at 15-20; Reeve, Defining the Undefinable—Marketability (1954).


\(^4\) Basye, op. cit. supra note 1, § 171 at 259; Scurlock, Retroactive Legislation Affecting Interests In Land, 80 (1953); Simes and Taylor, op. cit. supra note 1, at 3.
ing land titles of many interests more than forty years old. Underlying the legislative intention to bar interests of ancient origin was the intention to implement the public policy favoring the free alienability of lands. 6

The Act is designed to accomplish this purpose by making the marketability of title to real estate ascertainable to a greater extent than ever before by a search of recent records. It operates by enabling the holder of a forty year record chain of title to bar some actions by persons whose claims adverse to his title are more than forty years old, unless such persons have preserved their claims by filing statutory statements of claim, or unless the property is in the adverse possession of the claimant or some third person. It thus permits the holder of a title meeting the statutory requirements to disregard certain interests more than forty years old, if the records covering the preceding forty years do not disclose that statements of claim have been filed to preserve such interests.

Many other states preceded Illinois in enacting such legislation 7 and these statutes are generally described as marketable title acts. 8 Although the Illinois Act appears in the Limitation chapter of the Illinois Revised Statutes, it is in part a recording act because it requires that before a claimant may bring an action

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5 Cribbet, supra note 3, at 778. Professor Cribbet's comments are of special interest because he was Chairman of the Illinois State Bar Association Committee that drafted the Act.


For a general discussion of marketable title statutes, including comments on the statutes now in effect, see: Basye, op. cit. supra note 1, §§ 171-180, 371-374 (1953, Supp. 1960); Patton, op. cit. supra note 1, § 563; Simes, op. cit. supra note 3, at 42-48; Simes and Taylor, op. cit. supra note 1, at 3-16, 271-73, 297-361.

For a general discussion of cases decided in which marketable title statutes have been construed see Annot., 71 A.L.R.2d 846 (1960). For law review articles on marketable title legislation see Simes and Taylor, op. cit. supra note 1, at 359-61.

The Illinois Act is substantially the Iowa type. The Iowa type, as distinguished from the Michigan type, avoids defining marketability.

7 Simes and Taylor, op. cit. supra note 1, at 4, 295.
on a claim more than forty years old, he must have first preserved
the claim by the recording of a statement thereof. By establishing
this requirement, the Act modifies the pre-existing recording laws
which previously preserved recorded interests that were more
than forty years old. From the standpoint of third persons dealing
with real property, it is also a recording act in that such third
persons may ignore any recorded claims over forty years old
which were not preserved by recording statements of claims within
the statutory period.

The Act may also be regarded as a statute of limitations in
form for the reason that it appears, at the very minimum, that a
plea of limitation may be asserted as a bar to certain actions for
the recovery of real estate. However, the Act appears to be much
more than a statute of limitations in that it purports to bar
claims of persons under disability, claims of the State of Illinois,
and certain contingent claims which have not yet accrued. Thus,
it may bar a future interest, even though an action could be
brought on such interest.

While the Act, by its terms, purports to bar the remedy
of a claimant not complying with the filing requirement, the
word "extinguish" appears twice in the text of the Act. And,
as a practical matter, it appears to have the effect of extinguishing
the right of a claimant as well as his remedy. In fact, it may
have this effect even though the claimant's interest is not yet
assertable by suit. It is clear, then, that the Act does much more
than operate to cure certain defects which have arisen in the
execution of instruments in the chain of title and that, in
addition, it may have the effect of cutting off many heretofore
valid interests.

II. PRESERVING CLAIMS

The provisions of the Act relating to the filing of statements
of claim are of immediate importance to the holders of old claims
who may desire to assert them at some future time. No claim
need be barred by the Act if timely compliance with its provisions
is made by the claimant. All the claimant need do to keep the
claim alive as against a title otherwise marketable is to file a proper statement of claim.

However, in some instances, the preparation of a proper statement of claim can be time-consuming and burdensome. For example, since the Act requires that the statement definitely describe the real estate involved, it would seem that an accurate and full legal description of all the land affected by the claim, set forth in particular terms, should be made.

The statement of claim also must definitely describe the nature and extent of the right or interest claimed and state the facts upon which the right or interest is based. This requirement implements the purpose of the Act to facilitate land transactions because it enables a prospective purchaser to determine the nature and extent of a claimant's interest without having to make a complete search of the ancient records affecting the title to the property in question. At the same time, it provides an arduous task for the claimant who has a volume of claims he wishes to preserve. In addition to the above, a final requirement is that the statement of claim be verified.

Furthermore, the statement of claim will be of no avail unless it is filed within the applicable time limit prescribed by the Act. When the Act becomes fully operative, the time limit will invariably expire forty years after the claim to be preserved arose. However, since the Act applies not only to interests which may arise in the future but also to interests that are already forty years old, the legislature made provisions for periods of grace extending the period for recording claims that were forty years old when the Act was adopted on July 14, 1959, or that became forty years old less than two years after the effective date of the Act.

Since the period of grace applying to claims that were more than forty years old at the time the Act became effective has already expired, such claims can no longer be preserved. Unless statements were filed for such claims prior to July 14, 1961,
actions upon such claims are barred and the claims are effectively extinguished. However, the period of grace applicable to claims expiring less than two years after the effective date of the Act has only expired with respect to some claims, and will continue to be applicable to some claims until the Act becomes fully operative on July 14, 1963. With respect to these claims, the Act provides that if the forty year period expires less than two years after the effective date of the Act, such period is extended for an additional two years from the date of expiration.

The Act provides that the statement of claim is to be filed in the office of the Recorder of Deeds in the county where the real estate affected is located. Ordinarily, it should be filed by the claimant, his attorney, or his agent. However, in the case of a claimant who is a minor or who is under legal disability, the statement may be filed by his guardian, conservator, trustee, either parent, or any person acting on his behalf. And, in the case of a claimant who is unborn or unascertained, the statement may be filed by any person acting on his behalf.

Unfortunately, the Act does not state the period for which the statement of claim is effective. There can be little doubt that the statement will preserve the claim for a forty year period and, perhaps, because of the absence of provision to the contrary, it will preserve the claim indefinitely. However, by reason of the provision that the Act shall be liberally construed to effect the legislative purpose, it may be that it will be construed to preserve the claim only for a forty year period. If the claim is preserved only for a forty year period, the Act would probably be construed to contemplate renewals because the preservation of claims beyond a forty year period might be necessary in order to satisfy constitutional requirements.\[^9\]

\[^8\] Professor Basye believes that the timely filing of notice will preserve a claim indefinitely under the Act and that it will therefore ultimately be necessary to search back for periods in excess of forty years in order to determine whether there are old claims which have been preserved. He thinks that it would be preferable to require re-recordings of notices during each forty year interval in order to limit periods of search. See Basye, op. cit. supra note 1, § 173 at 78-9 (Supp. 1960).

\[^9\] Recent Statute, 55 Harv. L. Rev. 886, 888 (1942).
In some instances, a claim could be preserved without filing the statutory statement of claim in the manner above described. For example, if the claimant's cause of action has accrued, he can bring suit within the forty year period. And, if the claimant is in adverse possession of the real estate involved, his claim will not be extinguished by the Act, even though he neither files a statement nor brings an action. His adverse possession will provide ample evidence of his claim. Also, if the premises in question are in the adverse possession of someone other than either the claimant or the holder of forty year record chain of title, the latter will not be able to bar an action by the claimant.

Since the indexing of statements of claim is the responsibility of the recorder of deeds rather than the responsibility of the claimant, the method of indexing is of little interest to the claimant. It is of interest to a title examiner searching the title on behalf of a prospective purchaser or mortgagee, however. The Act provides that the claim shall be recorded and indexed in the manner provided by law.

In counties where the recorder is not required to keep a tract index, the Act further provides that he shall index claims in an index labelled "Claimant's Book" and it prescribes the manner in which this shall be done. In addition to indexing the claim under the name of the person filing the claim, the recorder is required to index it under the name of the person against whom the claim is filed. Fortunately the Act has been amended to make this latter requirement applicable only if the person against whom the claim is filed is named in the claim. Otherwise, the Act might have been construed as requiring the claimant to name the person against whom the claim was filed in the statement of claim and, under this construction, a title examination would have been necessary in order to prepare a proper statement of claim. If the volume of claims filed were not large, it might not be difficult to identify the claims affecting particular

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10 In other jurisdictions with marketable title acts which have been in effect for many years, comparatively few statements of claim have been filed. Simes, op. cit. supra note 3, at 47.
premises in a "Claimant's Book" because, after indexing the claim under the proper name, the recorder is required to include the document number of the claim (or the book and page where-in the same is recorded) and a description of the real estate involved.

III. AGAINST WHOM BARRED

The bar of the Act against actions at law or in equity based on old interests, which have not been preserved by the filing of a statement of claim, can be invoked only by the holder of a chain of title who with his grantors, immediate or remote, must be shown by the record to have held chain of title for at least forty years before the action was commenced. In addition, the real estate must not be in the adverse possession of another.

The operation of the Act is limited by its requirements with regard to the title a person who seeks to invoke it must have. The requirement of record title can be satisfied by records other than by the records of the recorder's office only, such as the records of the probate and chancery courts. The forty year period for which record title must be shown is measured back from the time a claimant commences his action. The chain of title which must be shown for that period is a connected chain of title which is unbroken.11

The Act expressly enumerates several ways in which the requirement of a connected chain can be satisfied. It can be satisfied by conveyance from one who held title of record at the time of the conveyance. Title by will or descent from any person who held the title of record at the date of his death also satisfies this requirement. Also, title by decree or order of any court, or by deed issued pursuant thereto, meets this requirement of a connected chain. Thus trustee's, trustee's in bankruptcy, con-

11 In Simes and Taylor, Model Title Standards, 25 (1960) it is stated that, "'An unbroken chain of title of record,' within the meaning of the Model Marketable Title Act may consist of (1) a single conveyance or other title transaction which purports to create an interest and which has been a matter of public record for at least forty years; or (2) a connected series of conveyances or other title transactions of public record in which the root of title has been a matter of public record for at least forty years."
servator's, guardian's, executor's, administrator's, receiver's, assignee's, master's in chancery, and sheriff's deeds are transfers which are included in determining the record chain of title.

The Act is silent with respect to whether a record chain of title must be based on a particular root of title. Although the Act has not been construed by the courts of Illinois yet, this problem has been considered in the construction of marketable title acts by the courts of other states. In the case of *Wichelman v. Messner*, the Supreme Court of Minnesota said that the title benefited by the Minnesota Marketable Title Act is a fee simple absolute or fee simple determinable or on condition subsequent. It further said that the title benefited may not be founded upon a stray, accidental or interloping conveyance because the statute does not operate to provide a foundation for a new title. Finally, the court noted that a law review article interpreted the term "record title" in the Iowa Marketable Title Act to mean fee simple title.

The root of title problem was also considered by the Supreme Court of Nebraska in the case of *Smith v. Berberich*. Therein, the heirs of a person whose title to certain real estate was founded upon a quit claim deed from one tenant in common brought an action to quiet title against the heirs of another tenant in common, contending that, since the quit claim deed had been of record for more than twenty-two years and since they were in possession, they had the entire title to the land by reason of the Nebraska Marketable Title Act. The defendants appealed from the judgment of the District Court and the Supreme Court reversed, holding that the plaintiffs could not invoke the aid of the marketable title act to sustain a claim of title to an interest in land more extensive than that which the instrument upon which the claim was founded purported to create and that a quit

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12 250 Minn. 88, 83 N.W.2d 800 (1957).
13 The article to which reference is made is Comment, 2 Drake L. Rev. 76, 81 (1953).
14 168 Neb. 142, 95 N.W.2d 325 (1959).
claim deed does not purport to convey the premises but only any present interest of the grantor therein.\textsuperscript{15}

The reasoning of the \textit{Wichelman} and \textit{Smith} cases cannot, however, be accepted as settling the root of title problem in Illinois. The \textit{Wichelman} case is of limited value for this purpose because the Minnesota act uses the term "source of title" in lieu of the term "chain of title" which appears in the Illinois and Iowa acts.\textsuperscript{16} And the comment of the Minnesota court with respect to a fee simple source of title being required under the Iowa act did not purport to be anything more than an expression of opinion. Furthermore, the \textit{Smith} case involved a rather special situation because the plaintiff and defendants therein were tenants in common.

The fact remains that, under the Act, it may be unnecessary for the record chain of title to be based on full fee simple ownership to enable the holder of title to invoke the bar of the Act.\textsuperscript{17} Because of the Act's silence on this question it may be that it will be construed to permit estates and interests other than fees simple to be declared marketable and freed of old claims that have not been preserved. The legislature has provided that the Act shall be liberally construed and the courts may decide that its purpose will be furthered by making it applicable to interests in land less than a fee.

Even if the holder of title has a title that meets the require-

\textsuperscript{15} Professor Simes notes that the principal case only pertains to quit claim deeds as roots of title. See Simes and Taylor, \textit{op. cit. supra} note 1, at 349. If this construction is adopted in Illinois, it will provide a partial solution to the "wild deed" problem.

\textsuperscript{16} The Minnesota marketable title act was amended subsequent to the decision in the \textit{Wichelman} case. See Minn. Laws 1959, ch. 492, approved April 24, 1959. Professor Simes states that the effect of this amendment is to make any recorded fee simple transaction a sufficient root of title for the chain of title contemplated by the act. See Simes and Taylor, \textit{op. cit. supra} note 1, at 339-40.

\textsuperscript{17} Professor Simes, in his discussion of problems and objectives in drafting marketable title acts, states that such statutes are needed to clear titles to fees simple and that their value would not be substantially impaired if they only operated to clear titles to fees simple. He then goes on to say that the value of such acts would be impaired if they were limited to fees simple absolute because they should solve the problem of how to transform a fee simple, which is shown by the record not to be absolute, into a fee simple absolute. See Simes and Taylor, \textit{op. cit. supra} note 1, at 351.
ments of the Act, he cannot invoke its bar if the property is in the adverse possession of another. Two Minnesota cases shed light upon what is meant by the term possession in the marketable title acts. In the *Wichelman* case, the court rejected the contention that claimants with constructive possession, such as the plaintiff and his grantors claimed, fall within the exception in the Act relating to rights of persons in possession on the ground that the exception requires that the possession be present, actual, open, and exclusive and inconsistent with the title of the person protected by the Minnesota act.

The Supreme Court of Minnesota also considered the possession requirement in a different context in the case of *B. W. & Leo Harris Co. v. City of Hastings*.\(^\text{18}\) Therein, the record owner brought action against a claimant to title through adverse possession perfected more than forty years before the Minnesota Marketable Title Act became operative to determine adverse claims, contending that the marketable title act barred the defendant's claim since the defendant had not filed any notice of claim. The District Court awarded judgment to the defendant on the ground that the defendant had been in adverse possession since 1876. On appeal, the Supreme Court reversed, holding that the marketable title act did not merely limit the time for commencing an action but barred the right itself, and that the evidence was insufficient to establish possession of the nature required to avoid the conclusive presumption of the marketable title act. The court decided that such possession must be present, actual, open, and exclusive and must be inconsistent with the title of the person who is protected by the act, and that it must be continuous from the time the act would otherwise bar the claim until the action is commenced.

Several Iowa decisions consider the possession problem where a trust relationship exists. Although the Iowa Marketable Title Act, like the Minnesota Marketable Title Act, requires that the holder of title be in possession in order to invoke the bar

\(^{18}\) 240 Minn. 44, 59 N.W.2d 813 (1953).
of the act, whereas the Illinois Act merely requires that the property not be in the adverse possession of another, there is good reason to believe that the Illinois courts will follow the reasoning of the Iowa cases. In the case of *Boehnke v. Roenfanz*, cestuis que trust sued the trustee in possession to establish their interests in realty. The trustee appealed from the decree of the District Court for the plaintiffs contending that their rights were barred by the Iowa Marketable Title Act. The Supreme Court of Iowa affirmed the decision of the District Court holding that statutes of limitation have no application as between the trustee and cestuis of an express trust, that possession by the trustee of trust property is in law possession of the cestuis, and that there had not been a sufficient repudiation of the trust by the trustee to make these rules inoperative.

The *Boehnke* decision was followed in the case of *Pap v. Pap*. Therein, the residuary beneficiaries under the will of a grantor sued his grantee to establish a trust relationship in the real estate conveyed. The defendant appealed from the decree of the District Court finding a trust by implication, contending that the action was barred by the Iowa Marketable Title Act. The Supreme Court of Iowa affirmed the decision of the District Court, holding that the possession of a trustee is for the benefit of the cestuis and cannot be adverse thereto until the trustee repudiates the trust. *Rorem v. Rorem* is an earlier decision which also deals with the trust relationship as it relates to possession. Therein, a son brought suit against the executors of his father's estate to obtain title to real estate. The son appealed from the decision of the District Court dismissing his petition. The Supreme Court of Iowa affirmed the decision of the District Court, holding that the son had failed to establish the trust relationship which would make the marketable title act applicable.

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19 Because the possession by the trustee of trust property is in law possession of the cestuis, that possession is adverse to the trustee's claim of individual title.

20 246 Iowa 240, 67 N.W.2d 585 (1954).

21 247 Iowa 371, 73 N.W.2d 742 (1955).

22 244 Iowa 980, 59 N.W.2d 210 (1953).
The meaning of adverse possession should also be specially considered where the premises in question are in the possession of one tenant in common or one joint tenant. Unfortunately, the decision in the Smith case did not rest on the matter of possession and therefore is of little help. It may be assumed, however, that the occupation of one tenant in common or one joint tenant will not generally be regarded as hostile to the others.

Although the Iowa Marketable Title Act was carefully considered at the time the Act was drafted in Illinois, the Illinois Act differs from the Iowa one in that the former merely requires that the property not be in the adverse possession of another whereas the latter requires the person invoking the act to be in possession. The possession requirement of the Iowa act was a critical factor in the recent case of Todd v. Todd.23 Therein, the surviving partners sued the devisees of the deceased partner for partition, contending that the decedent merely held title for the partnership. The surviving partners appealed from the decision of the District Court holding that they had no interest in the property. On rehearing, the Supreme Court of Iowa withdrew its former opinion and reversed the judgment of the District Court. In so doing, it held that the surviving partners were entitled to partition and that their rights were not barred by the Iowa Marketable Title Act because from the time the property was purchased it was farmed by the partners and in the possession of the partnership, until the death of the deceased partner, and by the surviving partners since his death.

The principal advantage of the Illinois adverse possession provision is that it enables the bar of the Act to be applied in cases involving vacant land whereas the holder of title could never apply the bar of the act in Iowa unless he had possession. The adverse possession provision thus extends the applicability of the Act. But under the negative requirement of "no one in hostile possession" as well as under the affirmative requirement 23 250 Iowa 1084, 96 N.W.2d 436 (1959).
of possession, a squatter might be able to prevent the record owner from getting marketable title. It has been suggested that it would therefore be better to require neither possession nor the absence of hostile possession, but to provide that the record owner gets marketable title subject to the rights of anyone arising from a period of adverse possession.24

Assuming that the holder of title is able to meet the chain of title requirement and also the "no one in hostile possession" requirement, the question arises of whether actual knowledge of the existence of the claim would prevent him from invoking the bar of the Act. Although the Act is silent on this, it appears that a holder of title with actual or constructive knowledge of a stale claim is not prejudiced thereby. This construction appears necessary to attain the purpose of the Act, especially since it contains no requirement that one must be a bona fide purchaser in order to assert its bar.25

Furthermore, in the case of United Parking Stations, Inc. v. Calvary Temple,26 the Supreme Court of Minnesota, in effect, concluded that actual knowledge was immaterial under the Minnesota Marketable Title Act. Therein, a lessee, which claimed the benefit of an easement reserved in a deed by a remote grantor of the lessor, sued the holder of a contract for deed to the servient tenement made subject to the easement, to enjoin obstruction of it. The District Court found for the defendant, holding that the easement had been lost by abandonment. On appeal, in

25 Stebbins, Significance of Chapter 293, Laws of 1941, in Connection With Examination of Titles to Real Property, 15 Wis. S.B.A. Bull. 93 (1942); Tulane and Axley, Title to Real Property—Thirty Year Limitation Statute, 1942 Wis. L. Rev. 258.

The attitude of our Appellate Court on the subject of actual knowledge is explained in relation to the Mortgage Limitations Act in McCarthy v. Lowenthal, 327 Ill. App. 166, 63 N.E.2d 666 (1945). It appears that under section 11b of this act a mortgage lien may be enforceable against the mortgagor or persons liable on the mortgage by reason of extension, part payment or assumption, but may turn out to be barred as to third persons if no notice has been given to them by recording in the fashion required by statute. Thus a distinction has been made between the original parties to the transaction and third persons. The possibility that the courts will make a similar distinction under the Marketable Title Act seems remote, but it should not be overlooked.

26 257 Minn. 273, 101 N.W.2d 208 (1960).
addition to disputing the fact of abandonment, the plaintiff contended that the more-than-forty-year-old easement for which no preserving notice had been filed fell within an exception to the bar of the Minnesota Marketable Title Act for two reasons. First, that by the terms of the reservation in the deed, the easement was to be used by the owners of the dominant and servient tenements jointly and that the actual occupancy and use of the defendant would therefore bring the easement within the exception to the marketable title act relating to easements manifested by actual occupancy and use. Second, that the easement was revived by the reference made to it in the contract for deed. In addition to affirming the judgment of the lower court, the Supreme Court answered the contentions of the defendant relating to the marketable title act. It decided that there was nothing joint in the use of the right-of-way because one party used it as owner and the other party by virtue of the reservation. It also decided that the reference to the easement in the contract for deed to the servient tenement did not revive it.

IV. Persons Barred

Having determined who can invoke the bar of the Act, it is next necessary to determine against whom this bar can be invoked. It appears from the purpose of the Act that it can be invoked to bar the claim of anyone except the United States. With reference to this one important exception, the Act provides that it shall not be deemed to affect any right, title or interest of the United States unless the Congress shall assent to its operation in that behalf. Since the Congress has not assented, the bar of the Act cannot operate against actions founded upon instruments showing title or liens of the federal government. Because it is beyond the power of a state legislature to bar the claims of the federal government, this exception was probably placed in the Act to indicate that the legislature intends that the Act shall apply to federal claims when and if the Congress assents.

The Act is broader than most statutes of limitation in that its bar can be asserted against the State of Illinois. It expressly
provides that the rule that the State of Illinois is not bound by limitations shall not apply. It further provides that it shall serve to bar any right, title, interest or lien which the State of Illinois or any department, commission or political subdivision thereof would otherwise have. The intention of the legislature is thus made very clear and, in addition, the Act provides that it bars claims asserted by governmental corporations, thus removing any possible doubt that is was not intended to apply to municipal corporations.

As would be expected, the Act is made applicable to private corporations and to natural persons who are sui juris. The Act is extraordinary, however, in that it makes its provisions applicable to persons under disability. Thus, it expressly dispenses with the previously existing privilege of incompetents and minors to commence actions after their disability ceases. The previously existing privilege was founded on the belief that the social interest in protecting persons under disability was of greater importance than quieting titles. The Act changes this and, under it, incompetents will lose their claims unless someone files a statement in their behalf just as persons sui juris will lose their claims if, through mischance or neglect, they fail to file proper statements of claim.

Since the Act is also expressly made applicable to persons not yet in being, statements must be filed on behalf of unascertained owners of contingent future interests in order to prevent their actions from being barred when they accrue. Finally, by making the bar of the Act applicable to persons within or without the state, the legislature removed another customary exception.

V. Claims Barred

As has been established, the bar of the Act can be invoked against any claimant except the federal government. Next it is necessary to consider against what claims the bar of the Act can be invoked. The legislature provided that the Act bars an action
upon any claim arising or existing more than forty years before the commencement of such action. By thus providing for a forty year limitation period instead of a specific cut-off-date, the legislature eliminated one disadvantage of the Iowa act which has necessarily been periodically amended to move forward the cut-off date.

The meaning of the statutory term "arising or existing" is critical to a determination of what claims are barred. It has been suggested that this term is ambiguous because, for example, a contingent remainder created by a will could be said to arise either at the time the will became effective or at the time the life tenant died. The Illinois legislature, however, borrowed this term from the pre-existing Iowa Marketable Title Act and, fortunately, its meaning has been ascertained in Iowa. The Iowa courts construed the term "arising or existing" to mean "originating" or "coming into being" rather than "accruing."

The first case in which the Supreme Court of Iowa was called upon to construe the meaning of the term "arising or existing" was the case of Lane v. Travelers Ins. of Hartford Conn. Therein, the minor plaintiffs sued to re-establish their interests in land as contingent remainderman, alleging that the quiet title decree, by which their interests were divested, was based upon fraudulent testimony. The defendant appealed from the decree of the District Court granting the relief prayed for, contending that the interests of the minor plaintiffs were barred by the Iowa Marketable Title Act. The Supreme Court reversed the decision of the District Court, holding that contingent interests arise when they originate or come into being rather than when they accrue.

27 In his discussion of problems and objectives in drafting a marketable title act, Professor Simes suggests that a marketable title act should be thought of as an all-inclusive tool. Instead of spelling out the details of its application to every conceivable interest and situation, the legislator should regard it as a frame of reference, with blanks to be filled in by judicial decision. See Simes and Taylor, op. cit. supra note 1, at 349.
29 Comment, supra note 13, at 79.
30 230 Iowa 973, 299 N.W. 553 (1941).
The *Lane* case thus establishes that, in Iowa, a claim arises or exists at the time it comes into being rather than subsequently when it accrues. Therefore, the bar of the Iowa act can be invoked against an action on a claim even though the claim did not become possessory and even though an action on the claim had not accrued within the statutory period. Although the language of the Minnesota Marketable Title Act differs, the Supreme Court of Minnesota construed it to reach the same result in the *Wichelman* case.\(^{31}\) It did so by expressly rejecting the contention that the Minnesota Marketable Title Act merely protects titles against adverse claims, and that the plaintiff’s title was not protected because it did not become adverse until the School District decided not to use the property for school purposes, on the ground that this contention would frustrate the policy of the Minnesota act of preventing ancient records from fettering marketability.

Because the language of the Illinois act is the same as the language of the Iowa act in this particular and because the policy of the Illinois act is the same as the policy of the Minnesota act, one reasonably might expect that the term “arising or existing” will be construed to mean “originating” or “coming into being” by the Illinois courts. Should this be so, an action on a claim can be barred even though the claim did not become possessory and even though an action on the claim had not accrued prior to the expiration of the forty year period provided by the Act for the filing of statements of claim.

A further consideration is whether a claim “arises” or “exists” by reason of a conveyance being made “subject to” the interest claimed. It has been suggested that, under the language of the Wisconsin Marketable Title Act, easements and restrictions and other rights are not barred if a conveyance recorded within the statutory period is made expressly “subject to” such easements or other rights.\(^{32}\) However, it is doubtful whether this

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\(^{31}\) *Supra* note 12. The facts of this case are set forth on page 801.

\(^{32}\) Tulane and Axley, *supra* note 25, at 275.
construction will be adopted in Illinois.\textsuperscript{33} The argument for adopting such a construction would be that a forty year title search would reveal the existence of the claim. However, the Act provides that the existence of the claim must be revealed by a statement of claim and that the statement must describe the nature and extent of the claim and the facts upon which it is based. It would seem that the legislature intended that this be the exclusive method of preserving a claim and that it did not regard other forms of notice as sufficient. In the light of the policy of the Act, even the contention that a holder of title who had taken title "subject to" an interest should be estopped to invoke the bar of the Act is not likely to be adopted by the courts of Illinois, particularly since actual knowledge appears to be irrelevant insofar as the operation of the Act is concerned. Furthermore, it must be remembered that if the term "arising or existing" should be construed by our court to mean "originating" or "coming into being," it could hardly be contended that an interest originates or comes into being merely because a conveyance is made subject to it.

The Act makes no distinctions between interests which have been created in a formal manner by documents which have been recorded and those which have been created under unrecorded documents and by other methods. It therefore appears that the Act applies to actions founded upon claims based on any instrument, event, or transaction more than forty years old. Although it has been suggested that it might be better to provide that the date of recording controls for the purpose of determining the time at which an interest arose,\textsuperscript{34} the Act does not now so provide.

In addition to determining the meaning of the term "arising or existing," it is necessary to determine whether a claim must be based on a separate source of title in order that it may be barred. This question was resolved under the Minnesota Marketable Title Act in the case of \textit{Wichelman v. Messner}.\textsuperscript{35} Therein,

\textsuperscript{33} United Parking Stations, Inc. v. Calvary Temple, \textit{supra} note 26, indicates that this construction has been rejected in Minnesota.

\textsuperscript{34} Jossman, \textit{supra} note 24, at 422.

\textsuperscript{35} \textit{Supra} note 12.
the grantee of the vested interest of the heirs of the grantor of certain real property, who had conveyed it to the predecessor of a School District in 1897, subject to the condition that the premises should revert when they ceased to be used for school purposes, brought this action against the School District and its grantee subsequent to 1946 when the school on the property had been abandoned and the premises conveyed to the defendant, to determine adverse claims and to obtain possession. Although the defendants contended that the interest of the plaintiffs was conclusively presumed to be abandoned by reason of the failure of the heirs of the original grantor to record notice of their interest within the forty year period as required by the Minnesota Marketable Title Act, the District Court held for the plaintiff. On appeal, the Supreme Court reversed, holding that the Minnesota Marketable Title Act permits the record owner of a fee simple to be relieved from the burdens and restrictions outstanding against such fee where the fee title itself is predicated upon the instrument which contains the right or condition to be extinguished.

Because the Illinois Act makes no distinctions between claims based on separate sources of title and claims based on the same source of title, it seems probable that a claim may be barred in Illinois, as in Minnesota, even though it is not based upon a separate source of title. While the problem may not arise in Illinois with respect to reverters and rights of re-entry by reason of the Reverter Act, it may arise with respect to other interests reserved or excepted in conveyances.

In Minnesota, it has been determined that a claim involving a boundary line dispute will not be barred by the Minnesota Marketable Title Act. This result was reached by the Supreme Court of Minnesota in the case of *Minneapolis & St. Louis Ry. Co. v. Ellsworth.* Therein, a landowner whose land was bounded

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36 If the claim appears in instruments in the chain of title preceding the root of title and if it does not appear in the instrument constituting the root of title, it would seem that it is even more certain that the claim will be barred.

37 297 Minn. 439, 54 N.W.2d 800 (1952). In commenting on this case, Professor Simes
on the north by a quarter section line sued a landowner whose land was bounded on the south by the same line to determine the proper location of that boundary line. The District Court made a determination of the boundary line in accordance with the contention of the plaintiff and accordingly rendered judgment for the plaintiff. On appeal, the defendant contended that since the plaintiff's title was founded on a deed recorded more than forty years prior to the commencement of the action and since the plaintiff had not filed any statutory notice, its claim was barred under the Minnesota Marketable Title Act. The Supreme Court of Minnesota affirmed, holding that the defendant could not take advantage of the Minnesota act because he had a source of title to his own land which had been of record for forty years.

Although the Minnesota act uses the term "source of title" whereas the Illinois act uses the term "chain of title," it would seem that the reasoning of the Minnesota court could be applied under the Illinois act. The Illinois court might find that the defendant had no chain of title to the land south of the line as determined by it and that the defendant therefore could not invoke the bar of the Act. Consequently, it appears that the Act will not operate to bar claims in boundary line disputes where the location of a particular line is in issue.

The effectiveness of the Iowa Marketable Title Act in barring claims based on irregularities in the chain of title was considered by the Supreme Court of Iowa in the case of Tesdell v. Hanes. Therein, the vendor under a purchase agreement sued for a judgment declaring that he had met the requirements of the agreement relating to good and merchantable title notwithstanding an irregularity in the chain of title prior to 1940. The vendee appealed from the decision of the District Court granting the

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noted that it was indicated that the act might apply in cases of clearly conflicting descriptions. He then said that over-lapping property descriptions are merely a special instance of conflicting chains of record title and that the application of marketable title statutes to cases involving chains with conflict is awkward at best. See Simes and Taylor, op. cit. supra note 1, at 337.

38 248 Iowa 742, 82 N.W.2d 119 (1957).
judgment sought, contending that the Iowa Marketable Title Act did not cure the irregularity in the chain of title. The Supreme Court affirmed the decision of the District Court, holding that the holder of record chain of title for the statutory period who has filed the statutory affidavit of possession and against whose property no claim has been filed has good and merchantable title by reason of the Iowa Marketable Title Act, notwithstanding an irregularity in the chain of title prior to 1940.

The Tesdell case establishes that the Iowa Marketable Title Act has the effect of barring claims based upon irregularities in the chain of title. Since the relevant provisions of the Illinois Act are similar to those of the Iowa act, the Illinois Act may well be construed to have the same effect. Thus, irregularities in the chain of title such as flaws in an old conveyance which make it impossible to identify the ground described therein as corresponding exactly with the ground now claimed under chain of title or a variance in names which exceeds the limits of the doctrine of idem sonons may be cured by the Act.

In addition to the general considerations discussed above, it must be determined what specific claims will be barred by the Act. The language of the Act with respect to this is broad and sweeping. It provides that it may be invoked to bar any and all interests of any nature whatsoever, however denominated. This broad language is made subject to specific exemptions which will be discussed later. At this time, specific claims that may be barred will be considered.

The legislature expressly made the bar of the Act applicable to both vested and contingent future interests. In the Wichelman case, the Supreme Court of Minnesota said that it would be

39 Professor Simes, in his discussion of problems and objectives of drafting marketable title acts, states that future interests, such as rights of re-entry, possibilities of reverter, and reversions and remainders subject to life estates should not be excepted from the operation of forty-year statutes. He believes that as much consideration is given to such interests as their social significance deserves by permitting them to be preserved by the filing of notices. See Simes and Taylor, op. cit. supra note 1, at 357.

40 Supra note 12.
unreasonable and inconsistent with the purpose of the Minnesota act to include within the meaning of the word "title," the life estate, and thus compel the reversioner or remainderman to file the statutory notice or be barred. The court recognized, however, that the Iowa act will bar interests of contingent remaindermen following a life estate and cited the *Lane* case\(^4\) to that effect. Thus, in addition to the express language of the Act, the construction given the Iowa act, after which the Illinois act was to a large extent patterned, leaves little room for doubt that reversioners and remaindermen will be barred if they do not file the requisite statement of claim providing there is a chain of title running from the life tenant.

Furthermore, since it is probable that the Illinois courts may follow the Iowa construction of the term "arising or existing," the Act may bar future interests upon which a cause of action has not yet accrued prior to the expiration of the forty year filing period or which, having accrued, have not yet become barred by the expiration of the period allowed by other limitation statutes, particular notice being taken of the extended terms of limitation provided for minors and insane persons. Also, since the Act probably cannot be construed to require the person invoking its bar to have a separate source of title, it can be invoked to bar reversioners and rights of entry.

The Act expressly provides that actions based on equitable interests as well as legal interests may be barred. Therefore, in the case of property held in trust, the failure of the trustee to file a claim might result in the effective extinguishment of the beneficial interest as well as the legal interest of the trustee. The bar of the Act also could be applied to other equitable interests such as charges created by will.

Even though the court refused to apply the bar of the Iowa act to a charge created by will in the case of *Lytle v. Guilliams*,\(^4\) it clearly indicated that such interests could be barred, under the

\(^4\) 230 Iowa 973, 299 N.W. 553 (1941).  
\(^4\) 241 Iowa 523, 41 N.W.2d 668 (1950).
proper circumstances, by the Iowa act. In that case, the successors
of legatees whose interests were charged against devised property
sued to establish and foreclose the legacies. The defendants who
had possession and claimed record chain of title by reason of a
sheriff's deed issued after the foreclosure of a mortgage executed
by the life tenant and the remainderman whose interest was subject
to the charges, appealed from the judgment of the District Court
granting the relief prayed for, contending that the interests of the
plaintiffs were barred by the Iowa Marketable Title Act. The
Supreme Court affirmed the decision of the District Court, hold-
ing that only those who have a title which complies with the con-
ditions of the statute are qualified to invoke its aid and that the
defendants did not have such title because the legatees whose
interests were charged against the property did not join in the
execution of the mortgage. Because the Illinois act provides that
it is applicable to equitable interests, there appears to be little
doubt that the Illinois courts, like the Iowa courts, would, under
the proper circumstances, make its bar applicable to charges
against devised property.

Because certain mortgages are expressly exempted from the
operation of the Act, it would seem that all other mortgages
and trust deeds will be held to be interests in real property
subject to the bar of the Act. It further seems that the bar of
the Act will also effectively extinguish other liens that endure
more than forty years such as the liens of real property taxes and
special assessments.

Since no exception is made in favor of dower, it would
seem that the Act also will bar dower interests. Thus, if a
married man acquired title to property and also conveyed it
without his wife's signature more than forty years prior to his
death, the widow's dower interest would be barred. In this
example, the widow's dower would be barred while it was still
inchoate on the ground that it arose at the time her husband
acquired his title and on the ground that he had acquired his
title more than forty years previously. If the dower interest had
become consummate, this would not prevent it from being barred, unless the courts construe the election of a widow to take dower as giving rise to a new interest. Even if the courts arrive at this construction, it would seem that a dower interest could be barred after it has become consummate for a period of forty years.

Numerous other interests will be within the bar of the statute. Easements, profits, covenants and restrictions, except to the extent that they are exempted from the operation of the statute as will later be noted, are also subject to its bar. Therefore, a claimant who may want to assert any of these interests at some future time should protect his right to do so by complying with the statutory filing procedure within the forty year period.

VI. EXEMPT CLAIMS

As was suggested in the discussion of what claims may be barred by the Act, it is not absolute so as to bar actions on all interests. The legislature exempted numerous claims from the bar of the Act. These exemptions protect certain interests that might otherwise have been barred and relieve the holders of these interests of the necessity of filing statements of claim in order to preserve them. At the same time, these exemptions make it impossible for a purchaser or a mortgagee to rely on a forty year chain of title.

The Act expressly exempts any easement or interest in the nature of an easement, the existence of which such easement or interest either is apparent from or can be proved by physical evidences of its use. This exemption, like the "no one in hostile possession" requirement already discussed, protects possession. Perhaps it was included on the theory that interests like these were more likely to be overlooked because of the fact that the owner of the right is not so actively concerned with it. Perhaps the legislature included it in order to spare the owners of multitudinous easements, such as public utilities, the burdensome

43 Tulane and Axley, supra note 25, at 265.
task of filing statements of claim for every parcel of land over which they are used.\textsuperscript{44}

In addition to exempting such easements and interests in the nature of an easement, the legislature exempted any rights granted, reserved, or excepted by any instrument creating such easements or interests. This additional exemption averts the problem which otherwise might arise where the use of only a part of an easement granted is apparent. In the absence of this provision, perhaps the Act might have been construed only to preserve that part of the easement the use of which is apparent. Also, it might have been construed so as to extinguish collateral rights, such as the right to trim shrubs that interfere with the use of the easement.

The legislature also provided that such easements are exempt whether or not physical evidences of their use are visible from the surface. This avoids a problem of construction that might arise, for example, with respect to underground pipelines. In the absence of this provision, owners of such interests would have been in doubt as to whether they, like the owners of similar surface interests, were exempted from the duty to file statements in order to preserve their rights.

While the meaning of the term “easement” is clear, it must be determined what the term “interest in the nature of an easement” is intended to include. It might be contended that this terminology would include covenants and restrictions affecting the use of land. For example, a building line restriction might be regarded as an easement of air, light and view. Then, if there are sufficient existing violations so that the building line cannot be proved by physical evidences of its use, an action to enjoin a further violation could be barred if a statement of claim had not been filed.\textsuperscript{45}

The Act also exempts any interest created or held for any

\textsuperscript{44} Aigler, Marketable Title Acts, 13 U. Miami L. Rev. 47 (1958).
\textsuperscript{45} For a discussion of the effect of marketable title acts on easements and equitable servitudes see Simes and Taylor, \textit{op. cit. supra} note 1, at 224-29.
public utility purpose from the filing requirement. This exemp-
tion, which was added to the original Act by amendment, altered
the intent of the Act because its effect is to remove the require-
ment of filing claims as to unused recorded easements more than
forty years old. It preserves utility easements some of which may
never be used again. However, many of the presently unused inter-
ests preserved by this clause may be used in the future. In fact, such
interests may have been acquired in anticipation of a future
need that has not yet materialized. For example, it is possible that
provisions made for public utility easements at the time property
is subdivided will not result in the construction of public utility
facilities until more than forty years thereafter when the proper-
ty is developed. If the Act had the effect of extinguishing the
easements, the result might be delay and unnecessary expense
in providing necessary services for the community.

Another exemption provides that the Act shall not validate
any encroachment on any street, highway or public waters. By
so providing, the legislature recognized that the public interest
in streets, highways, and public waters outweighs the public
interest in promoting the marketability of land
titles. This
provision was necessary because the Act otherwise applies to
interests of the State.

The clause exempting any separate mineral estate from
the filing requirement of the Act was added by amendment
because coal companies were fearful that the Act otherwise might
be construed to place the owners of mineral titles in the category
of claimants. It is unlikely that such a construction would have
been adopted. In fact, in the Wichelman case, the Supreme
Court of Minnesota said that the owner of a mineral estate does
not have to file a statutory notice because he has a separate
freehold estate of inheritance from the surface estate. And the
Supreme Court of Illinois held in the case of Uphoff v. Trustees

46 Professor Simes believes that the exception of governmental interests from
the operation of marketable title acts is undesirable. See Simes and Taylor, op. cit. supra
note 1, at 357.

47 Supra note 12.
of Tufts College, that a mineral title is a separate and distinct estate and that non-user of the mineral interest does not terminate the estate. In any event, there is now no doubt that mineral estates are exempt.

Any rights, immunities and interests appurtenant or relating to separate mineral estates are also expressly exempted. Perhaps the principal reason for this clause is that, when a mineral estate is acquired, it is customary to acquire additional rights to mine and remove coal which are a charge against the surface estate. It can be contended that, in the absence of this clause, such additional rights could be prejudiced by conveyances from surface owners not containing the appropriate exceptions.

It is also provided that no statement recorded or action filed pursuant to the provisions of the Act shall affect real estate registered under "An Act concerning land titles." And the further provision that real estate heretofore or hereafter registered under "An Act concerning land titles," shall be subject to the terms thereof and all subsequent amendments thereto leaves no doubt that property registered under the Torrens system is not subject to the Act. This exemption was probably made because the Act is designed to improve the recording system, and the Torrens system therefore was regarded as beyond its scope.

The Act also contains express exemptions relating to leasehold estates. It provides that it shall not operate to deprive any lessor or his successor as reversioner of his right to possession on the expiration of any lease. And it further provides that it shall not operate to deprive any lessee or his successor of his rights in and to any lease. These exemptions were probably included because long term leases are seldom inconsequential interests or stale claims and their inclusion therefore would have done more harm than good.

48 351 Ill. 146, 184 N.E. 213 (1932).
49 Professor Simes concedes that an argument in favor of including this exception in marketable title acts can be made, because lessors who are out of possession might reasonably overlook the requirement of notice, but he believes it to be of little practical importance. See Simes and Taylor, op. cit. supra note 1, at 357.
An exemption is also made in favor of any interest of a mortgage or interest in the nature of that of a mortgage, where the due date of the mortgage is stated on the face, or ascertainable from the written terms thereof and is not barred by section 11b of "An Act in regard to limitations." This exemption will be particularly helpful where long term mortgagees with general descriptions are involved since, under these circumstances, it would be particularly difficult to prepare proper statements of claim. Therefore, when such mortgages are being drafted, care should be taken to qualify them for this exemption and old mortgages should be reviewed to ascertain whether they qualify. If they do not, statements of claim must be filed to prevent them from being extinguished.

Although, in the Wichelman case, the Supreme Court of Minnesota said that recorded mortgages securing monetary obligations over a term of at least forty years which the fee owner has assumed or taken "subject to," are exempt from the requirement of filing notice if there is a current active relationship with the fee owner, it added that it is desirable to file notice in order to avoid the problem of proving the fact of a sufficiently active relationship. Under the Illinois act, there is no reason to believe that "a sufficiently active relationship" would prevent a mortgage from being barred. A statement of claim therefore, should be filed whenever the due date is not ascertainable from a reading of the mortgage.

As has already been noted, the holder of title cannot invoke the bar of the Act if the premises in question are in the adverse possession of the claimant or some third party. Thus adverse possession at the time the action is brought may exempt some claims and this adverse possession apparently need not be continuous.

50 Professor Simes believes that mortgages should not be excluded from the operation of marketable title acts. See Simes and Taylor, op. cit. supra note 1, at 357.
51 Supra note 12.
52 The Act could be invoked to bar a claim to title based on adverse possession which was perfected more than forty years before and it could possibly bar such a claim which had partially accrued prior to the forty year period.
53 Professor Simes, in his discussion of problems and objectives in drafting a mar-
Finally, the Act will not bar actions to enforce rights, claims, interests, encumbrances, or liens founded upon any event, instrument, or transaction executed or occurring within forty years prior to the commencement of the action. Nor will it bar actions where the plaintiff has filed a proper statement of claim within forty years.

The specific exemptions provided by the Act merely serve to emphasize its widespread applicability and the importance of complying with its requirements in order to preserve claims. While good reasons exist for most of these exemptions, at the same time, they detract from the purpose of the Act by making it impossible to rely upon a title search limited to the comparatively recent record. Because they detract from the purpose of Act, it is reasonable to assume that they will not be liberally construed and the claimant should therefore file a preserving statement unless he is certain that it falls within one of them.

VII. CONSTITUTIONAL VALIDITY

Having considered how the Act operates, it remains to be considered whether there are any constitutional barriers which will prevent the Act from being upheld by the courts as a valid exercise of the police power. It has already been established that marketable title acts are more than statutes of limitation in substance. The constitutionality of this new type of legislation in Illinois, therefore, cannot be predicted with certainty.

It might be contended that the Act should be declared void on the ground that it violates the constitutional prohibition against depriving persons of property without due process of law. The contention that the Minnesota Marketable Title Act

ketable title act, states that it is better for the destructive effect of the statute to be absolute so that a claim cannot be revived by a mere change in possession once it has been extinguished. The alternative is for the destructive effect of the statute to be relative so that claims which have been extinguished may become valid by a shift in possession. See Simes and Taylor, op. cit. supra note 1, at 352.

54 If the constitutional validity of the Act is upheld, it will be upheld on the ground that its requirements are a legitimate exercise of the police power. See Nelson, Conveyancing in New York, 43 Cornell L. Rev. 617, 635 (1958).
retroactively bars vested rights, and therefore, violates the due process provisions of the Minnesota and federal constitutions, was made in the *Wichelman* case.\(^5\) The Supreme Court of Minnesota, however, rejected this contention, saying that no one has a vested right in any particular remedy and that the legislature may change or modify the existing remedies for the enforcement and protection of vested rights in property, as long as an adequate remedy remains.

The answer of the Minnesota Supreme Court goes a long way toward resolving the due process problem under the Illinois act for the reason that it, like the Minnesota act, does not automatically terminate interests already in existence unless the claimant fails to comply with the filing requirement. No cause of action can be barred by the Act unless the filing requirement is not observed. Whether the Act complies with the requirements of due process would therefore seem to hinge upon the reasonableness of the requirement that a statement of claim be filed.

In the *Wichelman* case, the Supreme Court of Minnesota was also confronted with the contention that the application of the Minnesota act as between parties to the same instrument could produce consequences in violation of the contract provisions of the Minnesota and federal constitutions. It rejected this argument for the same reason that it rejected the due process argument. In Illinois, as in Minnesota, the legislature may change or modify the existing remedies for the enforcement and protection of contract rights as long as an adequate remedy remains. If the filing requirement may be regarded as reasonable, it should follow that a claimant will never be deprived of an adequate remedy by the Illinois act.

If the filing requirement were held to be unreasonable, it would be necessary for the Illinois courts to decide whether the Act, by terminating property interests, did violate due process and impair the obligation of contracts, in which case, the Act

\(^5\) *Supra* note 12.
might be held void. Even then, however, efforts would probably be made to sustain its validity by citing cases in which statutes terminating property interests have been upheld. The case of *Livingston v. Meyers*, in which the Supreme Court of Illinois upheld the Mortgage Limitation Act, would be cited. It might be persuasive upon the court because the Mortgage Limitation Act has the effect of extinguishing vested rights.

Other cases which might be cited in an effort to uphold the validity of the Act, if the contingency under consideration occurred, would include *Trustees of Schools v. Batdorf*, in which the validity of a statute limiting the duration of possibilities of reverter and rights of re-entry was upheld; *Jennings v. Capen*, in which a statute terminating the right of a life tenant and remainderman to destroy contingent remainders was upheld; *Prall v. Burckhardt*, in which a statute terminating the possibility of reverter to land for streets was upheld; and *McNeer v. McNeer*, in which a statute abolishing the estate of curtesy was upheld. None of the statutes upheld by these cases are as broad in scope as the Act. However, since it is improbable that the filing requirement will be found to be unreasonable, it seems useless to explore further the consequences of a contingency that probably will not occur.

The requirement that a preserving statement be filed is not merely an alternative to the bringing of an action because, under the Act, it may be necessary to file a statement of claim to preserve a cause of action before it accrues. Statutes of limitation limit the time for bringing an action after the cause of action has accrued. Therefore, the reasonableness of the filing requirement of the Act cannot be completely measured by comparing it to the requirements of statutes of limitation. It would seem, however,
that the filing requirement is comparable to the requirements of existing recording laws\(^6\) and that, since it serves an important public purpose, it will not be found to be unreasonable.\(^6\)

The reasonableness of the filing requirement cannot be doubted when it is compared with the requirements of both recording statutes and limitation statutes. The Act imposes a lesser burden on landowners than did the recording laws because it only applies to those who claim interests of ancient origin.\(^6\) At the same time, it promotes the public welfare by assuring more secure land transactions, just as the recording acts have done. Also, the Act imposes a lesser burden than a statute of limitation because it offers the filing of a statement of claim as an alternative to the bringing of an action in cases where the cause of action has accrued. Furthermore, the Act will never have the effect of shortening existing limitations when a proper statement of claim is recorded.

Even though the Act is retrospective in that it applies to claims that have existed for many years, it operates prospectively in that it provides ample time for the filing of statements based on such claims. The periods of grace provided by the Act give persons with claims already in existence ample time within which to assert such claims. Statutes of limitation which shorten the period for bringing an action are upheld if they give the holder of a claim a reasonable time in which to assert and preserve his rights.\(^6\) The Act, like valid statutes of limitation, provides for this.

Perhaps, the only other basis on which the reasonableness of the filing requirement could be questioned is that no provision is made for the renewal of preserving statements. It has been suggested that provision for successive renewal by periodic re-record-

\(^6\) Simes, *op. cit. supra* note 3, at 47.
\(^6\) The United States Supreme Court upheld a statute that required claimants with existing causes of action to sue within nine months and seventeen days in the case of *Terry v. Anderson,* 95 U.S. 628 (1877). The cases of *Blinn v. Nelson,* 222 U.S. 1 (1911) and *McGahey v. Virginia,* 135 U.S. 662 (1890) hold that a one year period of grace is sufficient as to rights already in existence.
ing is necessary in order to meet the requirements of due process. Unfortunately, the Act does not indicate whether such renewals are contemplated. In fact, the Act does not even state whether a statement filed will remain effective for a period of forty years. However, if the Act is construed so that the filing of a statement will preserve a claim indefinitely, no objection founded upon the due process clause can be maintained. In view of the silence of the Act on this question, this appears to be the probable construction.

In addition to the due process objection, there remains to be considered other grounds upon which the validity of the Act may be questioned. The validity of the Minnesota Marketable Title Act was challenged in the *Wichelman* case with the contention that the exceptions are so arbitrary and discriminatory as to constitute class or special legislation forbidden by the Minnesota constitution. The Supreme Court of Minnesota disposed of this contention by saying that there was nothing to indicate that the legislature acted arbitrarily in classifying the exceptions so that persons similarly situated were arbitrarily treated differently or that the legislature abused its authority.

The same challenge could be made under the Illinois constitution, but it is likely that the Illinois courts will arrive at the same answer. Even though the amendment, exempting interests created or held for public utility purposes, changed the original intent of the Act by permitting certain unused easements more than forty years old to endure without the filing of a claim, it would seem that it did not go so far that it will be found to be arbitrary and discriminatory. Also, it would seem that none of the other exemptions could be characterized as arbitrary or discriminatory.

Another possible ground upon which the validity of the Act might be questioned is that, unlike most statutes of limita-

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67 *Recent Statute*, supra note 9, at 888.
68 *Supra* note 12.
tion, its bar can be asserted against anyone except the United States. This objection, however, is without merit. It is established that the State of Illinois may constitutionally be barred of its rights when a statute expressly so provides. The usual extended limitation applicable to persons under disability is founded upon a public policy established by statutes rather than upon a constitutional mandate.

A final constitutional objection, and one which was argued in the Wichelman case, is that the terminology of the Act is so vague and ambiguous as to render it meaningless. In the Wichelman case, this argument was directed at the term "claim of title based on a source of title," and the Supreme Court of Minnesota rejected it on the ground that it was able to define the purpose and intent of the legislature and to construe the Minnesota act in a reasonable manner to support and give effect to that purpose and intent. If this same objection is made in Illinois with respect to the term "chain of title" or the term "arising or existing," it is likely that the Illinois courts will dispose of it as it was disposed of in Minnesota. This result is more probable because these terms appear in the Iowa Marketable Title Act, and they had been construed by the Supreme Court of Iowa prior to the time that the Illinois act became law.

For the above reasons, it seems probable that the Supreme Court of Illinois will uphold the constitutional validity of the Act when it is called upon to do so. In other states, no marketable title act with a filing requirement similar to that of the Illinois Act has been held unconstitutional and the Supreme Courts of Iowa and Minnesota have upheld the marketable title acts in

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70 Note, 38 Ill. L. Rev. 418 (1944).
71 Supra note 12.
72 Furthermore, the Act enumerates circumstances under which a person will be deemed to hold chain of title.
73 In Tesdell v. Hanes, supra note 38, the Supreme Court of Iowa indicated that the Iowa act was enacted with ample legislative authority. Previously, in both Applesby v. Farmers State Bank of Dows, 244 Iowa 288, 56 N.W.2d 917 (1953) and Swanson v. Ponzralo, 238 Iowa 693, 27 N.W.2d 21 (1947) the court referred to its statement in Lane v. Travelers Ins. Co. of Hartford, Conn., supra note 41, to the effect that statutes giving greater stability to record titles are desirable.
74 Wichelman v. Messner, supra note 12.
those jurisdictions. The Kansas\textsuperscript{75} and Pennsylvania\textsuperscript{76} statutes aimed at barring stale claims were held unconstitutional because, unlike the Illinois act, they required that suit be brought within a short time even if the cause of action had not accrued.\textsuperscript{77}

\textbf{VIII. Effect}

Although the Act is broad in scope, there are many interests which it will not affect. The operative portions of the Act affect no interest that is not at least forty years old. Furthermore, the Act expressly provides that it shall not extend the period for the beginning of any action or the doing of any other required act under any statutes of limitation. Therefore, claims that do not endure for forty years, such as judgment liens, mechanics' liens, and inheritance tax liens, cannot be affected by the operation of the Act. Actions on many other types of claims will be barred by statutes of limitation within less than forty years after they arise assuming that they accrue within the first few decades after they arise.

The Act has no effect whatever upon certain numerous interests that are more than forty years old. Thus it can have no effect upon the numerous interests that it expressly exempts. It can have no effect upon claims of the United States, regardless of their age, until such time as Congress assents. And no holder of title can use the Act to bar a claim unless he has a forty year chain of title. As a result, the Act does not enable reliance on a forty year title search.\textsuperscript{78}

In addition, the Act protects the rights of persons in possession. The holder of title cannot bar any claim, regardless of its age, if the land is in the adverse possession of the claimant or even some third person. Although the Act will not bar actions on many

\textsuperscript{75} \textit{Murrison v. Fenstermacher}, 166 Kan. 568, 203 P.2d 160 (1949).
\textsuperscript{76} \textit{Girard Trust Co. v. Pennsylvania R. Co.}, 364 Pa. 576, 73 A.2d 371 (1950).
\textsuperscript{77} Brodkey, \textit{Current Changes in Illinois Real Property Law}, 10 DePaul L. Rev. 567, 575 (1961). Mr. Brodkey states that it is probable that the constitutionality of the Act will be upheld.
\textsuperscript{78} Even though the Act does not make shorter title searches possible, it may simplify the examining process because it will enable many instruments to be disregarded.
claims even if an attempt is made by the holder of title to assert its bar, it is more reliable than most statutes of limitation in that it does not contain the usual exceptions in favor of persons under disability, and in that the State of Illinois is expressly made subject to its provisions.

In the area in which the Act is operative, it will destroy property interests. When its bar is asserted in actions upon claims for which preserving statements have not been filed, it will have the effect of extinguishing these interests as well as barring them. Furthermore, since the Act’s first and most important grace period expired on July 14, 1961, its bar can already be asserted against actions on numerous forty year old claims for which statements have not been filed in the time allotted. As time goes on it will continue to effectively extinguish more and more interests.

Although the Act will cause numerous claimants, especially those whose claims have not accrued within the forty year period, to lose their interests, it has many advantages. By modifying the recording law to limit the time within which a recording has the effect of notice to subsequent purchasers, the Act restores the effectiveness of the recording system in facilitating transactions in land. This modification of the recording system was necessary to preserve the stability of record ownership which has been increasingly threatened by the accumulation of stale claims which hamper marketability. It was necessary for legislative action to clear land titles of these stale claims in order to prevent them from becoming an increasing barrier to marketability.

Since the Act has the effect of modifying the recording system by limiting the time within which recording has the effect of notice, a liberal construction of the provision that it shall not affect the operation of any acts or case law governing the recording or the failure to record any instruments affecting land is called for. Any conflict here can easily be resolved for the reason that, while the Act has the effect of modifying the recording system, it actually operates merely to bar actions.
While the Act appears to accomplish the legislative purpose of simplifying and facilitating land title transactions, its operation may result in some inequities. As previously suggested, it might have been better to have a different requirement with respect to possession so that a squatter could not prevent a record owner from getting marketable title. However, in general, the Act serves the important public purpose of promoting the marketability of land titles in what appears to be an efficient and equitable way.\textsuperscript{79} And the public purpose served by the Act off-sets the effect it has of destroying aged interests if proper and timely statements of claim are not filed.

\textsuperscript{79} Simes, \textit{op. cit. supra} note 3, at 42.