Proposed Title Legislation: A Suggested Solution to the Problem of "Marketable Title"

Ray J. Aiken
PROPOSED TITLE LEGISLATION:
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I. INTRODUCTION: STATEMENT OF THE PROBLEM

In contrast to the situation a half-century ago, when a given parcel of land passed through a title transaction an average of once every twenty-five to thirty years, the average in today's era of expanded commerce and mobile populations is less than once every seven years. Further, the great tracts of wild and undeveloped lands which once predominated in Wisconsin have yielded in substantial degree to ever-broadening programs of development. Consequently, the significance of the land record as a prime index of title has declined in favor of land use.

In the first instance, long-recognized deficiencies in title practice, formerly tolerable, have been intensified by these changes in land use and the increased activity in the real estate market, and the need for improvement has become more apparent. In the second instance, these changes have suggested a change in substantive approach to the problem.

The ultimate source of dissatisfaction with present title law and practice is its intensified tendency to exaggerate errors of form and record, often to the prejudice of interests which are unblemished in fact. This is the result of an attempt to prevent wholesale usurpation of legitimate titles in an earlier day, when, possessory protections being absent, the title examiner was compelled to place heavy, even exclusive emphasis upon the formal record. Thus a defect in the formal record came to constitute the equivalent of a defective title in fact, it being not the fact that a grantor had good title, but the appearance of that fact of record that rendered a title merchantable. The effect was a restriction of free marketability, which is inconsistent with the general commercialization of real estate.

The function of title examination is to provide assurance that one's title is legally invulnerable to attack, i.e., good in law and in fact. An assurance that a title is merchantable or marketable (the terms are synonymous), is an assurance that the title appears from the record to be good, and such assurance performs this function only on the assumption that the record speaks "the truth, the whole truth, and nothing but

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1 Stack v. Hickey, 151 Wis. 347, 138 N.W. 1011 (1912); Douglass v. Ransom, 205 Wis. 439, 444, 237 N.W. 260, 262 (1931).
2 Douglass v. Ransom, 205 Wis. 439, 446, 237 N.W. 260, 263 (1931).
the truth.” However, this assumption may be unfounded in law or in fact in either of two generic ways.

First, the record may deceive in what it affirmatively declares. Some examples would be cases of forgery or other want of authority to sign deeds, nondelivery, mistaken or fraudulent misdescription of parcels conveyed, and misdeclaration of marital status.

Secondly, the record may mislead in what it omits to say, as in cases of unrecorded deeds, satisfactions, or other conveyances; incomplete evidences of corporate existence or power, defective instruments of authority of agents, inadequate evidences of jurisdictional foundation for judgments, ambiguous proofs of identity of persons, and omitted declarations of marital status. Each such omission produces an apparent hiatus of record title, total or partial, and some such hiatus becomes the basis of all objections to title.

Faced with such a hiatus, the title examiner may, objectively, draw either of two inferences. He may infer from the silence of the record, or from the ambiguity of its statement, that the missing evidence, if supplied, would be favorable to title. On the other hand, he may infer that the missing information would be unfavorable to title, i.e., he may infer the existence of a prior outstanding claim adverse to or inconsistent with the estate or interest which his client intends to purchase.

Under present law and practice, the alternative possibilities are generally resolved adversely to marketability of title. A grantor who does not state whether he is married or single is, for purposes of marketability, assumed to have been married until proven single. A corporate representative, an agent, or a fiduciary whose instruments of authorization are limited or not fully shown is assumed to have acted without authority until affirmatively shown to have been fully, properly, and expressly authorized. A judgment is assumed to have been entered without jurisdiction unless the specific facts necessary to establish jurisdiction are made to appear. It has become the settled conviction, in sum, that an omission or ambiguity of record fact excites in the ordinary prudent grantee of lands so powerful a provocation to inquiry that his *mala fides* is conclusively implied from his failure to heed the same.

The impact of such a conviction is manifested in the overtechnic-ality which must, and indeed does, flourish. In fairness, it should be pointed out that there are at least two bases upon which a degree of such “fly-specking” can be practically and logically justified. First, since the examiner is compelled to accept a “clean” record without questioning its complete authenticity, he is conservatively inclined to stretch that assumption no further than he must. Every “cloud” becomes a source of deepest suspicion, regardless of its individual merits. Second, liberality on his part may very well collide with illiberality on the part of a subsequent examiner, it being a “matter of common knowl-
edge that some examiners of title are more particular and technical than others about passing titles."
3 It becomes embarrassing, to say the least, when a title examiner must justify his leniency to a client in whose hands the title suddenly become unmarketable, in fact if not in law. More seriously, the impact of this conviction upon the facile creation, transfer, or mortgaging of real property interests elevates the unreal, the imagined, the merely possible interest which is adverse to the highly probable title, to the status of a cumbersome and contract defeating obstacle to the ready achievement of such purposes. Feudal attitudes to the contrary notwithstanding, there is a dynamic and intelligent commerce in real estate today, one which modern legislation can afford neither to ignore nor to discourage.

The most technical and the most liberal of title examiners could agree entirely, however, that a title which is demonstrably invulnerable to attack, i.e., good in fact, meets any standard of title examination; and they could further agree on the converse, that a title which is demonstrably vulnerable to attack meets no standard. So long, however, as the land record remains broadly open to conflicting possibilities of inference, legal or factual, the issue of marketability must always remain a highly subjective matter, resolved on substantially an ad hoc basis. The improvement of title law and practice should therefore achieve, at least in some measure, a greater predictability of interpretation of title evidences.

II. ALTERNATIVE APPROACHES TO THE PROBLEM

Two generic avenues of approach are open, though there is not absolute necessity of electing one to the complete exclusion of the other.

First, "outstanding claims adverse to or inconsistent with" apparent title could be legislatively or judicially declared to be, in specified situations, unenforceable, void, barred or extinguished. Secondly, marketability could be redefined, legislatively, judicially or through organized action of the Bar, so as to prohibit, in specified instances, certain inferences adverse to title.

The first approach operates fundamentally against the owner of the outstanding claim, if such claim exists in fact, and therefore may expropriate property. Whether or not this can be done without violating traditional notions of due process depends, to a large extent, upon the specific circumstances under which it is attempted. For the purposes of this discussion, however, nothing shall be assumed in this regard, i.e., it will not be assumed either that such extinguishment violates or does not violate due process.

The second approach operates fundamentally against the title examiner and his client, the purchaser, in that it effectively compels

3 Id. at 448, 237 N.W. at 263.
him to accept and pay full value for a title which may, in fact, be vulnerable to legal attack. While centuries of experience have been had with the various title-clearing devices of the first category, experience with those of the second category is comparatively modern, and is limited in scope.

A. JUDICIAL OR LEGISLATIVE VOIDING OF OUTSTANDING CLAIMS ADVERSE TO OR INCONSISTENT WITH APPARENT TITLE
1. Actions and special proceedings in rem to quiet title, or actions in personam having the same effect. Under modern redefinition, acquisition of jurisdiction over local actions requires only procedures reasonably calculated to give notice. However, outstanding claims are judicially extinguished, with legislative sanction, regardless of whether such notice is actually received. Also,

[The owner of an equitable interest] . . . may not sit by and permit judgment to be taken in either a legal or equitable action with the expectation that he will not be concluded thereby as in other cases. He must at the proper time assert his rights under the circumstances of the particular case in the manner prescribed by law.

2. Statutes of limitations, and actions to establish titles acquired thereunder. A usurpation of title by disseisen, which extinguishes legitimate interests, occurs if an entry is made which is actual, nonpermissive, notorious, exclusive and uninterrupted for twenty years. If the entry is under a "color of title" instrument, valid or invalid, recorded or unrecorded, usurpation of title occurs after only ten years of such disseisen. The action to establish titles so acquired, and to avoid titles so extinguished, is brought under section 281.02 of the Wisconsin Statutes. However, adverse possession is strictly construed, and it must be clearly proved that the adverse user is truly hostile to and inconsistent with the rights of the true owner. The statutes run, therefore, only against those having the right of possession at the time of entry, and consequently do not run against remaindermen, reversioners, or future interest holders generally. The statutes also run only against those persons having legal capacity to resist.

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5 Wis. Stat. §§281.01, 235.60 (1963). Wis. Stat. §269.47 (1963) provides for defense even after final judgment when service is by publication, but also provides that "... title to property, sold under such judgment to a purchaser in good faith, shall not thereby be affected."
7 Wis. Stat. §§330.08-.10 (1963); Shephard v. Gilbert, 212 Wis. 1, 249 N.W. 54 (1933).
8 Wis. Stat. §§330.06, .07, .10 (1963); Marky Investment Inc. v. Arnezeder, 15 Wis. 2d 74, 112 N.W. 2d 211 (1961); Peters v. Kell, 12 Wis. 2d 32, 106 N.W. 2d 407 (1960).
9 Zeisler Corp. v. Page, 24 Wis. 2d 190, 198, 128 N.W. 2d 414, 418 (1964).
It should be noted that the tolling of the statute for minority or
disability does not necessarily extend the ten year ultimate limitation,
even where entry is made against a minor or incompetent. For example,
in case of entry under a forged or fraudulent color of title instrument
against a minor sixteen years old, limitation runs ten years after entry,
not fifteen. This is so because section 330.135(1) merely extends the
limited time sufficiently to allow five years for bringing an action after
the disability is removed. However, the limitation would be fifteen
years if the minor were only eleven years old at the time of entry,
since he would again be allowed five years after removal of his dis-
ability. Note also that tacking of disabilities is not provided for. The
result is that interests may be extinguished even though the owner is
not at any time in a position to resist. Nevertheless, because of possible
factual or evidentiary problems, titles founded on adverse possession
are, at best, of doubtful marketability.

3. Recording or Nonrecording acts and equities.

(a) Conventional form—Statutes of this type conventionally ex-
tinguish unrecorded (and otherwise unnoticed) interests upon the rec-
ord of a subsequent conveyance to a bona fide purchaser. Because
Wisconsin's statute, section 235.49, establishes no "period of grace"
and contains no "saving provisions" for minors or incompetents, it
can operate within very short periods of time. However, it is limited
to cases in which one interest-holder double-conveys his interest, i.e.,
it requires that there be a common grantor. Thus, the conven-
tional recording act cannot reach the case of hiatus (whole or partial,
true or technical), which is the source of substantially all title objection.

(b) Judicial estoppels by nonrecording—It is well established in
Wisconsin that a bona fide purchaser, induced to rely to his detriment
upon record title, may extinguish a prior unrecorded interest even
though he fails to qualify under section 235.49 by reason of his failure
to record ahead of the prior interest. The doctrine rests upon estoppel
by laches. The principle has not been applied, however, to cases other
than those of double-conveyance by a common grantor, so the record
hiatus is unsolved by this device.

(c) Stale record acts (Non-current recording)—Most modern
"marketable title acts," including Wisconsin's section 330.15, are en-
actments of this type. Wisconsin's statute purports to extinguish, in
favor of purchasers "for value," all interests except easements, cove-
nants, and governmental and public utility interests, of which no notice
appears of record within thirty years of the time such purchaser's in-

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11 Swearingen v. Robertson, 39 Wis. 462 (1876).
12 Fallass v. Pierce, 30 Wis. 443 (1872).
14 Id. at 369, 106 N.W. at 845.
Easements and covenants are extinguished under the same conditions after sixty years. As originally enacted in 1941, the statute operated only in favor of bona fide purchasers and their successors. Since a true owner in actual possession would give notice of his interest by the fact of his possession, the statute could not operate originally to divest the titles of non-recording owners in possession. However, in order to permit such owners to institute quiet title proceedings despite their nonrecording, subsection 330.15(4) provided that the section shall not apply to any action commenced by an owner in possession.

The wording was the unfortunate consequence of an equally unfortunate opening sentence, the product of an again unfortunate misclassification of the statute as a statute of limitations. Section 330.15 is not a statute of limitations, since its period does not begin to run upon the arising of the cause of action. Instead, its period runs backward from the time when the purchaser for value arises, and it is therefore a form of nonrecording act. Upon the erroneous assumption that it was a statute of limitations, or upon the assumption that it would be constitutionally or otherwise more acceptable if it were thought to be one, section 330.15(1) began with the typical phrase of such statutes: "... no action... shall be commenced. ..." Therefore, it required some sort of exemption for quiet title actions by owners in possession.

The amendment for 1943 was also somewhat unfortunate. Acting on the assumption that a record more than thirty years old nevertheless continued to afford constructive notice, it was suggested that the statute in its original form could never operate, because no bona fide purchaser could arise regardless of the antiquity of the voided interest. Rather than limit the notice-giving power of ancient records, the amendment reduced the original bona fide purchaser requirement to the present "purchaser for value." Probably unwittingly, the amendment thereby stripped away much of the protection formerly accorded to nonrecording "owner in possession," since if he ever lost possession, the amendment prevented him from regaining it even against a land pirate. This spectre was made the more ominous by the failure of the section to define possession, so that, conceivably and conventionally, an interest not currently recorded was completely "up for grabs" whenever its owner was physically absent from the premises.

Wis. Laws 1941, ch. 293.
"... no action ... shall be commenced ... which is founded upon any unrecorded instrument executed more than 30 years prior to the date of commencement of the action ... ." WIS. STAT. §330.15(1) (1963).
Wis. Laws 1943, ch. 109, s. 2.
WIS. STAT. §330.15(6) (1963): "The word 'purchaser' as used in this section shall be construed to embrace every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration and also every assignee of a mortgage or lease or other conditional estate."
Despite these well recognized difficulties with the form of the statute, its principle has stood the test of experience. Title standards adopted by the Bar have stipulated that it shall be given force. More to the point, however, the first case has yet to arise in which the statute has operated to actually extinguish a legitimate interest on the basis of nonrecording; and even in quarrels over marketability of titles, no case has presented a test of the statute’s basic validity. The irresistible conclusion, in a purely empirical sense, is that record defects of all kinds very rarely reflect actual vulnerability of titles.

4. "Curative" Statutes. In the main, existing statutes of this type simply accommodate past transactions to modifications of formal requisites. Thus, wartime deeds, or deeds lacking, for example, seal, witnessing, acknowledgement, or specific corporate charter authorization, which were previously invalid or unrecordable, were by curative statutes declared valid or recordable, either generally or after a stated period from execution or record. In a broad sense, all title legislation is essentially "curative.” In the form in which attorneys have become accustomed to curative statutes, they are confined to treatment of mere formalities of execution. At least one of Wisconsin's curative statutes purports summarily to "cure” defects of a substantive sort.

B. REDEFINITION OF "MARKETABILITY" THROUGH ACTION OF THE LEGISLATURE, BENCH OR BAR

1. Marketable Title Acts. Nomenclature presents difficulty in this area. Although section 330.15 has never been denominated a "marketable title act,” neither it nor the Michigan marketable title act declares titles "marketable,” in the sense of declaring that a purchaser entitled to marketable title must accept them. Instead, both operate as nonrecording acts in that they affirmatively extinguish claims of which no notice appears of record within a stated number of years. The “Model Acts” of Professors Simes and Taylor began with a slightly revised version of the Michigan act, and proceeded in a rather heterogenous fashion to

21 "Section 330.15 of the Statutes shall be applied and availed of in passing upon titles in those situations to which that section is by its terms applicable," REAL ESTATE TITLE STANDARD No. 4 (Wisconsin State Bar).

22 See Wis. STAT. §§235.15 (use of forms, sufficient in law but other than as prescribed by statute); 235.18 (conveyance not under seal); 235.19(12) (defective acknowledgement; 235.20 defective execution); 235.21 (defective seal); 235.25 (instrument executed by person in war service); 235.48 (conveyances made under prior statutes); 235.68 (defective conveyances of farm or homestead property to satisfy indebtedness); and 235.69 (1963) (variety in names of parties). See also Wis. STAT. §§992.01-07 (1963).

23 Wis. STAT. §235.20 (1963), with some ambiguity, purports to validate corporate conveyances executed "by the proper corporate officers . . . [but] without corporate authority" after ten years of record, and does so without regard to good faith or the absence of it on the part of the claimant benefitted. This provision, therefore, amounts to a summary validation of a species of forgery.


expand upon the principle so as to cover title problems within Michigan's forty year period.

Wisconsin's section 235.69, relating to name variances which have appeared of record for twenty years, is a "marketable title act" in a far more restricted sense, in that it simply declares a title containing such a defect to be "not unmerchantable." Both on its face and in practical operation, the statute is innocuous. It is practically inconceivable that, even initially, the variants with which it deals suggest forgeries. It is more inconceivable that the title could be upset by the appearance of the legitimate titleholder after twenty years. Furthermore, it is extremely doubtful that the courts would regard a name variance, after such a time, as a basis for "reasonable doubt," so as to make title unmarketable, regardless of the statute.

The principle of the statute is more debatable. It compels the title examiner to regard as marketable a title which of record, is not conclusively invulnerable to legal attack. In so doing, it rather plainly impairs the obligation of contract between seller and purchaser by requiring the latter to accept less than he bargained for. Suppose the unlikely event occurred, i.e., the legitimate titleholder appears, exposes the forgery and seeks to eject the purchaser. Section 235.69 itself arms the purchaser with no defense; and in most cases he finds his defense, if at all, only in enactments of the first category explored above.

2. Prima Facie Evidence Enactments. Such enactments, prime Wisconsin examples of which are sections 235.46 (relating to affidavits stating facts of record) and 992.08 (relating to certificates of county tax sales) are a clumsy and indirect, but apparently effective way of accomplishing much the same thing as does section 235.69. That the legislative mind was not centered upon the problem of judicial admissibility of such affidavits is evident from the fact that the provisions were far removed from Chapters 327 and 328 of the Wisconsin Statutes, which deal with that subject. Unquestionably, the force of these sections was to compel a title examiner to accept such "evidence" as proof of marketability, and this appears to be the settled construction.26

Statutes of this type go, at least arguably, a small step beyond section 235.69, in that they afford the title examiner and purchaser documentary proof upon which to build at least a prima facie case in favor of his title. But of what importance is this evidence? Either the questioned fact will never be in issue, or it will come into issue when the title is directly challenged. If the latter, it can hardly be assumed that the challenger will come into court with no evidence—simply putting the purchaser to his proofs.

The fact that such statutes, especially section 235.46, have "worked well" testifies eloquently to the highly significant fact that record defects rarely reflect any real likelihood that the title is vulnerable to attack, and that title objection based upon such defects is, therefore, without objective justification. The best argument that can be made for "prima facie evidence" statutes is that they afford a seller a phantom weapon with which to put to rest phantom assaults upon his title. By the same token, however, real defects of title are immune from such statutes. They therefore do not reach the essential problem: the conflicting possibilities of inference, legal and factual, in determining the marketability issue.

3. Bar Association Title Standards. To the extent that title standards may be enforceable against both title examiners and purchasers, they operate in very much the same fashion as do marketable title and prima facie evidence statutes, discussed supra, and judicial redefinitions of marketability, discussed post. They are distinguishable only in that they may receive a lesser degree of judicial recognition, and in that they may yield more readily to practical problems of original enactment and change. They can properly reach no further, however, than existing legislation and judicial decision will carry them; they must amount simply to a recitation of particular applications of settled law. Within their limitations however, improved title standards can, and do, improve title practice. But if there are problems inherent in existing title law itself, no improvement of title standards can reach such problems.

4. Judicial redefinition of marketability. The Wisconsin Supreme Court, in Haumersen v. Sladky,27 clearly implied that the title examiner in that case had carried improbable technicality beyond even the wide discretionary limits declared in Douglass v. Ransom.28 This case illustrates the possibility of seeking to improve title practice by resort to the courts. However, the case also illustrates the limitations of that approach, and the fatal weakness thereof. Like the title examiner himself, the court may be torn between inclinations to liberality and conservatism. Like the title examiner himself, the court may be unable to discount entirely the possibility that a title which it forces upon an objecting purchaser may prove defective in fact. In any event, it is plain that individual litigants will be loath to carry the burden of achieving improved title practice through the courts; and that, in view of the variety of defects to be attended to, judicial redefinition of a comprehensive sort would be painfully slow.

5. Broader Use of Title Insurance. This possibility probably represents the most promising approach in this category. Marketability of title and insurability of title are not comparable terms, principally because the

27 Ibid.
28 205 Wis. 439, 237 N.W. 260 (1931).
insurer's appraisal of a given risk will normally reflect the situation's realistic potentialities, not merely its literal or technical implications.

This alternative has, in common with the preceding four devices, the characteristic that it does nothing to improve the title itself, though it ordinarily operates to produce easy marketability. It is, by present experience, hardly less expensive—in terms of its total impost on the real estate industry—than any other device for title assurance; and this may be true precisely because it does nothing to improve the title. In individual cases, reliance upon title insurance may operate to impose extreme hardships, by way of underinsurance, technical policy defenses, or assertions of rights of subrogation against uninsured vendors or mortgagors. The ultimate shortcoming of the title insurance device, however, is the practical difficulty in achieving and maintaining protection of the many thousands of title transactions on an individual-policy basis. Present title practice cannot be expected to yield overnight to any near-universal substitution of title insurance.

III. PROPOSED WISCONSIN STATUTE SECTION 235.491

The Title Legislation and Standards Committee of the State Bar of Wisconsin, at its June, 1963 section meeting, approved the following proposed statute for presentation to the state legislature:

Section 235.491. Notice from the record.

(1) A purchaser for a valuable consideration, without notice as defined in sub. (2) hereof, and his successors in interest, shall take and hold the estate or interest purported to be conveyed to

29 For the history of the proposed legislation, and a discussion of an earlier draft of the proposal, see Lovejoy, Proposed Title Legislation, 1963 Wisconsin Bar Bulletin 45, (April); Aiken, Commentary on Proposed Title Legislation, 1963 Wisconsin Bar Bulletin 49, (April).

30 Enactment of the proposed section 235.491 would necessitate amendment of section 75.30 to read:

Section 75.30.

(1) Five-Year Limitation. In addition to other applicable limitations, no action shall be brought by the original owner of the recovery of lands purporting to be conveyed by a tax deed, whether or not void on its face, after the expiration of five years from the date of the recording thereof, in cases where the grantee in the tax deed shall have taken actual possession of such land within two years after the date of such recording and shall have actually and continuously maintained such possession to the end of such period of five years.

(2) Affidavit of Possession. Proof of such possession of the grantee and the record of the tax deed shall be conclusive evidence of the legality and effectiveness of the deed and of the title conveyed. As a means of proving possession the grantee may, at any time after five years from the date of the tax deed, record an affidavit that such deed was issued and recorded and that the grantee is in possession of the real estate described therein as defined in section 75.31 and has been in such possession for a continuous period commencing within two years after such deed recording and has actually and continuously maintained such possession to the end of such period of five years. A certified copy of the record of any affidavit of possession shall constitute prima facie evidence of the facts recited therein.

(3) Exclusions and Application. The term "grantee" shall include any subsequent owner of the title of the lands. The term "former owner" shall
such purchaser free of any claim adverse to or inconsistent with such estate or interest, if such adverse claim is dependent for its validity or priority upon:

(a) Non-delivery. Non-delivery, or conditional or revocable delivery, of any recorded conveyance, unless the condition or revocability is expressly referred to in such conveyance or other recorded instrument.

(b) Conveyance outside chain of title and not identified by definite reference. Any conveyance, transaction or event not appearing of record in the chain of title to the real estate affected, unless such conveyance, transaction or event be identified by definite reference in an instrument of record in such chain. No reference shall be definite which fails to specify, by direct reference to a particular place in the public land record, or, by positive statement, the nature and scope of the prior outstanding interest created or affected by such conveyance, transaction or event, the identity of the original or subsequent owner or holder of such interest, the real estate affected, and the approximate date of such conveyance, transaction or event.

(c) Unrecorded extensions of interests expiring by lapse of time. Continuance, extension or renewal of rights of grantees, purchasers, optionees, or lessees under any land contract, option, lease or other conveyance of an interest limited to expire, absolutely or upon a contingency, within a fixed or determinable time, where two years have elapsed after such time, unless there is recorded a notice or other instrument referring to such continuance, extension or renewal and stating or providing a later time for the enforcement, exercise, performance or termination of such interest and then only if less than two years have elapsed after such later time. This paragraph shall not apply to life estates, mortgages or trust deeds, nor shall it inferentially extend any interest otherwise expiring by lapse of time.

(d) Non-identity of persons in chain of title. Non-identity of persons named in, signing or acknowledging one or more related conveyances or instruments affecting real estate, provided the persons appear in such conveyances under identical names or under variants thereof, including inclusion, exclusion or use of: commonly recognized abbreviations, contractions, initials, or foreign, colloquial or other equivalents; first or middle names or initials; simple transpositions which produce substantially similar pronunciation; articles or prepositions in names or titles; description of entities as corporations, companies, or any abbreviation or contraction of either; name-suffixes such as senior or junior; where such identity or variance has appeared of record for five years.

(e) Marital Interests. Dower or homestead of the spouse of any transferor of an interest in real estate, where the re-

not refer to or include any real estate title or interest therein while owned, occupied and used by any person defined in section 196.01 or 195.02 or any trustee or receiver of any such person or any mortgagee or trust deed trustee or receiver thereof. This section shall apply to tax deeds heretofore or hereafter recorded, but the commencement of any action shall not be precluded by this section until two years after its effective date.
corded conveyance purporting to transfer the same states that the person executing it is single, unmarried or widowed; or fails to indicate the marital status of such transferor, and where such conveyance has, in either case, appeared of record for five years.

This paragraph shall not apply to the interest of a married woman who is described of record as holder in joint tenancy with such transferor.

(f) Lack of authority of officers, agents, or fiduciaries. Any defect or insufficiency in authorization of any purported officer, partner, agent or fiduciary to act in the name or on behalf of any corporation, partnership, principal, trust, estate, minor, incompetent or other holder of an interest in real estate purported to be conveyed in a representative capacity, after the conveyance has appeared of record for five years.

(g) Defects in judicial proceedings. Any defect, or irregularity, jurisdictional or otherwise, in an action or proceeding out of which any judgment or order affecting real estate issued after the judgment or order has appeared of record for five years.

(h) Non-existence, incapacity or incompetency. Non-existence, ultra vires act or legal incapacity or incompetency of any purported person or legal entity, whether natural or artificial, foreign or domestic, provided the recorded conveyance or instrument affecting the real estate shall purport to have been duly executed by such purported person or legal entity, and shall have appeared of record for five years.

(i) Facts not asserted of record. Any fact not appearing of record, but the opposite or contradiction of which appears affirmatively and expressly in a conveyance, affidavit or other instrument of record in the chain of title of the real estate affected for five years. Such facts may, without limitation by non-inclusion, relate to age, sex, birth, death, capacity, relationship, family history, descent, heirship, names, identity or persons, marriage, marital status, homestead, possession or adverse possession, residence, service in the armed forces, conflicts and ambiguities in descriptions, identification of any recorded plats or subdivisions, corporate authorization to convey, and the happening of any condition or event which terminates an estate or interest.

(j) Defects in tax deed. Non-existence or illegality of any proceedings from and including the assessment of the real estate for taxation up to and including the execution of the tax deed after the tax deed has been of record for five years.

(k) Interests not of record within 30 years. Any interest of which no affirmative and express notice appears of record within thirty years.

(2) A purchaser has notice of a prior outstanding claim or interest, within the meaning of this section wherever, at the time such purchaser's interest arises in law or equity:

(a) such purchaser has affirmative notice apart from the record of the existence of such prior outstanding claim, including notice, actual or constructive, arising from use or occupancy of the real estate by any person at the time such purchaser's interest therein arises, whether or not such use or occupancy is exclusive;
provided, however, that no constructive notice shall be deemed to arise from use or occupancy unless due and diligent inquiry of persons using or occupying such real estate would, under the circumstances, reasonably have disclosed such prior outstanding interest; nor unless such use or occupancy is actual, visible, open and notorious; or

(b) there appears of record in the chain of title of the real estate affected, within thirty years and prior to the time at which the interest of such purchaser arises in law or equity, an instrument affording affirmative and express notice of such prior outstanding interest conforming to the requirements of definiteness of subsection (1) (b); or

(c) the applicable provisions of paragraphs (c) to (k) inclusive of subsection (1), requiring that an instrument have remained for a time of record, have not been fully satisfied.

(3) This section shall not be applied to bar or infringe any prior outstanding interest in real estate:

(a) while owned, occupied or used by any public service corporation as defined in section 196.01 or any railroad corporation as defined in section 195.02, or any trustee or receiver of any such corporation, or any mortgagee or trust deed trustee or receiver thereof; nor any such interest while held by the United States, the state or any political subdivision or municipal corporation thereof; or

(b) which, at the time such subsequent purchaser's interest arises, is unplatted, vacant and unoccupied, unused, unimproved and uncultivated; except that this subsection (b) shall not apply to prior interests dependent for validity or priority upon the circumstances described in paragraphs (a), (b), (j) and (k) of subsection (1).

(4) The term "chain of title" as used in this section shall include instruments, actions and proceedings discoverable by reasonable search of the public records and indices affecting real estate in the office of the register of deeds and in probate and of clerks of courts of the counties in which the real estate is located; a tract index shall be deemed an index where the same is publicly maintained.

(5) Nothing in this section shall be construed to raise or support any inference adverse or hostile to marketability of titles.

IV. WHAT IS THE GENERAL PRINCIPLE OF THE PROPOSED LEGISLATION?

It should be noted that the proposed legislation makes no exclusive choice between the various alternative approaches to the problem. It anticipates the continued utilization of all of them, and would not be adverse to their expansion and liberalization. However, the fact that no exclusive choice is made should not dispense with choice altogether. Title practice will hardly be improved if it continues to become more complex and multiprincipled. This was the chief difficulty with other
proposals studied and rejected by the Title Legislation and Standards Committee.\(^{31}\)

The current proposals adopt the "non-current recording" principle of section 330.15 of the Wisconsin Statutes, and apply that principle to a small set of selected transactions less than thirty years old. As in the original form of that enactment,\(^{32}\) the proposals operate only in favor of bona fide purchasers, and give full sway to constructive notice arising from actual use or occupancy. They correct any supposition, arising from form or placement in the statute books, that they are "statutes of limitations" in any proper sense of that term. Therefore, no specific provision to exempt actions by "owners in possession" is required. They meet the problem of constructive or actual notice from old records directly, by depriving such records of their notice-giving power, as against "otherwise" bona fide purchasers. Indeed, were subsection (1)(a)-(j) inclusive deleted from the proposal, leaving only (1)(k), "Interests not of record within 30 years," the proposal would represent simply a restatement of section 330.15 as originally enacted, involving but two substantive modifications.

First, the nonrecording period for easements and covenants would be reduced from sixty to thirty years. Second, notice from possession would have been defined, by (2)(a) and (3)(b) of the proposal, so as to permit notice from non-exclusive possession, limit notice from occasional or seasonal occupancy, and exclude wild and undeveloped lands from operation of the section.\(^{33}\) In other respects, the definition of "notice from possession" stated in (2)(a) appears to correspond to existing case law.\(^{34}\)

Apart from the fact that the Bar has generally lent its approval to the principle of section 330.15 as the best device for improvement of title practice, the proposals favor that principle over the suggested alternatives for reasons generally implicit in the foregoing discussion of the alternatives themselves.


After thorough study, the Title Legislation and Standards Committee elected to abandon the Simes-Taylor approach. It was felt that these proposals offered no single-principled scheme by which a greater predictability of interpretation of title evidences might be achieved, and that Wis. Stat. §330.15 (1963) formed a more familiar and better base upon which to build.

\(^{32}\) Subsection (6) of Section 330.15, defining a "purchaser" simply as one who takes for value, was not added until 1943. Wis. Laws 1943, ch. 109, s. 2.

\(^{33}\) It would be entirely feasible, by slight amendment of the proposed (2)(a), to allow the stale notice provision to operate upon such wild and undeveloped lands, without making such essentially "unguarded" lands subject to the remaining cut-off provisions of the proposal.

\(^{34}\) Olmsted v. McCrory, 158 Wis. 323, 148 N.W. 871 (1914); Miller v. Green, 264 Wis. 159, 58 N.W. 2d 704 (1953); Bump v. Dahl, 26 Wis. 2d 607, 133 N.W. 2d 295 (1965).
V. WHAT CONSIDERATIONS UNDERLIE THE REDUCED GRACE PERIODS?

Though consistently faithful to the general principle of nonrecording and stale notice, the proposals, in subsections (1)(a)-(j), define specified situations in which, it is felt, the thirty year "grace period" is unwarranted, unrealistic, and largely ineffective to meet the central problem of excessive "phantom" title-defects. As a general proposition, this proposed "grace period" is five years. As above noted, the "grace period" for easements and covenants is reduced from sixty to thirty years.

In proposing these reductions, a number of factors have been taken into account, and a general balance of probabilities applied. Generally, the aim has been to facilitate the title transaction as thoroughly as possible without incurring substantial risk that legitimate interests will be unfairly extinguished thereby. The emphasized words indicate the key considerations.

The substantiality of the risk is dependent, first, upon the likelihood that a given record defect will reflect the existence of a real outstanding claim. Experience would indicate that in the overwhelming majority of cases, there is no such likelihood, even in the case of "fresh" records. Variances are almost universally the product of mistake or inadvertence.

The substantiality of the risk is dependent, second, upon the likelihood that the legitimate interest-holder will use the protective measures available to him, and the first key consideration thereby merges somewhat with the second. However, under the proposed statute, mere negative, ambiguous or inferential record notice more than five years old is declared ineffective in the cases specified; all forms of actual or affirmative notice, on or off the record, will protect the legitimate interest; and the scope of notice from possession or occupancy is considerably expanded. Subsection (2)(a) imposes a rather strict responsibility upon the subsequent purchaser to explore the fact of physical occupancy thoroughly. By subsection (3)(b), unplatted, vacant and unoccupied, unused, unimproved and uncultivated lands are totally exempted, on the hypothesis that normally-available possessory protections are absent in those cases. Finally, the proposal operates only in favor of "a purchaser for a valuable consideration, without notice . . . and his successors in interest . . . ." By this limitation, legitimate interests cannot be usurped in favor of defrauders, donees, heirs, devisees, or creditors; but only in favor of those who innocently infer that the current, i.e., thirty-year, record supports the apparent title, and change position in reliance upon that inference.

Possessory protections will most commonly be available to the holders of present possessory interests, but not equally to future interest

35 Proposed Section 235.491(1)(c), (d), (e), (f), (h), (j).
36 Proposed Section 235.491(1).
holders. These would include, generally, remaindermen after life estates, reversioners after leaseholds, beneficiaries under trusts (especially remote, contingent or residual beneficiaries), and married women entitled to dower or homestead protection. In each case, some complicity of the present interest-holder in the fraudulent usurpation of the future interest will ordinarily be present; for otherwise the assertion of the hostile claim would evoke affirmative action by the present interest-holder, which would automatically operate to protect the future interest as well.

The principal protection afforded such interests, in common with all other legitimate interests under the proposals, is a practical one which arises out of the grace period. A person inclined to attempt a fraud against a legitimate interest is motivated by a hope of present gain. He does not, and generally cannot, predict circumstances five years into the future. The perpetration of his fraud, under the proposed statutes, must be anticipated by recording a fraudulent conveyance five years in advance, else the proposals will not operate, and if the proposed statutes will not operate in the interim, the defrauder will experience the greatest difficulty in realizing any profit out of his fraud.

A final element of protection to legitimate interests of all kinds is the integrity of the legal profession itself, especially when that fact is joined with the seemingly innocuous provisions of section 59.513. A title fraud, to be successful under the proposed legislation, will practically require the complicity of someone having a considerable expertise in both title law and conveyancing. Whatever might be the inclination of the lay public to attempt a title fraud, there is every basis for the assertion that the legal profession would only rarely include a member inclined to assist in such a scheme, to say nothing of naming himself as draftsman of the fraudulent conveyance.

Traditionally and modernly, Wisconsin's policy and practice has placed principal reliance upon the integrity of notaries public as a stopgap to forgeries and related frauds. Until comparatively recently, it was common practice for them to draft conveyances as well as taking acknowledgments of them. Though screening practices in the commissioning of notaries have been lenient, there has been a remarkable paucity of instances in which forged conveyances have passed even the casual and often inexpert scrutiny of a notary.

The proposed legislation assumes that, while there may be some risk of a coincidence of all of these factors in derogation of legitimate interests, the proposals reduce that risk to obvious insubstantiality.

37 Wis. Stat. §59.513(1) (1963): "No instrument by which the title to real estate or any interest therein . . . is conveyed . . . shall be recorded by the register of deeds unless the name of the person who . . . drafted such instrument is printed, typewritten, stamped or written thereon in a legible manner. . . ."
However, the proposals would be totally ineffective if they could never operate to extinguish a legitimate interest. This is to say the possible validation of forgeries and other fraudulent usurpations of title must be countenanced if a statute of this type is to operate at all. The present section 330.15 involves the same possibility. The ultimate issue is simply whether extinguishment of legitimate interests, however rarely or improbably, is an unfair provision, under any of the predictable circumstances in which it may be expected to operate.

The question of fairness or unfairness is necessarily a bilateral consideration. If regarded purely and simply from the standpoint of the person whose right may be extinguished, any possibility of such extinguishment is “unfair.” In this sense, quiet title actions, statutes of limitations, judicial estoppels, conventional recording acts and the present section 330.15 are also “unfair.” Bilaterally regarded, however, there must be taken into account the necessities of real estate commerce, and the circumstances of the subsequent purchaser who seeks legal protection against extinguishment of his interest.

It certainly cannot be disputed that title law and practice have made every effort to guarantee the complete accuracy, freedom from doubt or ambiguity, and general reliability of the public land records. Neither can it be disputed that these efforts have not been entirely successful, and probably never will be. The problem is, therefore, whether it is any more “fair” to foist the losses which may arise out of these occasional instances of unreliability of evidence upon the owner of the misrepresented title or upon the subsequent purchaser who depends upon it. Caveat emptor, if it were broadly acceptable as a principle of commercial law, would insist upon the former. The proposals being discussed, within their very severe limitations, would insist upon the latter.

In final analysis, the reason for this proposed degree of departure from traditional policy is that caveat emptor, applied to commercial real estate transactions, unreasonably burdens and discourages those transactions. A purchaser under legal forewarning to “be wary or be sorry” can be required, in fairness, to extend his wariness no further than probable inference from available data would suggest. Present title law and practice insists that he go further, running every vagrant suspicion to the ground, and even then declares that he is unprotected by the evidences upon which he has relied.

Whatever may be the propriety of caveat emptor as applied to an industry in which the good faith purchaser and the legitimate owner are [generally] equally vulnerable to loss by fraud, it is submitted that modern real estate commerce is not such an industry. Present law and practice compels thousands of buyers and sellers to go to ridiculous extremes of wariness, assurance, and “title correction” in order to lay to rest the ghosts of typographical errors and technical omissions.
hoping thereby to avoid the remote possibility of extinguishing one legitimate interest, whose owner may or may not have extended the slightest reasonable effort to protect himself.

This, it is submitted, is unfair to the modern real estate industry. Conversely, no objectionable unfairness inheres in the remote but conceivable possibility that the proposals may operate, as many other accepted forms of title legislation now operate, to cut off legitimate interests.

VI. How Will “Short Grace Periods” Operate in Specific Cases, as Compared to Present Law?

Each of the subsections of subsection (1) of the proposed statute will be discussed in order.

(a) Non-delivery. Under present law, an undelivered deed is a nullity. Whether or not the same proposition applies to undelivered contracts related to land is a matter of some doubt, as is the question whether affirmative “acceptance” is indispensable to operation of a conveyance in favor of an adult and competent grantee.

In Everts v. Agnes, after extensive soul-searching, the Wisconsin Supreme Court held that a grantor, who entrusted a fully-executed deed to a third-party, with instructions to deliver to the grantee on fulfillment of certain conditions, remained owner of the property even as against a subsequent bona fide purchaser from the named grantee, when the grantee procured the deed without satisfying the conditions. This position has since been qualified only to the extent of holding, inconsistently, that if a deed is obtained from grantor himself by grantee himself, the delivery being conditional, the condition itself is unenforceable.

Delivery is a formal manifestation of intent to transfer, which is its principal element. Why the formality of delivery should be superimposed upon formalities of preparation, signature, sealing, attestation, and acknowledgment before our law will conclude that grantor really intended the transfer proclaimed by his deed is a mystery lost somewhere in the feudal ceremony of livery of seisen, when lands were customarily conveyed without benefit of any writing whatsoever. From the time when statutes of frauds did away with parol transfers, the lingering semblance of excuse for continued insistence on delivery was that a considerable time interval necessarily and frequently occurred between

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38 Chaudoir v. Witt, 170 Wis. 556, 170 N.W. 932 (1919); Giblin v. Giblin, 173 Wis. 632, 182 N.W. 357 (1921); Sederlind v. Sederlind, 176 Wis. 627, 187 N.W. 750 (1922); Kolber v. Steinhaefel, 190 Wis. 468, 209 N.W. 595 (1926); Ritchie v. Davis, 26 Wis. 2d 636, 133 N.W. 2d 312 (1965).

39 Welch v. Sackett, 12 Wis. 270 (1860); Jones v. Caird, 153 Wis. 384, 141 N.W. 228 (1913); Estate of Duwe, 229 Wis. 115, 281 N.W. 669 (1938).

40 Chaudoir v. Witt, 170 Wis. 556, 170 N.W. 932 (1919).

41 Chaudoir v. Witt, 170 Wis. 556, 170 N.W. 932 (1919).

42 Herzing v. Hess, 263 Wis. 617, 58 N.W. 2d 430 (1953).
execution of a deed and its intended time of operation. Widespread illiteracy and comparative unavailability of able conveyancers made it broadly convenient to allow the parties to breathe life into their transaction by the uncomplicated device of manual tradition.

As a reading of the cases cited above would suggest, the principal impact of delivery questions on modern conveyancing is in disputes between heirs over "deathbed" conveyances. Rarely will a bona fide purchaser be involved. Where such a purchaser is involved, however, *Everts v. Agnes* would appear to control the case against him, in favor of the heir whose equity is limited to his birthright.

Modern commercial law has long deemphasized the delivery requirement, and now proposes, by several provisions of the Uniform Commercial Code, to eliminate it altogether, at least as against bona fide purchasers. The rationale is essentially one of estoppel. If, to suit personal convenience, a grantor sees fit to perform all of the various formalities requisite to draftsmanship and execution of a commercial instrument, the risk of possible unintended circulation is, by present commercial law, borne by the originator of the instrument, not by him who deals in reliance upon its supposed validity.

By precisely the same token, subsection (1)(a) of the proposed statute would reverse the rule of *Everts v. Agnes* in real estate transactions, wherever the "undelivered" conveyance appeared of record. A grantor who purports, by signature, attestation, and acknowledgment, to effect a present transfer of an interest in real estate, ought not to be heard, as against the subsequent claim of a bona fide purchaser, to assert the essentially secret defense of nondelivery. Because the element of estoppel is more obviously present in nondelivery cases than in cases dealt with in the later subsections of the proposal, no "grace period" is provided in this instance.

(b) *Conveyance outside chain of title and not identified by definite reference.* This species of title defect is related to non-recording, and it is, therefore, again deemed inappropriate to establish a grace period with reference to it. The basic kind of defect at which the subsection is aimed is the practice of referring, in one conveyance, to some incumbrance or limitation of title to which such conveyance is made subject, or, probably more frequently, which is excepted from the warranty of such conveyance. For example, there may be excepted from a conveyance "a certain lease in favor of Charles Jones," or "a

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43 For example, U.C.C. §3-306 establishes "nondelivery, or delivery for a special purpose" as a defense to the claim of one not a holder in due course. However, U.C.C. §3-305, comment 3, makes it clear that it is intended that a holder in due course hold free from the defense of "nondelivery, conditional delivery or delivery for a special purpose." Holding an undelivered deed to be a "nullity," of course, would rule out any such subsequent vitalization of the instrument, even in the hands of one not involved in the transaction in which delivery failed.
certain easement in favor of Lot Six." If such outstanding leasehold, mortgage, option, easement, contract or other interest is properly of record within thirty years in the chain of title to the affected lands, the indefinite reference thereto, though itself insufficient to give notice of the interest, is immaterial. But the proposed subsection (1)(b) would operate to excuse inquiry as to the unrecorded interest, which under present practice often requires running the vagrant interest to the ground through almost every possible avenue of investigation. The proposal does not prevent notice of a prior unrecorded interest from being given by reference in a subsequently-recorded instrument; but it does insist that such reference be sufficiently definite to apprise the title examiner of the important details of the outstanding interest. For example, subsection (1)(b) requires that such reference specify the nature and scope of the interest, the identity of its owner or holder, the real estate affected by it and the date of the conveyance, transaction, or event by which it was created. Such information, if not directly stated, may be by "direct reference to a particular place in the public land record"—necessarily either outside the chain of title of the lands affected, or more than thirty years old—where the details are set out.

The subsection may conceivably have a second application to conveyances, affidavits and the like, which may of themselves be so fatally indefinite as to fail to identify the essential details of the interest sought to be created or noticed. For example, a grant of an easement may afford no means of identifying the servient estate, but may appear in the chain of title purely by reason of the identification of the grantor. Such grantor may own many tracts, any of which might constitute the servient estate. To the extent to which there is visible evidence of the exercise of such an easement on the ground, of course, subsection (2)(a) of the proposal would protect the interest. In cases where this was not true, however, subsection (1)(b) could operate, except as against governmental and utility interests, protected by subsection (3)(a).

(c) Unrecorded extension of interests expiring by lapse of time. A common title defect is the presence of various limited-interest conveyances, without affirmative evidence of their discharge, release, forfeiture or abandonment. For example, the record may show a land contract from A to B, calling for final "closing" by December 1, 1963. In 1962, A conveys and warrants full title to C. Early in 1966, C proposes to sell or mortgage to D. The transaction is obstructed by the purported A-B contract.

The proposition that "time is not of the essence" of the ordinary contract relating to real estate is well-recognized, and was emphasized in *Long Investment Co. v. O'Donnell*, where a contract in the ordi-

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*44 3 Wis. 2d 291, 88 N.W. 2d 674 (1958).*
nary interim form was held, as between the parties, enforceable approximately three years after its stated date of performance, neither party having done anything of consequence in the interim to settle or close the transaction. Whether or not the subsequent purchaser from the original vendor would have taken subject to the "open equity" of the first purchaser had the former been aware simply of the existence of the earlier contract was not, of course, touched upon; but that problem provokes the proposed (1)(c).

In the typical case, investigation will most often disclose that the prior executory interest, in fact, does not encumber the title. The prior purchaser will either have forfeited his interest or will have settled the same on some informal basis. Especially will this be true in those cases in which the prior interest is already two years past its stated time of expiration.

The propriety of assuming that interests of purchasers, lessees, optionees, or other interest holders have expired after their stated consummation dates is buttressed by the fact that, but for possibilities of equitable relief from purely technical time defaults, any fully effective "continuance, extension, or renewal" of such interests ordinarily demands execution and recording of a new document. Otherwise, the case would logically come within the principle of conventional non-recording acts, and the bona fide purchaser would be protected independently of the proposed statute.

The only function of the proposed subsection (1)(c), therefore, is to negative any suggestion that the presence on the record of the original, apparently expired conveyance itself provokes particular inquiry as to possible exercise, extension, or renewal. It may be doubted that any "grace period" whatever is appropriate in such a case, since none is provided by section 235.49, relating to the effect of an unrecorded deed. Certainly it would be unfortunate if, by process of negative inference, the proposed statute were construed to mean that, for example, the recording of a six-month option, rendered the title unmarketable until two years after the option, by its terms, had expired. No such negative inference is intended. What is intended is to provide that after such two year period inquiry is unnecessary, regardless of whether or not it may have been necessary before. The grace period is allowed as a compromise concession to "informal" extension arrangements, in the hope that by briefly "clogging" the titles of vendors, optionors and lessors, any inclination to reconvey in fraudulent defiance of such arrangements will be effectively discouraged.

(d) Non-identity of persons in chain of title. By process of inconsistent technical inference, today's title examiner assumes that when property owned by Charles D. Jones appears to have been conveyed by

Charles D. Jones, the owner and the transferor are identical; whereas if the same property appears to have been conveyed by Chas. D. Jones, or Charles Jones, or C. D. Jones, the transferor is an interloper and, usually, a forger.  

These technical approaches to the problem are unsatisfactory on two accounts. First, the inference favorable to title, i.e., that the subsequent conveyance is not a forgery, regardless of the perfection or imperfection of its form, is not legally dependable. If the conveyance is a forgery, the most circumspect of title examinations is of no avail. Second, the inference unfavorable to title, i.e., that imperfection of form suggests a reasonable probability of not only forgery, but a clumsy attempt at that, is extremely unrealistic.

Present practice permits the inference unfavorable to title to be effectively overcome, for purposes of marketability, in either of two ways; by passage of twenty years under section 235.69, or immediately by the recording of an affidavit of identity under section 235.46. Why it should be supposed that one initially guilty of forgery would have any compunction against correcting his technical mistakes by false affidavit is apparently neither questioned nor explained.

Thus, the central problem in modern title law and practice is, as above suggested, the problem of forgery in one species or another. Because our system of land titles to date includes nothing akin to public signature cards or fingerprint indentification systems, our ultimate defense against forgery lies in the system of notarial acknowledgment. When that defense has been overcome, the question is simply one of the forger discriminating between victims.

It would appear senseless to hold, as is now held, that an impersonator and forger who misspells or abbreviates a name provokes inquiry into his fraud, whereas one who is more meticulous does not do so. The possibility that a forgery may lurk in the chain of title is at least as good in one case as the other. On this reasoning, the proposed statute does not single out the case of the “name variance” as a special instance of title defect arising from possibility of forgery, but makes the same rule apply “whether the persons appear in such conveyances under identical names or under variants thereof. . . .”

As suggested above, the problem of forgery of the title record can be met either by foisting the risk upon the subsequent purchaser or by permitting the forgery to operate, divesting the title of the true owner in favor of a subsequent good faith purchaser. The general comments which introduced this paper, relating to the need for more realistic approaches to judging the marketability of titles, suggest the rationale

46 An objection to title based on a name variance in instruments recorded less than twenty years, and thus not “cured” by Wis. Stat. §235.69 (1963), is recognized as valid. Wisconsin Real Estate Title Standard No. 5, (Wisconsin State Bar).
for the position adopted in the proposed legislation. To this extent, and for these reasons, subsections (1)(d)-(j) constitute deliberate, though limited, reversals of the traditional rule of property law that a forgery is an absolute nullity, and no right, title or interest can arise out of it.

It should, perhaps, be noted that subsection (1)(d) does not purport to "cure" a complete hiatus of title, but only a hiatus in fact which does not appear affirmatively of record. Thus, if the owner of record appeared as Charles D. Jones, a subsequent conveyance by Mrs. Charles D. Jones, or Charlotte Jones, or Charles D. Johnson, would not evoke this subsection. Such a defect could be cured, under the proposed statute, either (1) by quieting title (and if such proceeding involved a defect, subsection (g) might apply); or, (2) by filing an affidavit identifying the missing conveyance in the chain and asserting that it had in fact been executed and delivered, which would be effective after five years under subsection (i); or, (3) by invoking the stale notice provisions of subsection (k). Absent such curative procedures, however, the appearance of "an affirmative and express notice of such prior outstanding interest"—the interest of Charles D. Jones—under subsection (2)(b) would indefinitely suspend possible operation of the proposed statute against that interest.

(e) Marital Interests. Under existing law, a conveyance by a married man of his homestead, without joinder or estoppel of his wife, is void. Such conveyance of non-homestead property is ineffective to bar dower. Title problems arise chiefly in the case of failure of the record to disclose the marital status of a male grantor. The possible inferences are that he is either married or single. If married, either he is attempting a fraud upon the interest of his wife, or she has included her interest by a form of transfer not appearing of record. Even if the former be true, the attempted fraud as to dower cannot be consummated prior to widowhood.

It should be noted that such fraud upon the rights of a married woman by failing to disclose marital status, is, like the misspelled forgery, a clumsy attempt. A husband intelligently bent upon such purpose would improve his prospects of success considerably by declaring himself to be single, divorced or widowed; and, if he had been so inept in the first instance as to omit such declaration, he or those holding under him would presumably have no reluctance to supply the false evidence by affidavit under section 235.46 or otherwise. The preferred device for perpetrating such a fraud, all things considered, would probably be the substitution of a female imposter for his lawful wife on the original deed or mortgage, thus placing the case squarely within the forgery provisions of subsection (d).

There are two considerations which differentiate this problem from forgery problems in general, assuming our policy is to protect contingent marital interests no more strongly than it protects a fee simple absolute. The first additional consideration is that, in many cases, the assertion of a marital interest against a subsequent bona fide purchaser for value may permit the married woman both to "have her cake and eat it." There is no necessary implication from the fact that a married man conveys his land without his wife's joinder, that she is excluded from at least unknowing participation in the fruits of his fraud. Indeed, some of that fruit may persist, in disguised form, in the estate of the husband at his death, and the wife may well be in position to double her widow's entitlement by that fact. Assume a married man who, by one or another of the suggested frauds, sells a piece of property for $9000, which sum he collects from the purchaser and subsequently invests and reinvests, ultimately placing the resultant securities in joint tenancy with the "defrauded" wife. He then dies. The widow takes the entire lot of securities by survivorship, and also asserts, perhaps against a bona fide purchaser, her entitlement to dower out of the wrongfully conveyed property. The claim for breach of warranty by the grantee from the husband goes begging for lack of probate assets.

The second distinguishing factor is that, in the ordinary case, a wife is factually in position to exercise far closer surveillance over the nefarious activities of her husband than is the victim of a fraud perpetrated by a complete stranger. The married woman of today is not the disentitled and disenfranchised demi-chattel in whose interest dower and homestead protections were created centuries ago. Granting that title law should lend no impetus to the disturbance of what little domestic tranquillity may remain in the modern age, it is still possible to assume that a married woman might perform discreet inquiries into her husband's financial affairs at intervals not to exceed five years. Under present law, it may be safely asserted that if she postpones such inquiry for ten years, she will be barred in any event.\(^\text{48}\)

(f) Lack of authority of officers, agents, or fiduciaries. Obviously, "any defect or insufficiency in authorization of any purported officer, partner, agent or fiduciary to act in the name or on behalf of any . . . holder of an interest purported to be conveyed in a representative capacity" means that the resultant conveyance, intentionally or unintentionally, is a forgery. Little need be added to the foregoing reasoning on that generic subject, except that a forgery by the mechanism of misrepresented power to act for another can be treated no differently than forgery by the mechanism of impersonation. True, some types of "power" are necessarily in writing, and therefore susceptible of being recorded and scrutinized. This fact, however, tends more to emphasize

\(^{48}\text{Wis. Stat. §330.04 (1963).}\)
than to diminish the need for including these "forgeries" within the operation of the proposed statute, because the larger the possibility of documentary "proof" of a title fact, the greater the opportunity for technical objection to the form or sufficiency of such documents, and the greater the likelihood that the documentary record will include some error or omission.

One consideration which would appear to have peculiar importance in this area is the fact that, unlike the case of the impersonator, the agent-forgery does not usually operate entirely outside of the protective mantle of his purported principal. By an ill-defined and little-understood principle of agency law, a principal is not chargeable with the guilty knowledge of an agent or employee when that knowledge is acquired directly out of a scheme to defraud the principal or employer.49 A second principle which bears on the problem is the anomalous and much-questioned "sealed instrument" or "equal dignity" rule, which severely restricts implications of authorization in "sealed instrument" cases.50 Carried to their logical extreme, these rules can, and at times do, impose on modern title practice extremes of "authentication" which once characterized the system of notarial acknowledgment. There certifications were required by the clerk of courts that a notary was a notary, by a judge that the clerk was a clerk, by the county clerk that the judge was a judge, and so on ad absurdum.51

A second special consideration which may apply here is the widespread practice, at least of a large proportion of the principals whose interests may be affected under this subsection, of requiring fidelity bonds of their officers, partners, agents and fiduciaries. Since, as a matter of legitimate practical inference, unauthorized conveyances of the property of such principals will most commonly be attempted by

50 A concise statement of the "equal dignity rule" is found at 2 C.J.S. Agency §27(d) (1936): "As a general rule, in order that an instrument under seal may be validly executed by an agent, the agent's authority must have been conferred on him by an instrument of equal dignity, and if the authority is not so given, then the instrument executed by the agent is not binding . . . . The rule has been changed in some of the states by statutes abolishing all distinctions between sealed and unsealed instruments, in which case a sealed authorization is unnecessary".
Wis. Stat. §235.01(1) (1963), provides that "conveyances of land or any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney." (Emphasis added.) The significance of the seal in Wisconsin is properly the subject of speculation, in light of the permissive rather than mandatory language of section 235.01(1), and the statement in Wis. Stat. §235.19(13) (1963) that a properly acknowledged conveyance is recordable although it is not sealed. This doubt as to the seal's significance in conveyancing, by the "equal dignity" rule, creates similar uncertainty as to its importance on an instrument permitting an "agent thereunto authorized by writing" to execute a conveyance, given pursuant to Wis. Stat. §240.06 (1963).
51 The process of acknowledgment in Wisconsin has been greatly simplified by the adoption of the Uniform Acknowledgment Act, Wis. Stat. §235.19 (1963).
persons who hold some degree of authority from the same principals, it would appear probable that many losses occasioned by defalcations of this type will be compensable by claim on the bond. Whatever may be the pros and cons of shifting such losses from principals to subsequent bona fide purchasers, different considerations may come into play when the practical question is between a paid fidelity insurer and such subsequent purchaser.

(g) Defects in judicial proceedings. It would not appear, under present law, that a non-jurisdictional defect or irregularity in any action or proceeding necessary to complete the chain of title constitutes an objection to marketability, if the time for appeal has run. The title problem arises principally in two slightly different aspects. Most commonly, the case record fails affirmatively to disclose that a jurisdictional procedure has been followed. Furthermore, if the examiner be mildly technical, he may well refuse to accept a bare recitation of that fact in the prefatory recitals of the judgment or order itself. Less commonly, the examiner is in doubt whether the defect or irregularity in question is jurisdictional or not.

In any event, the title record, necessarily examined and re-examined upon the event of each title transaction for at least thirty years, is complicated and extended by the full burden of papers and recitals which happen to appear on file.

As was the case in subsections of the proposed legislation already discussed, the omission of affirmative proof of jurisdiction in the record can produce either of two implications: jurisdiction was acquired or it was not. To assert that it was not requires a supposition that the attorney, the clerk, and the presiding judge were either defrauders, incompetents, or seriously careless, not an impossible supposition, but an extremely tenuous one.

A strange legal anomaly appears here, which has some reflection in the problem of forged instruments generally. By force of the familiar presumption, the regularity of judicial proceedings is demonstrated, prima facie, by the very fact that a judgment or order is entered.

52 2 Patton, Titles §§591 (1957).
53 "In some localities, the attorneys give full faith and credit to the recitations in judgment showing that the court had jurisdiction and that certain required procedures were followed. Attorneys in other areas insist on a fuller abstracting, particularly of those documents establishing the jurisdiction of the court..." Wis. Prac. Meth. §156 (1959). Pollard v. Wegener, 13 Wis. 636 (1861) (Recitals relating to due service held insufficient to establish jurisdiction, since if the record discloses that there was not such service in fact, the court was without jurisdiction in all matters, including jurisdiction to make the recital): "... [I]f the facts upon which the supposed jurisdiction was assumed are recited in the record, and they appear from it to have been insufficient, and not such as in law would confer such jurisdiction, then the party is not bound by it, but may disregard all its averments." Id. at 643.
54 Wis. Stat. §§262.16(6), 263.33 (1963). "It is not to be assumed that a court of general jurisdiction in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether
Chapter 328 of the Wisconsin Statutes establishes numerous other presumptions which variously affect title examination, and section 328.25, in particular, would appear to create a presumption that our ubiquitous "Chas." Jones is really Charles. Nevertheless, title law and practice appear to hold that the absence of a proof of service from a court record, or the variance in spelling of Jones' name, creates a valid objection to marketability of title. However, the filing of an affidavit under section 235.46 creates "prima facie evidence" of the same fact and thereby cures the defect. Obviously, these propositions are inconsistent.

(h) Non-existence, incapacity or incompetency. A conveyance to a nonexistent grantee, or to one not legally entitled to hold realty, is void. A conveyance by a nonexistent grantor, or one not legally entitled to convey by his own act, is at least voidable. These rules have necessitated demonstration and redemonstration, examination and re-examination, of supporting certifications with respect to conveyances by or to corporations, partnerships, and even proprietorships, and have in some cases even brought into question matters of personal emancipation or competency.

Unless, however, circumstances prompt a far greater protection to defectively organized or enfranchised corporations or to minor or incompetent grantors than is given landowners generally, the possibility of validation of deeds involving such defects must be countenanced to the same extent that the possibility of validation of forgeries is countenanced. Added impetus is given to subsection (h), however, by the fact that general corporate franchise laws now reduce the technicalities of incorporation to a minimum and broadly extinguish the ultra vires objection.

(1) Facts not asserted of record. Existing section 235.46 creates a prima facie presumption, for title purposes, of the truth of facts relating to titles which are made to appear of record by affidavit. The

there are recitals in its record to show it or not." Linschitz v. C. A. Neuberger Co., 230 Wis. 304, 310, 283 NW., 811, 814 (1939).

55 Douglass v. Ransom, 205 Wis. 439, 237 N.W. 260 (1931).


57 City Bank of Portage v. Plank, 141 Wis. 653, 124 N.W. 1000 (1910); Marky Investment, Inc. v. Arnezeder, 15 Wis. 2d 74, 112 N.W. 2d 211 (1961).


59 Lenhard v. Lenhard, 59 Wis. 60 (1883); Luedtke v. Luedtke, 181 Wis. 471, 195 N.W. 382 (1923).

60 Wis. Stat. §180.04 (1963) : "General powers. Each corporation, when no inconsistent provision is made by law or by its articles of incorporation, shall have power:

* * *

(4) To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, and to own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated.

(5) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets."
inadequacies of this section, as an effective device for improvement of title law and practice, have already been discussed.

Proposed subsection (i) is a logical and necessary concomitant of subsections (a)-(h), and tends to be inclusive of all of them. It does not appear of record, for example, that a deed was in fact undelivered or conditionally delivered, but the deed itself recites that the lands covered by it have been and are conveyed as of its date. Also, it may not appear of record that a grantor under subsection (e) was a married man at the time of his conveyance. However, if his conveyance asserts that he is single, unmarried, divorced or widowed, "the opposite or contradiction" of the fact that he was married would appear "affirmatively and expressly in a conveyance . . . of record."

It is to be confidently supposed that subsections (a)-(h) will, of their own force, perfect titles involving the particular defects specified in them, generally after expiration of the grace period, and therefore dispense with the necessity of extinguishing the identical defects by filing affidavits under (i). Assuming that section 235.46 is retained in its present form, it may still be possible to "cure" defects by "manufacturing marketability" during the five-year grace period by filing affidavits, e.g., of identity, during that interim. However, this practice will be unnecessary if the title thereafter qualifies under subsection (d).

It is, therefore, the function and purpose of subsection (i) to cover cases identical in basic principle with those specified in (a)-(h), but which do not fall within the specifications of any of those subsections. It is anticipated that such cases will be relatively few in number, and will principally concern instances of rather complete hiatus of title. An illustration of such a possibility, with reference to subsection (i), was given at the discussion of subsection (d), supra. A second illustration might involve a conveyance which was made expressly subject to a condition subsequent or other defeasance, or made subject to a conditional covenant. By affidavit, the nonoccurrence or occurrence of the condition could be made to appear of record; and, after five years, subsection (i) would enable the bona fide purchaser to rely upon the assertion.

(j) Defects in tax deed. By the provisions of subsection (j), nonexistence or illegality of proceedings, from the assessment of real estate for taxation up to and including the execution of a tax deed, would not defeat the interest of a subsequent bona fide purchaser whose interest arose five years after recording of such tax deed. Thus, this section would accomplish the salutary purpose of removing a common form of title objection which, under present law and practice, often proves insuperable without formal quiet title proceedings.

61 WIS. STAT. §235.46 (1963), provides for an affidavit of possession as prima facie evidence of the fact of possession.
(k) Interests not of record within 30 years. This subsection, effectively a restatement of the ultimate provisions of section 330.15, has been adequately discussed.

VII. SCOPE AND EXCLUSIONS

The scope of the proposed legislation's applicability is found in the generic statement of interests to be avoided, found in section (1), and discussed above; in provisions specifying instances in which a purchaser is held to have notice of a prior outstanding claim or interest, found in section (2); and in provisions expressly excluding specified interest holders and types of realty from the operation of the proposed statute, which exclusions are found in section (3).

A. GENERIC STATEMENT OF INTERESTS TO BE AVOIDED

No attempt was made in section (1) of the proposal to specify the particular prior outstanding interests which are affected by its provisions.62 This is partly because the interests to which the proposal pertains are largely self-identifying, and partly to avoid the dangers implicit in the rule expressio unius est exclusio alterius.63 Section 235.49 seems to have met with little difficulty in its generic statement of interests to be avoided,64 and none is expected with respect to the proposed statute.

B. SPECIFICATION OF INSTANCES IN WHICH A PURCHASER IS HELD TO HAVE NOTICE

Instances in which a purchaser is held to have notice of a prior claim are specified in section (2). Subsection (2)(a) provides for notice from use or occupancy. Notice from possession traditionally negatives bona fide purchaser status. The Wisconsin Supreme Court, in Miller v. Green,65 noted that "the general rule is that possession of land is notice to the world of whatever rights the possessor may have in the premises."

The theory of the law is that the person in possession may be asked to disclose the right or title which he has in the premises, and the purchaser will be chargeable with the actual notice he would have received had he made inquiry.66

62 As was attempted in Wis. Stat. §330.15(4) (1963).
63 "Expression of one thing is the exclusion of another."
64 "Conveyance of real estate" as used in Wis. Stat. §235.49 (1963) is defined in Wis. Stat. §235.50 (1963) as "every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned or by which the title to any real estate may be affected in law or equity . . . ."

Under this generic definition, a variety of interests have been avoided other than those expressly set out. See Boyden v. Roberts, 131 Wis. 659, 111 N.W. 701 (1907) (agreement preserving a tract of land for residential purposes only and executed so as to be entitled to record, held to "affect" title to real estate within the meaning of section 235.50); Cutler v. James, 64 Wis. 173, 24 N.W. 874 (1885) (a quit claim deed held to be a "conveyance" within the meaning of section 235.49).
65 264 Wis. 159, 162, 58 N.W. 2d 704, 706 (1953).
66 Ibid.
However, the court noted that:

The authorities generally hold that in order that possession may constitute constructive notice such possession must be 'open, visible, exclusive, and unambiguous.' It will thus be seen that the requirement as to the type of possession that will constitute constructive notice are practically identical with the requirements of the type of possession necessary to constitute adverse possession.67 (Citations omitted.)

The principle that one is chargeable with notice of such rights as due and diligent inquiry of persons in possession would have disclosed is disarmingly simple of statement, but sometimes extremely difficult of application. The problem cases spring essentially from situations in which "possession" by one person is alleged to constitute notice of the interests of another. Some of these confusions are:

1) Whether A's possession, as claimant of fee title, is notice of the unrecorded interest of B, as mortgagee, as lienholder, as easement-holder, as covenantee, as optionee, as spouse of A, or as purchaser,68 and

2) Whether B's possession, as tenant, licensee, purchaser, or holder of other form of inferior interest derived from A's title, is notice of the superior interest of A, again assuming the inferior interest to be unrecorded,69 and

3) Whether C's possession, as tenant in common or joint tenant of D is notice of D's cotenancy, assuming D's interest to be unrecorded.70

Another problem, springing from the same generic source, is the problem of distinguishing "possession," from which notice may be derived, from mere "occupancy," which affords no notice of the rights of the occupant. Thus, if A is paramount titleholder in actual possession, it is ordinarily held that no notice arises from the fact that W, A's wife, or M, A's mortgagee, or P, purchaser under contract from A, or T, a leaseholder, simultaneously occupy unsegregated portions of the premises. Where possession is "consistent with record title," no notice of in-

67 Id. at 163-64, 58 N.W. 2d at 707.
68 It would seem, under the familiar rule, that if possession is referable to a known right of the possessor, no further inquiry is necessary. First Nat'l Bank v. Savings L. & T. Co., 207 Wis. 272, 280, 240 N.W. 381, 384 (1932). The interest of A would give no notice of B's unrecorded inferior interest. But see Comment, Grantor's Possession as Constructive Notice, 34 Miss. L. J. 325 (1963).
69 Possession by, e.g., a tenant, is notice of his rights. That such possession may also give notice of the superior rights of the one through whom the inferior interest holder possesses, see Ostergard v. Norker, 102 Neb. 675, 169 N.W. 5 (1918).
70 That possession by a tenant in common is not notice of the unrecorded interest of his cotenant, see Tyler v. Johnson, 61 Fla. 730, 55 So. 870 (1911); Wilcox v. Loomister Nat'l Bank, 43 Minn. 541, 45 N.W. 1136 (1890). Also, since a cotenant is entitled to possession, there would be no further duty of inquiry. First Nat'l Bank v. Savings L. & T. Co., 207 Wis. 272, 280, 240 N.W. 381, 384 (1932).
consistent interests arises. It is from this principle that the element of "exclusive and unambiguous" possession, as applied to both statutes of limitations and conventional recording acts, springs.

The approach to these problems adopted for the purposes of the proposed subsection (2)(a) is two pronged. First, notice from actual use or occupancy of the real estate by any person at the time such purchaser's interest therein arises is specifically stated to extend to, but not to exceed, the notice which "due and diligent inquiry of persons using or occupying such real estate would, under the circumstances, reasonably have disclosed. . . ." (Emphasis added.) This is a direct incorporation of a doctrine often expressed by the Wisconsin Supreme Court. By this doctrine, the proposed subsection (2)(a) would or would not afford notice in each of the suggested areas of problem-cases dependent upon the simple fact-inquiry: Would the occupant, under the circumstances, reasonably have disclosed the outstanding interest to the subsequent purchaser? If the occupant's own claim was adverse to, or asserted in fraud of, the outstanding claim, clearly no inquiry of the occupant would bring the outstanding claim to light.

The second aspect of the proposed subsection (2)(a)'s approach to the problem is that each actual occupant or user of the subject premises is made a potential source of notice for purposes of the statute, because the traditional requirement of "exclusive and unambiguous" possession is expressly lifted. It is lifted here for precisely the reason that it is retained generally as a requirement for title by adverse possession, viz., the fact that a true owner should not be subject to usurpation of his title unless the usurper has totally excluded him from use and occupancy, both personal and representative.

It is conceded that this proposed section will relieve the subsequent purchaser from his present scrupulousness in checking record title only by imposing upon him a greater burden of diligence in investigating physical use and occupancy, and that the latter burden may be heavier under the proposed statute than is generally true under conventional recording acts. However, it is also true that the subsequent purchaser presently finds no relief whatever in conventional recording acts from the kind of title defects with which the proposals will deal. Conversely, "nonrecording" under conventional recording acts can extinguish legitimate interests only where the record itself affords no hint of those interests, and this utter lack of record notice is almost universally due to the failure of the prior interest-holder to protect himself by prompt recording. Under the proposed legislation, as has been seen, the opportunity for self-protection by record offered the prior claimant is not so

72 First Nat'l Bank v. Chafee, 98 Wis. 42, 73 N.W. 318 (1897); Olmsted v. McCrory, 158 Wis. 323, 148 N.W. 871 (1914).
universal. Consequently, a requirement that he be rather totally excluded from any share of the use and occupancy appears to be justified.

The degree of practical "hardship" which this requirement may impose on the subsequent purchaser may seem extreme, until his situation under the proposed subsection (2) (a) is compared with the situation in which he presently finds himself. At present, he is vulnerable to substantially every possibility of title defect, regardless of whether he is warned that such defect exists by record or by possessory fact. He must scrupulously pursue every suspicious circumstance discovered at either source; and ultimately, if such suspicions persist, his only safe alternative is to refuse to accept title. Under the proposed legislation, he may proceed in spite of the fact that record title is suspicious, if the possessory fact lends no weight to those suspicions. He is protected against record defects to the extent that the possessory fact does not tend to corroborate them.

Subsection (2) (b) provides that a purchaser has notice of a prior outstanding claim if the thirty year record affords "affirmative and express notice" of such claim. Such notice must, by the provisions of subsection (2) (b), conform to the requirements of definiteness set out in subsection (1) (b). Therefore, such notice must refer to the "conveyance, transaction, or event upon which" the interest depends. As is true of the present section 330.15, the measurement of the period runs backward from "the time at which the interest of such [subsequent bona fide] purchaser arises in law or equity."

The principal problem foreseen with reference to this provision is that created by the "pro-tanto" concept, which, whatever its problems may be with reference to "purchaser for value," has a clear impact upon the broader doctrine of bona fide purchase. For example, A, ostensible titleholder of record, has entered into an installment land contract with B, upon which B has made a ten percent deposit. X is holder of a prior outstanding interest dependent for its validity or priority upon one of the circumstances specified in (1) (a)-(j). When A's legal or equitable interest arose, either a grace period or notice apart from the record prevented his qualification under the proposed statute; B could qualify as of the time of his land contract, but for the fact that he had paid only a portion of his agreed consideration. The question, assuming that X now records notice of his interest, is whether, following the negotiable instruments principle of "holder in due course pro tanto," B's right to benefit by the statute should be limited to ten percent of the land (or its value), or whether his protection shall continue through the completion of his contract and ultimate deed.

A second offshoot of essentially the same problem is presented by the lease with option to purchase, exercisable at any time prior to termination of the leasehold. If notice of the "prior outstanding interest"
interrupts the lease period, even assuming that the leaseholder may "hold free" for the balance of his term, is he a "bona fide purchaser for value" with respect to his option rights?

By the specification of (2) (b) that notice of the outstanding interest must come "prior to the time at which the interest of such subsequent bona fide purchaser arises in law or equity," the proposals would seek to protect the subsequent interest to the full extent of its equitable potential. In short, the "pro tanto" concept is rejected, not so much because of any firm conviction that it is a weak or improper jurisprudential principle, but chiefly because of the impropriety and practical difficulty of partitioning lands so as to accommodate it. The same problem, and the same solution, are familiar law under conventional recording acts, for example section 235.49.

The next step, too, is involved. Having permitted B in the example above to "hold free of" the X claim, despite his ten percent payment, what will happen if B thereafter defaults his contract? Assuming that the resultant foreclosure is "strict," so that the unencumbered title reverts to A, it could be safely assumed that A does not thereby improve his original position, so as to hold free of X's claim. But suppose that A's foreclosure is "affirmative," e.g., by sale in enforcement of his equitable lien, pursuant to judgment of specific performance. Inescapably, the purchaser at such sale would succeed to the rights of B, and this could be true even if A were himself such purchaser.

In negotiable instruments law, the rights of successors to holders in due course are rather carefully spelled out; but whether or not "re-acquirers" share without discrimination in those rights has been, to a large extent, a matter of judicial decision. It has been thought preferable, in proposing this title legislation, to leave such highly-circumstantial problems to the area of judicial decision, confident that familiar equitable considerations will produce proper results.

The final doubt which may arise concerning (2) (b) is the meaning of the term "affirmative and express notice." Perhaps the term "definite," as used in (1) (b), and there defined, would be preferable. In any event, the meanings appear to be complete equivalents, and no difficulty should be encountered.

Finally, subsection (2) (c) makes the quite obvious provision that if a grace period is provided under subsections (1) (c)-(k), and the purchaser takes before the grace period has run, the purchaser is held to have notice of the prior outstanding claim or interest for purposes of the proposed statute.

C. NON-APPLICABILITY OF PROPOSED STATUTE TO SPECIFIED REALTY AND INTERESTS

The final area in which the scope of the proposed statute's appli-
cability is delineated is the provisions of section (3), which exclude certain interests from the operation of the statute altogether.

Interests of governmental units and public utilities are, by subsection (3)(a), generically excluded from the operation of the proposed statute. The justification of the exclusion, which also appears in section 330.15, is the manifest impracticality of protecting the typical land-interests of such entities against a “nonrecording” statute. To record claims in the nature of highway easements, to cite but a single example, would involve a complication of metes and bounds description of such size as to choke the facilities of the average register of deeds office.

“Wild” lands have, by judicial decision, been exempted from the operation of statutes of limitations, fundamentally on the ground that ordinary possessory safeguards against invasion are neither customary nor practical with respect to them.

Since the proposed legislation places heavy reliance upon normal possessory safeguards to protect legitimate interests against substantial risk of unfair usurpation, it is thought inappropriate to apply the shortened “grace periods” to “wild lands,” at least in blanket fashion; and they are, therefore, excluded from operation of the proposed statute by subsection (3)(b).

Subsection (3)(b) contains several “exceptions to the exception,” thus providing that despite the fact that lands may be described as “wild,” prior outstanding interests in them dependent for their validity upon certain evidences of title may nonetheless be barred by operation of the proposed statute. These evidences are covered in the “non-recording” provisions of (1)(a), the indefinite reference provisions of (1)(b), the tax title provisions of (1)(j), and the “stale notice” provisions of (1)(k). Because of their close alliance to conventional principles of nonrecording, it is felt that the fact that lands involved in these instances might be termed “wild” is of little relevance.

To describe real estate as “wild” is obviously unacceptable as a technique of draftsmanship, as is the convenient alternative of describing it simply as “vacant.” Neither term has sufficient definiteness or scope. However, when only that real estate which is, at once, “wholly unplatted, vacant and unoccupied, unused, unimproved, and uncultivated” is exempted, there is achieved a fairly exact specification of the type of lands which, in average experience, may well go without inspection for protracted periods of time.

The proposed subsection (3)(b) specifies as the critical time at which the “wildness” will exempt the lands from operation of the statute, “the time at which such subsequent bona fide purchaser’s interest arises.” Such specification may involve a mechanical problem,
in that it affords no significance whatever to the "wildness" of the lands at any time prior to the stipulated time. Hence, if a usurper falsifies the record of "wild" lands, the true owner is protected against the possible "subsequent bona fide purchaser" after the grace period only so long as the lands remain in precisely that condition.

VIII. CONCLUSION

Many state have been wrestling with the marketable title problem. Out of these struggles, a number of statutes have emerged. While all of these enactments are generically "marketable title" legislation, they usually approach the problem in one of two ways. First, they may take the "form" of statutes of limitations. Secondly, the statutes of some states approach the problem by cutting off adverse interests beyond a given period, unless notice of the interest has been filed.

The proposed Wisconsin statute would be basically of the latter category, relieving parties to a title transaction of the need for clarifying and correcting the record as to non-current defects. The proposed statute would reverse the title examiner's inclination to place the worst possible construction on title defects, and, generally after five years, establish a conclusive presumption that evidence not appearing expressly and affirmatively of record would, if it were available, prove favorable to marketability. It is in this way that the proposed legislation offers to satisfy the modern need for a more facile and realistic approach to the determination of the marketability of titles.

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77 Illinois, Indiana, Iowa, Minnesota, Massachusetts, Ohio, Wisconsin. Cf. text accompanying note 18 supra.

Florida, Michigan, Nebraska, North Dakota, South Dakota, Utah.