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## Iceberg, Right Ahead! A Compendium of Title Issues in North Dakota

Blaine T. Johnson

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# ICEBERG, RIGHT AHEAD! A COMPENDIUM OF TITLE ISSUES IN NORTH DAKOTA

BLAINE T. JOHNSON\*

## ABSTRACT

This article examines the doctrine of after-acquired title, North Dakota's Marketable Record Title Act, and the alienation of homestead: three areas of real property law that on the surface seem simple and easily applied, but below the surface are fraught with problems and unintended consequences. Much like the iceberg, what appears on the surface may look relatively harmless, but what lurks underneath can have serious repercussions. This analogy not only applies to the comparison between surface interests and mineral interests, but also to the difference between well-intended legislation and the resulting impacts that must then be addressed after a carefully researched analysis of the legislation's effect on real property law. This article addresses the history and development of each of the above-mentioned topics, discusses the current application of North Dakota real property law in conjunction with recent legislative changes, and finally suggests changes to the law. More importantly, however, this article seeks to give practitioners well-reasoned advice for the development and betterment of their real property practice.

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## I. INTRODUCTION

Most of an iceberg’s volume lies beneath the water’s surface. At first glance, the tip of the iceberg seems relatively harmless; however, it is what lies beneath the surface that can wreak havoc when unexpectedly

encountered. The same is true of real estate law and, in particular, title examination. This article will examine three common real estate principles: the doctrine of after-acquired title, North Dakota's Marketable Record Title Act, and finally alienation of homestead. To fully understand the basis and purposes of each principle, this article will first review the history and development of each. It will then explore in detail those troubling aspects that lie beneath the surface of superficial, cursory examinations of each principle. In addition, this article will probe recent changes in legislation that on the surface appear well meaning, yet upon further review seem to reach unintended consequences. Regardless of whether such legislation is repealed, amended, or otherwise adopted for practice, this article seeks to give practitioners a better understanding of common real estate principles—both with regard to surface estates and to mineral interests.

## II. DOCTRINE OF AFTER-ACQUIRED TITLE

At first glance, the doctrine of after-acquired title seems to be a simple concept. “If, at the time of a conveyance, a grantor does not own all or part of the interest that the grantor purports to convey, but the grantor later acquires the interest that was the subject of the earlier conveyance, the grantor may be estopped from denying the claim of the grantee to the after-acquired title.”<sup>1</sup> The underlying premise of the doctrine of after-acquired title is that the grantee acquires exactly what was promised by the grantor. This section will review the history of the doctrine of after-acquired title, the doctrine as applied to quitclaim deeds, the implied covenants of the word “grant” and its effect on the doctrine, and finally recent North Dakota case law and legislation.

### A. HISTORY

Derived from the California Civil Code,<sup>2</sup> the codification of the after-acquired title doctrine in North Dakota first appears pre-statehood.<sup>3</sup> “Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the

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1. JOYCE PALOMAR, 1 PATTON & PALOMAR ON LAND TITLES § 219 (3d ed. 2014).

2. CAL. CIV. CODE §1106 (West 1872).

3. GEORGE H. HAND, THE REVISED CODES OF THE TERRITORY OF DAKOTA 1877: COMPRISING THE CODES AND GENERAL STATUTES PASSED AT THE TWELFTH SESSION OF LEGISLATIVE ASSEMBLY, AND ALL OTHER GENERAL LAWS REMAINING IN FORCE 335 (1877).

same passes by operation of law to the grantee, or his successors.”<sup>4</sup> This codification is based upon a substantial body of longstanding case law.<sup>5</sup> The doctrine of after-acquired title has been explained as follows:

The deed, which the grantor engages to warrant and defend, is a solemn stipulation that the grantor has the title which he is now about to transfer to the grantee as a purchaser for value. In the face of this he cannot be heard to say, after making the transfer, that he had not that title at the time. So his new title lies lifeless in his hands against such purchaser; the estoppels being a true conveyance.<sup>6</sup>

The United States Supreme Court has stated:

“The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one . . . It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak.”<sup>7</sup>

“It is just that a party should not be permitted to hold or recover an estate in violation of his own covenant; and it is wise policy to repress litigation and to prevent a circuitry of actions.”<sup>8</sup>

## B. QUITCLAIM DEEDS AND THE DOCTRINE OF AFTER-ACQUIRED TITLE

Historically, a quitclaim deed was merely a release of any interest the grantor may have had in the property and did not rise to the level of a conveyance.<sup>9</sup> From a grantee’s perspective, the quitclaim deed is the least

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4. *Id.* See also NORTH DAKOTA REVISED CODE § 47-1015 (1943) (hereinafter N.D.R.C.); N.D.R.C. § 5529 (1913); N.D.R.C. § 4984 (1905); N.D.R.C. § 3547 (1899); N.D.R.C. § 3547 (1895).

5. See *Moore v. Crawford*, 130 U.S. 122, 130 (1889) (citing *Irvine v. Irvine*, 76 U.S. 617, 625 (1869)).

6. See RICHARD R. POWELL & PATRICK R. ROHAN, *POWELL ON REAL PROPERTY* § 927 n.4 (1989).

7. *VanRensselaer v. Kearney*, 52 U.S. 297, 326 (1850).

8. *Comstock v. Smith*, 13 Mass. (1 Pick.) 116, 119 (Mass. 1832). If a grantor were allowed to recover property against his grantee, the grantee would be entitled to an action against the grantor to recover the value of the land. *Id.*

9. See *Carkuff v. Balmer*, 2011 ND 60, ¶ 10, 795 N.W.2d 303, 306 (citing *Schuman v. McLain*, 61 P.2d 226, 227-28 (Okla. 1936)).

desirable form of conveyance because it includes no title covenants.<sup>10</sup> “The grantee does not have recourse against the grantor even if he had no interest in the property. Similarly, the grantee has no recourse if the title is encumbered by easements, mortgages, judgment liens, or any other property interests . . . . This type of deed usually is used for more limited purposes, such as releasing a mortgage, transferring property intrafamily, or settling a boundary line dispute.”<sup>11</sup> Absent fraudulent representations, the grantor of a quitclaim deed is not responsible for the goodness of the title beyond the covenants in his deed.<sup>12</sup> “A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time; and does not operate to pass or bind an interest not then in existence.”<sup>13</sup> After-acquired title will not, as a general rule, inure to the benefit of the grantee under a quitclaim deed.<sup>14</sup>

North Dakota adopted this general rule in *Alsterberg v. Bennet*.<sup>15</sup> In *Alsterberg*, the plaintiff alleged that oral promises made by the grantor of a quitclaim deed were enforceable for the recovery of monetary damages suffered by the plaintiff in order to satisfy encumbrances against the property conveyed.<sup>16</sup> The North Dakota Supreme Court held that “[o]ne who accepts a quitclaim deed is, in the absence of fraud, mistake, or other ground for equitable relief, conclusively presumed to have agreed to take the title subject to all risks as to defects or [e]ncumbrances, relying on such protection only as the recording laws afford him.”<sup>17</sup> “The absence of express or implied covenants in a deed is equivalent to an express declaration therein that the grantor assumes to convey only his right or interest, whatever it may be, and that he declines to bind himself to do more.”<sup>18</sup>

What constitutes a quitclaim deed and whether or not the doctrine of after-acquired title applies, however, is not always so clear. In *Aure v. Mackoff*, Aure owned land in fee simple in Section 19, Township 151 North, Range 95 West, McKenzie County subject to a mortgage to the State

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10. BARLOW BURKE, ANN M. BURKHART, & R. H. HELMHOLZ, FUNDAMENTALS OF PROPERTY LAW 540 (1999).

11. *Id.*

12. *VanRensselaer*, 52 U.S. at 322.

13. *Id.*

14. *Bilby v. Wire*, 77 N.W.2d 882, 888 (N.D. 1956).

15. 106 N.W. 49 (N.D. 1905).

16. *Id.* at 50.

17. *Id.* at 51.

18. *Id.*

of North Dakota.<sup>19</sup> Subsequently, Aure executed an assignment of royalty to W. R. Olson purporting to “sell, assign, transfer, convey and set over unto the said assignee, all of my right, title and interest in and to Ten per cent (10%) Royalty of all the oil and of all the gas produced and saved.”<sup>20</sup> The assignment of royalty provided that the assignor agreed to warrant and defend the title to the same.<sup>21</sup> The State of North Dakota foreclosed its mortgage, included the royalty owners in the foreclosure proceeding, and acquired title to the property by sheriff’s deed dated August 28, 1941.<sup>22</sup> A contract for deed was entered into between the State of North Dakota and Aure on February 17, 1942 for the purchase of the property.<sup>23</sup> The contract for deed was satisfied and a quitclaim deed was issued by the State of North Dakota on October 3, 1955, reserving an undivided fifty percent of all oil, gas, or minerals.<sup>24</sup>

The issue before the court was whether or not the doctrine of after-acquired title applied to the assignment of royalty to W. R. Olson.<sup>25</sup> The Court found that North Dakota Revised Code section 47-1015 was inapplicable because the assignment of royalty did not purport to grant real property in fee simple, only to “sell, assign, transfer, convey and set over unto the said assignee, all of my right, title and interest in and to Ten percent (10%) Royalty.”<sup>26</sup> The court likened this to a quitclaim deed.<sup>27</sup> This is certainly a case in which poor drafting results in poor law. It appears on the face of the assignment of royalty that the intent of such instrument was to convey to W. R. Olson an undivided ten percent royalty interest in the lands. The granting clause contained no words of release or quitclaim. The inclusion of the “all of my right, title and interest in and to” was simply superfluous in nature, and it therefore resulted in ambiguity. The designation of conveyance of a specific interest in all of the oil and all of the gas produced and saved together in the lands with words of warranty is much more indicative of a warranty deed in which after-acquired title would pass. In some regards, the court acknowledged this in its argument by stating: “The assignment conveyed to Olson the complete and entire estate in a ten percent royalty. We therefore need not be concerned with the

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19. 93 N.W.2d 807, 809 (N.D. 1958).

20. *Id.*

21. *Id.*

22. *Id.* at 810.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 810-11.

27. *Id.* at 811.

rule that an estate cannot be enlarged by general warranty.”<sup>28</sup> A conveyance of a specific interest is substantially different from granting “all of the assignor’s right, title, and interest.” The court recognized, however, that the conveyance of only the assignor’s right, title and interest was not necessarily determinative because the assignment of royalty also included words of warranty.<sup>29</sup>

The *Aure* court then held that a true quitclaim deed containing warranty of title “estops the warrantor from asserting against the grantee or his assigns any after acquired title derived through any act or conveyance of the warrantor prior to the deed in question.”<sup>30</sup> In support of its proposition, the court cited *Bell v. Twilight*, an 1853 case from the New Hampshire Supreme Court.<sup>31</sup> Bell held a mortgage against property owned by Ebenezer Fitts.<sup>32</sup> Bell then executed a quitclaim deed to Twilight in which he “released, sold, and quitclaimed” the “right, title, interest, estate, and demand” of Bell in the property together with words of limited warranty of title.<sup>33</sup> Subsequently, Bell acquired a life estate interest in the property from Hannah Fitts.<sup>34</sup> Twilight argued that the quitclaim deed was effective to convey after-acquired title because of the words of warranty.<sup>35</sup> The *Bell* court deemed that the warranty was limited in nature to only title derived and claimed by, from, or under Bell.<sup>36</sup> Because the life estate interest was acquired from other sources, it did not fall under the purview of the limited warranty.<sup>37</sup> Bell never purported to convey more than he had at the time he executed the deed, and the limited warranty could not be read to be inconsistent with the grant.<sup>38</sup> The court noted that “[i]f the doctrine of estoppel went as far as was claimed, a party owning a partial title in an estate could not, by a quitclaim deed, drawn in the most guarded and specific terms, convey that interest, without at the same time stopping himself forever from purchasing the residue of the estate, and setting it up against his grantee.”<sup>39</sup>

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* (citing *Bell v. Twilight*, 26 N.H. 401 (N.H. 1853)).

32. *Bell*, 26 N.H. at 404.

33. *Id.* (covenanting “to warrant and defend the said granted premises against all claims or demands of any person claiming by, from, or under [him].”).

34. *Id.* at 405.

35. *Id.*

36. *Id.* at 407.

37. *Id.*

38. *Id.*

39. *Id.* at 410-11.



The *Aure* court further cited the Massachusetts case of *Comstock v. Smith* to support its position.<sup>40</sup> The *Comstock* court, however, found that the covenants were restricted covenants and were coextensive with the grant or the release.<sup>41</sup> As such, a limited warranty covenanting against “the lawful claims and demands of all persons claiming by or under him” did not vest after-acquired title in the grantee.<sup>42</sup> The *Comstock* court went further and deemed that the application of the doctrine of after-acquired title to a restricted conveyance and covenant would be a manifest perversion of the principle upon which the doctrine is founded.<sup>43</sup>

The *Aure* decision likely reached the correct result in passing after-acquired title to the successors of the assignee. However, the court should not have deemed the assignment of royalty akin to a quitclaim deed. In attempting to justify its decision, the court left practitioners with no clear direction for drafting appropriate conveyances.

### C. THE MAGICAL WORD “GRANT” AND AFTER-ACQUIRED TITLE

While a naked quitclaim deed offers no covenants of title, North Dakota Century Code section 47-19-10 has created implied covenants of warranty when the word “grant” is used in conveyances, including quitclaim deeds. North Dakota adopted the statute from California Civil Code section 1113, enacted in 1872, and it reads as follows:

From the use of the word “grant” in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for the grantor and the grantor’s heirs and assigns, are implied unless retrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, nor any right, title or interest therein, to any person other than the grantee; and

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40. See *Aure v. Mackoff*, 93 N.W.2d 807, 811 (N.D. 1958) (citing *Comstock*, 30 Mass. (13 Pick.) 116 (Mass. 1832)).

41. *Comstock*, 30 Mass. (13 Pick.) at 120. (The grantor “agrees to warrant the title granted or released, and nothing more. That title only he undertook to assert and defend. To extend the covenant further, would be to reject or do away the restrictive words of it, and to enlarge it to a general covenant of warranty, against the manifest intention of the parties.”).

42. *Id.* at 117.

43. *Id.* at 121.

2. That such estate, at the time of the execution of such conveyance, is free from encumbrances done, made, or suffered by the grantor, or any person claiming under the grantor. Such covenants may be sued upon in the same manner as if they had been inserted expressly in the conveyance.<sup>44</sup>

In applying North Dakota Century Code section 47-19-10, the use of the word “grant” in a conveyance implies limited or restricted covenants of title rather than a general warranty.

An issue then arises when a deed purporting to convey all of the grantor’s right, title and interest includes the word “grant” or other covenants. In *Hanrick v. Patrick*, the United States Supreme Court examined a grant deed conveying “one undivided half of all my right, title, and interest in and to the following described lands . . . .”<sup>45</sup> The deed contained covenants that the grantor was:

lawfully seized of an interest in fee-simple of the granted premises aforesaid; that they are free from all incumbrances [sic] by me incurred; and that I have good right to sell and convey the same as aforesaid, and that I will, and my heirs executors, and administrators shall, warrant and defend the same to the said grantee, and to his heirs and assigns, forever, against the lawful claims and demands of all persons.<sup>46</sup>

The Supreme Court held:

The covenant of warranty in the deed to Sargent, however, relates only to the premises granted, which the grantors agree to warrant and defend, and the premises granted are described as “one undivided half of all my right, title, and interest in and to the following described lands,” and cannot, therefore, operate as an estoppel preventing the grantors from asserting any subsequently acquired title . . . . There is no recital in the deed to estop her as to the character of her title or the quantum of interest intended to be conveyed within the rule laid down by this court in *Van Rensseloer v. Kearney*, 11 How. 297. In the absence of such recital, a covenant of general warranty, where the estate granted is the present interest and title of the

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44. N.D. CENT. CODE § 47-10-19 (2013).

45. *Hanrick v. Patrick*, 119 U.S. 156, 173 (1886).

46. *Id.*

grantor, does not operate as an estoppel to pass a subsequently acquired title . . . Where the deed, although containing general covenants for title, does not on its face purport to convey an indefeasible estate, but only the right, title, and interest of the grantor, in cases where those covenants are held not to assure a perfect title, but to be limited and restrained by the estate conveyed, the doctrine of estoppel has been considered not to apply; in other words, although the covenants are, as a general rule, invested with the highest functions of an estoppel in passing, by mere operation of law, an after-acquired estate, yet they will lose that attribute when it appears that the grantor intended to convey no greater estate than he was possessed of.<sup>47</sup>

The South Dakota Supreme Court examined a quitclaim deed in which the grantors “hereby convey, grant, remise, release, and quitclaim unto John L. Lockhart, trustee for the State of South Dakota, and to his assigns, forever, all the [their] right, title, estate, interest, property, and equity in and to the following real property.”<sup>48</sup> South Dakota Codified Laws section 43-25-10 concerning the implied covenants that are attached to the word “grant” is identical to North Dakota Century Code section 47-10-19. In this case, the South Dakota Supreme Court held that the word “grant” in an instrument that only conveys the right, title, and interest of the grantor is not sufficient to convey after-acquired title.<sup>49</sup> Following this decision, the South Dakota legislature codified the application of the after-acquired doctrine to the implied covenants attributed to the word “grant” so that “[e]very such instrument, duly executed, shall be a conveyance to the grantee, his heirs, and assigns, of all right, title, and interest of the grantor in the premises described, but shall not extend to after-acquired title, unless words expressing such intention be added.”<sup>50</sup>

The California Court of Appeals came to a similar conclusion in *Southern Pacific Co. v. Dore*.<sup>51</sup> The deed in the *Dore* case contained the following grant clause:

That the said parties of the first part do by these presents grant, bargain and sell unto the said party of the second part, and to its

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47. *Id.* at 175-76.

48. *State v. Kemmerer*, 84 N.W. 771, 771 (S.D. 1900).

49. *Id.* at 773.

50. *See* S.D. CODIFIED LAWS § 43-25-8 (1911).

51. 168 P. 147 (Cal. Ct. App. 1917).

successors and assigns forever, all of their right, title and interest in and to the following tracts . . . .<sup>52</sup>

California Civil Code section 1113 concerning the implied covenants that are attached to the word “grant” is identical to North Dakota Century Code section 47-10-19 and, as noted above, was the basis for the North Dakota statute.<sup>53</sup> The California Court of Appeals refused to apply the implied covenants to a conveyance of only the grantor’s right, title, and interest, stating:

According to the plain language of the statute it is only when a conveyance of an estate of inheritance or a fee simple is to pass that from the word “grant” a covenant is implied that the land to be conveyed is free from incumbrances; [sic] and when the conveyance by its terms merely purports—as does the conveyance here—to pass all the right, title, and interest of the grantors, according to the authorities nothing more passes than the estate which such grantors had in the land at that time subject to all defects and equities which could have been asserted against the grantors. In *Hull’s Adm’r v. Hull’s Heirs*, 35 W.Va. 155, at page 164, 13 S.E. 49, at page 52 (49Am.St.Rep.800), the court says:

Where a deed conveys the grantor’s right, title and interest, though it contains in general terms a covenant of general warranty, the covenant is regarded as a restricted one, limited to the estate conveyed, and not one defending generally the land described. The covenant of warranty is intended to defraud only what is conveyed, and cannot enlarge the estate conveyed.<sup>54</sup>

Citing numerous other sources, the *Dore* court found that “it has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in the purchaser only what the grantor himself could claim, and the covenants in such deed, if there were any, were limited to the estate described.”<sup>55</sup>

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52. *Id.* at 147.

53. CAL. CIV. CODE § 1113 (West 1917).

54. *Dore*, 168 P. at 147. The *Dore* court went on to quote *Gee v. Moore*, stating “[t]he deed does not purport to convey the premises in fee simple absolute, so as to bring the instrument within the provision of the thirty-third section of our statute (section 1113) concerning conveyances. It only purports to pass all the right, title, and estate, which the grantor possessed in the land.” *Id.* (quoting *Gee v. Moore*, 14 Cal. 472, 474 (1859)).

55. *Id.* (citing *Brown v. Jackson*, 16 U.S. 449 (1818); *Coe v. Persons Unknown*, 43 Me. 432 (Me. 1857); *Pike v. Galvin*, 29 Me. 183 (Me. 1848); *Sweet v. Brown*, 53 Mass. (12 Met.) 175

The North Dakota Supreme Court first touched upon the use of the word “grant” in a quitclaim deed in *Frandsen v. Casey*.<sup>56</sup> The quitclaim deed examined by the court included a granting clause that stated that the grantor “do[es] hereby convey and quit claim” to the grantee “all right, title and interest in and to” the described tract.<sup>57</sup> The grantee argued that the quitclaim deed acted to convey all of the described property in fee simple and was not limited to only the one-third interest owned by the grantor.<sup>58</sup> No words of warranty were included in the quitclaim deed.<sup>59</sup> The court, in dicta, noted that the quitclaim deed did not include the word “grant,” which implies certain covenants.<sup>60</sup> Other than the possibility that the court included such dicta to signal a potentially different outcome had the word “grant” been included, nothing in the opinion reflects that the use of the word “grant” would have conveyed after-acquired title, and because the quitclaim deed had no covenants implied or otherwise, the issue was not properly before the court.<sup>61</sup> Relying upon *State v. Kemmerer*, the court held that the quitclaim deed only conveys the interest of the grantor and does not purport to convey the property.<sup>62</sup> *Frandsen*, however, was not a case of after-acquired title, but one of determining what interest such quitclaim deed conveyed when no covenants were made. The distinction is important because of the effect that this case caused on the interpretation of quitclaim deeds by practitioners.

Prior to the *Aure* and *Frandsen* decisions, North Dakota Title Standard 1.071 stated as follows:

The use of the word “grant” in a deed which releases and quitclaims all the grantor’s right, title and interest, or other words to that affect, does not make such a deed one by which an after-acquired title will pass.<sup>63</sup>

In 1978, the North Dakota Title Standards Committee adopted a change of Title Standard 1.071 to remove the word “not” from the standard:

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(Mass. 1846); *Allen v. Holton*, 20 Pick. (Mass.) 458 (Mass. 1838); *Adams v. Cuddy*, 13 Pick. (Mass.) 460 (Mass. 1833); *Blanchard v. Brooks*, 12 Pick. (Mass.) 47 (Mass. 1831)).

56. 73 N.W.2d 436 (N.D. 1955).

57. *Id.* at 447.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (citing *State v. Kemmerer*, 84 N.W. 771 (S.D. 1900)).

63. N.D. TITLE STANDARDS § 1.017 (N.D. State Bar Ass’n 1961).

The use of the word “grant” in a deed which releases and quitclaims all the grantor’s right, title and interest, or other words to that affect, does make such a deed one by which an after-acquired title will pass.<sup>64</sup>

The North Dakota Title Standards Committee cited *Kemmerer* as authority for the pre-1978 title standard.<sup>65</sup> The North Dakota Title Standards Committee cited North Dakota Century Code sections 47-10-15 and 47-10-19 as support of both versions of the standard.<sup>66</sup> In 1988, the title standard was renumbered to North Dakota Title Standard 1-08 and authority cited as North Dakota Century Code sections 47-10-15 and 47-10-19, 162 A.L.R. 556, and *Aure v. Mackoff*.<sup>67</sup>

The American Law Report article cited as authority does not support the contention that the word “grant” will effectively pass title to after-acquired property when used in a quitclaim deed of all of the grantor’s right, title, and interest. The article extensively cites cases that confirm that a generic quitclaim deed will only convey the interest of the grantor at the time of execution and that after-acquired title will only pass if words of general warranty are included.<sup>68</sup> The majority rule expressed by the article is found in *War Fork Land Co. v. Carr*, holding that:

The doctrine prevails that one who conveys, with a covenant of warranty, land to which he had not the title, but which he subsequently acquires by deed, devise, or descent, will be estopped to claim the land against his warrantee, to whom the title thereafter acquired inured by virtue of the conveyance and covenant of warranty . . . But that doctrine does not operate to divest a title subsequently acquired when the deed of conveyance is without warranty, or is limited to a transfer of the interest owned by the grantor at the time of the conveyance.<sup>69</sup>

The article goes on to further note:

A grantor in a deed of the second class, not having assumed to convey an actual estate and to make it good against all claims but only to relinquish whatever estate he may have with a

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64. N.D. TITLE STANDARDS § 1.017 (N.D. State Bar Ass’n 1978).

65. *Id.* (citing *State v. Kemmerer*, 84 N.W. 771 (S.D. 1900)).

66. N.D. TITLE STANDARDS § 1.017 (N.D. State Bar Ass’n 1978); N.D. TITLE STANDARDS § 1.017 (N.D. State Bar Ass’n 1961).

67. N.D. TITLE STANDARDS § 1-08 (N.D. State Bar Ass’n 1988).

68. K. A. Drechsler, Annotation, *Right or Interests Conveyed by a Quitclaim Deed*, 162 A.L.R. 556 (2015) (citing *War Fork Land Co. v. Carr*, 33 S.W.2d 308 (Ky. 1930)).

69. *Id.*

guaranty that he has not given anyone else any claim to it, is not bound to make any other title or estate good to grantee. If at the time of his deed, he has suffered no one else to acquire any rights or claims under him, there can be no breach of his covenant. After such a deed he is free to acquire other titles or estates in the same land, and hold them against his grantee, for he never covenanted against such titles or estates, but only against the title or estate he conveyed, whatever it was.<sup>70</sup>

It appears that the North Dakota Title Standards Committee felt that the limited covenants expressed by the word “grant” were sufficient to meet the requirements of a deed of conveyance with warranty. This position is arguably supported by *Aure* based upon the North Dakota Supreme Court’s decision to classify the assignment of royalty as a quitclaim deed with general warranty, and by *Frandsen*, which included dicta suggesting the word “grant” may have altered the outcome of the Court’s holding. The North Dakota Supreme Court dealt with this specific issue in the 2011 case of *Carkuff v. Balmer*.<sup>71</sup>

#### D. CARKUFF AND SUBSEQUENT LEGISLATION

In 1953, Alice Carkuff conveyed all of the oil, gas, and other minerals underlying her property to her four daughters.<sup>72</sup> On the same date, she conveyed by quitclaim deed the surface interest to her son, James Carkuff.<sup>73</sup> Four months later, on October 20, 1953, Alice Carkuff executed a quitclaim deed in which “Alice Carkuff ‘does by these presents GRANT, BARGAIN, SELL, REMISE, RELEASE and QUIT-CLAIM unto [James Carkuff] . . . all the right, title, and interest in and to’ the subject property.”<sup>74</sup> The quitclaim deed did not contain a reservation of minerals and was not restricted to the surface only.<sup>75</sup> Through a series of conveyances several years later, Alice Carkuff reacquired both the surface and the minerals and then again reconveyed the minerals to her daughters and the surface to her son.<sup>76</sup> The heirs of James Carkuff argued that the October 20, 1953,

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70. *Id.* (quoting *Crockett v. Borgerson*, 152 A. 407 (Me. 1930)).

71. 2011 ND 60, 795 N.W.2d 303.

72. *Id.* ¶ 3, 795 N.W.2d at 304.

73. *Id.*

74. *Id.* ¶ 13, 795 N.W.2d at 308.

75. *Id.* ¶ 4, 795 N.W.2d at 305.

76. *Id.*

quitclaim deed operated to convey after-acquired title to the mineral interests because of the inclusion of the word “grant” in the conveyance.<sup>77</sup>

The North Dakota Supreme Court reflected on 23 AM. JUR. 2D *Deeds* section 225, which provides:

In determining whether a quitclaim has been created, operative words of grant or release are subordinated to words defining or restricting the interest granted. When the entire instrument reveals an intention to convey the land itself or some definite interest therein, it is not a quitclaim merely because of the use of the word “quitclaim,” or the operative words “remit, release, and quitclaim,” unaccompanied by words of grant. Nevertheless, such operative words used alone are significant factors; and where only the grantor’s right, title or interest is quitclaimed, such operative words are conclusive that the instrument is a quitclaim.

Similarly, the intention of the parties so controls that the use of the term “grant” does not necessarily designate the character of a deed, but whether an instrument is a quitclaim deed or a deed of grant, bargain, and sale that purports to convey the property itself is to be determined from the whole of the granting clause contained in the deed.<sup>78</sup>

In making its decision, the North Dakota Supreme Court cited with favor the South Dakota decision of *State v. Kemmerer*.<sup>79</sup> The court rejected the position that the word “grant” transforms the deed into one that would pass after-acquired title.<sup>80</sup> Instead, the court held that while the term “grant” is used in the deed, it was limited to Alice Carkuff’s “right, title, and interest” in the property rather than specifically “grant[ing]” the entire fee to James Carkuff.<sup>81</sup> In construing the quitclaim deed in such a manner, the court held that a quitclaim deed with limited covenants resulting from the use of the word “grant” does not operate to convey after-acquired title.<sup>82</sup> The court made no mention of the North Dakota Title Standards in its analysis because the parties never asserted that the deed was ambiguous. At the time that the 1953 quitclaim deed was drafted and executed, North Dakota Title Standard 1.071 relied on *State v. Kemmerer* for the proposition

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77. *Id.*

78. *Id.* ¶ 11, 795 N.W.2d at 307 (quoting 23 AM. JUR. 2D *Deeds* § 225 (2002)).

79. *Id.* ¶ 13, 795 N.W.2d at 308 (citing *State v. Kemmerer*, 84 N.W. 771, 772 (S.D. 1900)).

80. *Id.* ¶ 14.

81. *Id.*

82. *Id.*



that the word “grant” did not convey after-acquired title, further supporting the likely intent of the parties and confirming the decision of the court.

The *Carkuff* decision was contrary to North Dakota Title Standard 1.071 as amended in 1978.<sup>83</sup> As a result, the North Dakota Title Standards Committee amended the standard to reflect the court’s holding: “The use of the word “grant” in a quit claim deed does not, of itself, make the deed on which passes after-acquired title. The deed on its [sic] face as a whole must be considered to determine the parties’ intent.”<sup>84</sup>

Practitioners’ reliance upon the title standard appears to be the basis for legislative amendments to North Dakota Century Code section 47-10-15 in 2013 “correcting” the Supreme Court’s holding in *Carkuff*.<sup>85</sup> The legislature passed Senate Bill 2168 in 2013 to amend North Dakota Century Code section 47-10-15 as follows:

When a person purports by proper instrument to ~~grant~~ convey real property in fee simple and subsequently acquires any title or claim of title ~~thereto to the real property~~, the ~~same real property~~ passes by operation of law to the ~~grantee or the grantee’s successors~~ person to whom the property was conveyed or that person’s successor. A quitclaim deed that includes the word “grant” in the words of conveyance, regardless of the words used to describe the interest in the real property being conveyed by the grantor, passes after-acquired title. The use of a quitclaim deed, with or without the inclusion of after-acquired title in the deed, does not create any defect in the title of a person that conveys real property. This section applies to any conveyance regardless of when executed.<sup>86</sup>

The amendment is contrary to well-reasoned case law and decades of practice—at least prior to 1978. The authority for 1978 title standard was tenable, which *Carkuff* confirmed. Admittedly, a simple bright-line rule for invoking the doctrine of after-acquired title is a good practice if it is in fact possible. However, it is also good practice to rely upon the common understanding that a quitclaim deed conveys only the interest of the grantor,

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83. N.D. TITLE STANDARDS § 1.071 (N.D. State Bar Ass’n 1978).

84. N.D. TITLE STANDARDS § 1-06 (N.D. State Bar Ass’n 2012).

85. See *Hearing on S.B. 2168 Before S. Judiciary Comm.*, 63rd Leg. Assemb., Reg. Sess. 2 (N.D. 2013) (“The reason for this bill is that the Supreme Court has addressed a case recently that dealt with a quit claim deed, if the deed utilizes the language grant after acquired title will always pass. If it does not have the grant language in it it will not pass after acquired title . . . it was decided to go with what the practice has always been and that is the use of the word grant whatever the document is would pass after acquired title.”). The Committee Minutes also reflect the attempt to resolve issues of successive quitclaim deeds being recorded out of order. See *id.*

86. 2013 N.D. Laws ch. 346, § 1 (codified at N.D. CENT. CODE § 47-10-15 (2013)).

whatever that may be, and nothing more. Good drafting requires one to explicitly describe within the instrument the true intent of the parties. Rather than relying upon the word “grant” in a conveyance to invoke the after-acquired title doctrine and thereby implying covenants of warranty as well, it is far better to simply state: “This [insert name of instrument] conveys all after-acquired title of the [Grantor/Assignor].” The inclusion of the word “grant” in a true quitclaim deed is unnecessary and may unintentionally transform the quitclaim deed into a limited warranty deed.

It is noticeably unusual that, as codified, the application of the doctrine of after-acquired title when invoked by the word “grant” applies only to quitclaim deeds. It should be noted that the Legislature did not change the definition of “grant” in North Dakota Century Code section 47-10-19; in other words, the limited covenants implied by the use of the word “grant” were not expanded. However, as amended, there is now the potential for the word “grant” to take on different meanings depending upon the type of instrument in which it is used.

In addition, the analysis of after-acquired title has always been founded upon the distinction of whether or not the instrument conveys a fee simple interest in the lands described or merely the interest of the grantor. Because the first portion of North Dakota Century Code section 47-10-15 only passes after-acquired title when the instrument purports to convey real property in fee simple, the legislative amendments fail to take into account the situation in which an instrument conveys all of the grantor’s right, title, and interest in and to the lands described without using the word “grant,” but includes language of general warranty. As such, it is possible that a warranty deed without the word “grant” and a quitclaim deed with the word “grant,” both conveying all of the grantor’s right, title and interest, would result in the warranty deed not conveying after-acquired title while the quitclaim deed conveys such title.

This leads to the unanswered question of whether or not the use of the word “grant” in a mineral deed, assignment of royalty, or any other instrument of conveyance also conveys after-acquired title. Should the court take a position that such instruments are akin to a quitclaim deed, as it concluded in *Aure*, it will have a tremendous effect on the examination of mineral title. Historically, it has been commonplace for professional landmen to acquire oil and gas interests, “grant” various interests to multiple investors, and then subsequently acquire additional oil and gas interests in the same lands to be further rationed out. It is also common for an individual to have conveyed all of her right, title, and interest in oil, gas and other minerals to a grantee only to subsequently acquire additional

interest through the estate of a relative, with no intent to convey such after-acquired title. In fact, such situations often did not even contemplate the grantor acquiring additional interest subsequent to the original conveyance. Retroactive application of this amendment may misconstrue the actual intent of the parties to the conveyance and will likely result in more litigation to determine the outcome of the conveyance.

The North Dakota Supreme Court provided well-reasoned guidance for its position in *Carkuff*, which is substantiated by the law of several other jurisdictions. The Legislature should take serious consideration of the specific objective of the 2013 amendments and determine whether or not it is wise to legislate in derogation of the North Dakota Supreme Court's holding and whether the legislative amendments truly accomplish such objective. In addition, the Legislature should contemplate whether or not the consequences of the adopted language are acceptable or if modifications would be appropriate.

### III. MARKETABLE RECORD TITLE ACT

Marketable title is “title that a reasonable buyer would accept because it appears to lack any defect and to cover the entire property that the seller has purported to sell.”<sup>87</sup> Marketable title acts are intended to limit the scope of title examination by cutting off virtually all interests in land that appear in the public records prior to a given time.<sup>88</sup> Nearly twenty states have enacted some form of marketable record title act.<sup>89</sup> This section will

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87. BLACK'S LAW DICTIONARY 1622 (9th ed 2009). The North Dakota Supreme Court has defined marketable title as “fee simple, free from litigation, palpable defects, and grave doubts . . . which will enable the purchaser not only to hold the land in peace . . . but to sell or mortgage it to a person of reasonable prudence and caution.” *Kennedy v. Dennstadt*, 154 N.W. 271, 274 (N.D. 1915).

88. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 236-37 (5th ed. 1998). “The name is unfortunate, for such acts neither declare anybody's title to be marketable nor define marketability.” *Id.* Indeed the Model Act notes that the term “marketable record title” as proposed by the Model Act does not mean title which a vendee would be compelled to accept, but simply that the forty-year title extinguishes all prior interests, subject to very few exceptions. See LEWIS M. SIMES & CLARENCE B. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 11 (1960).

89. CONN. GEN. STAT. §§ 47-33b to 47-33i (2004); FLA. STAT. §§ 712.01 to 712.10 (2000); 735 ILL. COMP. STAT. 5/13-118 (2003); IND. CODE §§ 32-20-3-1 to 32-20-4-3 (2002); IOWA CODE §§ 614.29 to 614.38 (1999); KAN. STAT. ANN. §§ 58-3401 to 58-3412 (2005); MICH. COMP. LAWS §§ 565.101 to 565.109 (2006); MINN. STAT. § 541.023 (2000); NEB. REV. STAT. §§ 76-288 to 76-298 (2003); N.C. GEN. STAT. §§ 47B-1 to 47B-9 (2005); N.D. CENT. CODE §§ 47-19.1-01 to 47-19.1-11 (1999); OHIO REV. CODE ANN. §§ 5301.47 to 5301.56 (2004); OKLA. STAT. tit. 16, § 71 (1999); R.I. GEN. LAWS §§ 34-13.1-1 to 34-13.1-11 (1995); S.D. CODIFIED LAWS §§ 43-30-1 to 43-30-17 (2007); UTAH CODE ANN. §§ 57-9-1 to 57-9-10 (West 2000); VT. STAT. ANN. tit. 27, §§ 601 to 606 (2006); WIS. STAT. § 893.33 (1996); WYO. STAT. ANN. §§ 34-10-101 to 34-10-109 (2007). Some other states have limitations provisions that could apply to particular claims. For

examine the creation of Marketable Record Title Acts, the establishment of a chain of title necessary to comply with the Marketable Record Title Act, the requirement of possession, and recent legislative amendments specifically affecting mineral interests.

#### A. CREATION OF THE MARKETABLE RECORD TITLE ACT

Michigan legislation, adopted in 1945, formed the precursor of the “Model Marketable Title Act,” which Lewis M. Simes and Clarence B. Taylor first proposed in 1960.<sup>90</sup> The impetus for the Model Act was the simple fact that the mere passage of time causes the chain of title to grow longer and longer.<sup>91</sup> In addition, “[i]ncreased business activity, population mobility, home ownership, mortgage financing, population growth and the shift from rural to urban land patterns have increased the volume of title activity that puts a strain on the present recording system and conveyancing practice.”<sup>92</sup> As a result, the practice of title examination becomes less and less efficient and far more costly.<sup>93</sup> The Model Act sought to shorten the length of the record required in order to determine marketable title.<sup>94</sup> Most states require an unbroken chain of forty years to establish marketable title.<sup>95</sup> The Uniform Marketable Title Act, as approved and recommended for enactment by the National Conference of Commissions on Uniform State Laws, proposed a thirty-year chain of title be required to establish marketable title.<sup>96</sup>

The Model Act requires an owner to give notice of a claim to preserve his or her interest.<sup>97</sup> If no such notice appeared of record during the requisite period of time, then all conflicting claims based upon any title

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example, California has a modified version of a marketable title act that limits certain kinds of claims based on old records. *See* CAL. CIV. CODE §§ 880.020 to 887.010 (West 2007).

90. Ted. J. Fiflis, *The Improvement of Conveyancing by Legislation*. By Lewis M. Simes & Clarence B. Taylor. *Ann Arbor, University of Michigan Law School, 1960*, 70 YALE L.J. 1409, 1410 (1961) (reviewing LEWIS M. SIMES & CLARENCE B. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* (1960)).

91. *Id.* at 3.

92. John F. Hicks, *The Oklahoma Marketable Record Title Act Introduction*, 9 TULSA L.J. 68, 69 (1973).

93. *Id.*

94. *Id.*

95. *See* discussion *supra* note 89. The “Model Act” recommended such a forty-year period suggesting that the requisite period must be long enough to avoid the filing of many claims and the deprivation of substantial interests by the operation of the statute. SIMES & TAYLOR, *supra* note 89, at 5.

96. *See* UNIF. MARKETABLE TITLE ACT (1990).

97. *See* SIMES & TAYLOR, *supra* note 89, at 3.

transaction prior to the requisite period were extinguished.<sup>98</sup> This effectively worked to eliminate satisfied but unreleased mortgages, titles by adverse possession, equitable titles, future interests, and other stale claims.<sup>99</sup>

In 1951, the Marketable Record Title Act (“MRTA”) became law in North Dakota.<sup>100</sup> The legislative purpose identified in North Dakota Century Code section 47-19.1-10 is consistent with the reasoning behind the Model Act.<sup>101</sup> The MRTA defines marketable title as follows:

Any person that has an unbroken chain of title to any interest in real estate and that person’s immediate or remote grantors under a conveyance or other title transaction that has been of record for a period of twenty years or longer, and is in possession of the interest, is deemed to have a marketable record title to the interest, subject solely to the claims or defects that are not extinguished or barred by the application of this chapter, instruments that have been recorded less than twenty years, and encumbrances of record not barred by the statute of limitations.<sup>102</sup>

As originally enacted, the MRTA required an unbroken chain of thirty years.<sup>103</sup> In 1957, the Legislature amended the MRTA to reduce the necessary time period to twenty years, making it one of the shortest time periods required in the United States to establish an unbroken chain of title.<sup>104</sup> An early analysis of North Dakota’s MRTA suggested that the MRTA could bar the following common claims:

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98. *Id.*

99. *Id.* at 4.

100. 1951 N.D. Sess. Laws 397. *See also* N.D. CENT. CODE ch. 47-19.1 (2013).

101. N.D. CENT. CODE § 47-19.1-10 (2013) (providing “[t]his chapter shall be construed to effect the legislative purpose of simplifying and facilitating real estate title transactions by allowing persons to deal with the record title owner as defined herein and to rely upon the record title covering a period of twenty years or more subsequent to the recording of a deed of conveyance as set out in section 47-19.1-01, and to that end to bar all claims that affect or may affect the interest thus dealt with, the existence of which claims arises out of or depends upon any act, transaction, event or omission occurring before the recording of such deed of conveyance, unless a notice of such claim, as provided in section 47-19.1-05, shall have been duly filed for record. The claims hereby barred shall mean any and all interest of any nature whatever, however denominated, whether such claims are asserted by a person sui juris or under disability, whether such person is or has been within or without the state, and whether such person is natural, corporate, private or governmental.”).

102. N.D. CENT. CODE § 47-19.1-01 (2013).

103. *See* 1951 N.D. Laws ch. 280.

104. 1957 N.D. Sess. Laws ch. 312, § 1; *see also* SIMES & TAYLOR, *supra* note 89, at xxiv (explaining that “if the period stated in the Model Marketable Title Act were changed from forty years to five or ten years, entirely different consequences would follow. Instead of extinguishing stale claims which have no real validity, it would tend to extinguish all sorts of live claims and interests. And large numbers of notices would constantly be filed to keep claims alive.”); Gardner Cromwell, *The Improvement of Conveyancing in Montana by Legislation—A Proposal*, 22 MONT.

- (1) A claim arising under tax title which is more than 30 years old.
- (2) A defective quiet title action, mortgage foreclosure, probate proceeding, or sale under a judgment.
- (3) A deed executed by a husband or wife only without stating that it does not cover homestead.
- (4) Informalities in the execution or acknowledgement of conveyances.
- (5) Interests which are present or future, vested or contingent with the exception of the reversionary interest of a lessor or his successor and the rights of remaindermen upon expiration of a life estate or trust created prior to the date of the recording of the conveyance under which title is claimed.<sup>105</sup>

#### B. ESTABLISHMENT OF A CHAIN OF TITLE

The definition of “Title Transaction” is extraordinarily broad, meaning: any transaction affecting title to real estate, including by will or descent from any person who held title of record at death, title by a decree or order of any court, title by tax deed or by trustee’s referee’s, guardian’s executor’s, or sheriff’s deed as well as by direct conveyance or reservation.<sup>106</sup>

Courts have held a variety of instruments qualify as a title transaction.<sup>107</sup> In *Dennison v. North Dakota Department of Human Services*, the North Dakota Supreme Court reasoned that, because a homestead statement was entitled to be recorded pursuant to North Dakota Century Code section 50-07-07 (1943), and that under North Dakota

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L. REV. 26, 29 (1960) (“A relatively short period, however, may have the effect of cutting off live and timely claims (easements or mortgages, for example) simply because the holders failed to record a notice.”).

105. James E. Leahy, *The North Dakota Marketable Record Title Act*, 29 N.D. L. REV. 265, 270 (1953). It should be noted that the article was written at a time when the unbroken chain was required to cover a period of thirty years; the mere act of stating the property conveyed is not homestead within the conveyance is insufficient for the purposes of North Dakota Title Standard 2-02. See N.D. TITLE STANDARDS § 2-02 (N.D. State Bar Ass’n 2012).

106. N.D. CENT. CODE § 47-19.1-02 (2013). Note, “or reservation” was included in 2013. See 2013 N.D. Laws ch. 351, § 2.

107. See generally *Mizla v. Depalo*, 438 A.2d 820, 820 (Conn. 1981) (finding a warranty deed creating an easement constituted a title transaction); *Heifner v. Bradford*, 446 N.E.2d 440, 440 (Ohio 1983) (holding a probated will constituted a title transaction); *Eisenbarth v. Reusser*, 18 N.E.3d 477 (Ohio Ct. App. 2014) (holding an oil and gas lease is a title transaction affecting real estate); *Hazard v. East Hills, Inc.*, 45 A.3d 1262 (R.I. 2012) (special master found that a boundary line agreement was a title transaction).

Century Code section 47-19-01 any instrument affecting the title to or possession of real property is entitled to be recorded, it followed that the Legislature intended a homestead statement to be an instrument affecting title to or possession of property.<sup>108</sup> This reasoning, however, is not fully inclusive. For instance, a warranty deed with an improper acknowledgement is not entitled to be recorded, but on occasion is mistakenly accepted by the recorder.<sup>109</sup> Such an improperly recorded instrument should still be an instrument affecting title. In *Marshall v. Hollywood*, the Florida Supreme Court held the term “affects title” did not carry the narrow meaning of “changing or altering,” but the broader meaning of “concerning” or “producing an effect upon.”<sup>110</sup> The court further reasoned that a void instrument would affect land titles by casting a cloud or doubt thereon.<sup>111</sup>

It is not, however, a mere title transaction that commences the clock on establishing a twenty-year unbroken chain of title. North Dakota defines “unbroken chain” as follows:

A person is deemed to have the unbroken chain of title to an interest in real estate when the records of the county recorder disclose a conveyance or other title transaction of record twenty years or more which purports to create the interest in that person or that person’s immediate or remote grantors, with nothing appearing of record purporting to divest that purported interest.<sup>112</sup>

It is the conveyance or other title transaction “*which purports to create the interest in that person*” that has been of record more than twenty years.<sup>113</sup> Practitioners commonly refer to such instrument as the “root deed” or “root of title.”<sup>114</sup> Courts and commentators have explained the root of title concept as follows:

[T]hat conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date

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108. 2002 ND 39, ¶ 1, 640 N.W.2d 447, 449.

109. N.D. CENT. CODE § 47-19-03 (2013); *but see* N.D. CENT. CODE § 1-04-01 (2013) (curing defects in acknowledgments when such instrument has been of record for a period of five years).

110. 224 So. 2d 743, 749 (Fla. 1969).

111. *Id.*

112. N.D. CENT. CODE § 47-19.1-02(1) (2013).

113. *Id.* (emphasis added).

114. *Id.*

twenty-three years prior to the time when marketability is being determined. The effective date of the “root of title” is the date on which it is recorded.<sup>115</sup>

The root of title need only purport to create or convey an interest, which means that the grantor need not have actually owned the property to qualify as a root deed.

Courts have taken contrary positions in determining what may be a root deed. In *Marshall v. Hollywood*, the Florida Supreme Court affirmatively answered a certified question confirming that a forged deed or “wild deed” could constitute a root deed.<sup>116</sup> The *Marshall* case specifically examined the ability of a forged deed to divest the true owners of the property when the forgery had been of record the requisite period of time.<sup>117</sup> The true owners of the property did not discover the forgery until some forty-two years later, and the true owners had failed to record any notice.<sup>118</sup> After amicus curiae from the Florida Bar and significant analysis of the purpose of the Marketable Record Title Act, the court stated that to determine a forged or wild deed could not act as a root deed “would be to disembowel the Act through a case dealing with a factual situation of a nature precisely contemplated and remedied by the Act itself. This we cannot do.”<sup>119</sup>

The Ohio Court of Appeals arrived at the same conclusion in *Straits v. Shepler*.<sup>120</sup> In *Straits*, Alvina Sprague conveyed the surface by deed to Fred W. Waters, reserving all oil and gas in 1916.<sup>121</sup> In 1936, Waters conveyed the property by deed without being subject to the prior reservation of oil and gas.<sup>122</sup> Sprague died in 1957 with her will being probated and several affidavits for transfer and record of real estate inherited identifying her as devisee placed of record.<sup>123</sup> This resulted in competing chains in which the 1936 deed from Waters was deemed a wild deed with regard to the oil and gas interests. The court held that a wild deed could in fact constitute a root deed, reasoning as follows:

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115. Obermiller v. Baasch, 823 N.W.2d 162, 170-71 (Neb. 2012) (quoting Gregory B. Bartles, Comment, *The Nebraska Marketable Title Act: Another Tool in the Bag*, 63 NEB. L. REV. 124, 136 (1984)).

116. *Marshall v. Hollywood, Inc.*, 236 So. 2d 114, 120 (Fla. 1970).

117. *Id.* at 116.

118. *Id.* at 117.

119. *Id.* at 120.

120. No. CA 332, 1982 WL 2919, at \*8 (Ohio Ct. App. Feb. 10, 1982).

121. *Id.* at \*3.

122. *Id.* at \*4.

123. *Id.*



[S]ince the purpose of the marketable title statutes is to eliminate the need for searching back to the sovereign, such statutes are not concerned with the quality of the title conveyed by the root. So long as the instrument serving as the root of title purports to convey an interest, it is effective to extinguish prior claims and interests. Thus, it is possible even for the grantee of a complete stranger to divest the title of the record owner.<sup>124</sup>

Wyoming has also recognized a wild deed as the root of title.<sup>125</sup> In *Esterholdt*, Continental Livestock Co. owned real property and conveyed the parcel in question to its president, J.A. Reed, in 1946.<sup>126</sup> In 1967, an easement was granted to Utah Power and Light Co.<sup>127</sup> The easement was executed by J. A. Reed as president of Continental Livestock Co., rather than in his individual capacity.<sup>128</sup> At the time of the easement, Continental Livestock Co. had no interest in the property.<sup>129</sup> Citing a law review article from two University of Wyoming College of Law professors, the court noted that “[t]he Act is capable of . . . recognizing a new title, free of all prior claims and defects, in a grantee holding under a wild or maverick deed.”<sup>130</sup> The *Esterholdt* court went on to find that nothing “in the Act . . . suggests that a wild deed cannot be the root of title for a contestant in a controversy under the Act. In fact, such an interpretation would render the methodology of the Act pointless.”<sup>131</sup>

Oklahoma, however, refuses to extend such treatment to forged deeds, finding that such deeds fall under the “inherent-defect” exception to the state’s marketable title act and holding that a forged conveyance is ineffective as a muniment of title for any purpose.<sup>132</sup> The *Mobbs* court, however, did find a void tax deed that met with explicit legislative approbation was an effective muniment of title and did qualify as a valid root of title.<sup>133</sup> In *Exchange National Bank of Chicago v. Lawndale*

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124. *Id.* at \*8 (quoting Walter E. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 57 (1967)) (emphasis contained in original).

125. *Esterholdt v. Pacificorp*, 301 P.3d 1086, 1091 (Wyo. 2013).

126. *Id.* at 1087.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1091 (citing Gary B. Conine & Daniel J. Morgan, *The Wyoming Marketable Title Act—A Revision of Real Property Law*, XVII LAND & WATER L. REV. 181, 199 (1981)).

131. *Id.*

132. *Mobbs v. City of Lehigh*, 655 P.2d 547, 552 (Okla. 1982).

133. *Id.*

*National Bank of Chicago*, two competing chains of title existed.<sup>134</sup> The Illinois Supreme Court held that in such cases of competing chains, a chain of title could not be founded upon a wild deed.<sup>135</sup>

*Wilson v. Kelley* held that a quitclaim deed that conveyed all of the grantor's interest did not constitute a root deed, finding that "clearly a quitclaim deed is a title transaction, but it appears that it is not possible to determine what estate it purports to transfer."<sup>136</sup> The court held that the ordinary "quitclaim deed only purported to transfer whatever interest the grantor may have had in the land," and therefore, "it was impossible to determine from the face of the instrument what interest or estate in land it 'purported to convey.'"<sup>137</sup> However, "a quitclaim deed can serve as a root of title if it evidences an intent to convey an identifiable interest in the land."<sup>138</sup> The court further held that the lack of warranty was not fatal to the application of the marketable title act.<sup>139</sup>

Nebraska courts have made the same determination. In *Smith v. Bendberich*, the owner of an undivided one-tenth interest in the real property delivered a quitclaim deed to the grantee without covenant, warranty, or recital showing an intention not to limit the interest affected by the conveyance to that which the grantor then owned.<sup>140</sup> The grantee then died and, through administration of the estate, the heirs of the grantee were assigned the entire tract of land.<sup>141</sup> The trial court held that the quitclaim deed satisfied the requirements of the Marketable Title Act.<sup>142</sup> On appeal, the Nebraska Supreme Court reversed and remanded to the trial court, holding that a quitclaim deed purports to convey nothing more than the interest or estate of the property described of which grantor is possessed—rather than the property itself. Because the quitclaim deed did not purport to create, in the grantee, an entire title to the land, it was not the kind of conveyance that complies with the conditions of the Marketable Title Act.<sup>143</sup> Nebraska has nearly identical language in its Marketable Title

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134. *Exchange Nat. Bank of Chicago v. Lawndale Nat. Bank of Chicago*, 243 N.E.2d 193, 193 (1968).

135. *Id.* at 196

136. *Wilson v. Kelley*, 226 So. 2d 123, 128 (Fla. Dist. Ct. App. 1969).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Smith v. Berberich*, 95 N.W.2d 325, 326-27 (Neb. 1959).

141. *Id.* at 326.

142. *Id.* at 327-28.

143. *Id.* at 329. The terms of the granting clause of the quitclaim deed were "That the said party of the first part . . . by these presents do grant, convey, remise, release, and forever quit-claim unto the said party of the second part, and to her heirs and assigns forever, all his right,

Act as North Dakota.<sup>144</sup> Professor Walter E. Barnett further discussed the concept of a quitclaim deed in his early analysis of the marketable title act:

Actually a bare quit claim deed of “all of grantor’s right, title, and interest in and to Blackacre” probably could not serve as a root of title to Blackacre, because under Model Act § 8(e) the root of the title must “purport to create the interest claimed” by the marketable record title holder. A bare quitclaim does not purport to create any specific interest in the grantee. *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959). The mere absence of warranty covenants, however should not prevent a quitclaim deed from serving as a root of title when it evidences an intent to convey the land. For example, some jurisdictions hold that an after-acquired title will inure to the benefit of the grantee of such a quitclaim deed. [cites omitted] Similarly, although a judicial determination of heirship and a probate of a will are title transactions within the meaning of the acts, neither could serve as a root of title if it did not purport to establish an interest in the specific land in question. A will, however, might well contain a specific devise of particular land; and thus 40 years after probate the devisee would obtain protection, unavailable to him through the recording acts, against prior unrecorded grants from the testator.<sup>145</sup>

One may argue that the specific interest conveyed by a quitclaim deed, personal representative’s deed, or other similar instrument that purports to convey all of the grantor’s or decedent’s interest can, in fact, be determined simply by examining the interest owned by the grantor or decedent. However, the underlying purpose of the MRTA—to shorten the period of time for which title must be examined—is completely defeated by such a proposition. In many ways, the MRTA creates an inverse title examination;

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title, interest, estate, claim and demand, both at law and in equity, of, in and to the following described real estate . . .” *Id.*

144. *Id.* See generally NEB. REV. STAT. § 76-289 (2003); SIMES & TAYLOR, *supra* note 89, at 347-349.

145. Walter E. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 58 n.40 (1967). Model Act section 8(e) states:

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

SIMES & TAYLOR, *supra* note 89, at 10. This definition is substantially similar to that promulgated in North Dakota. See N.D. CENT. CODE § 47-19-1-02(1) (2013).

that is to say, instead of examining title from its inception, the title examiner begins with the current owner or owners of record and works backwards to establish a twenty-year chain of title.<sup>146</sup> A title examiner simply cannot establish a chain of title of unknown quantity.

This process is relatively simple with regard to surface ownership. It is uncommon to have more than a few owners of the surface at any given time. As a result, the interest of any particular owner is often easy to calculate. Conveyances of the surface typically describe the lands or the grantor's precise interest in those lands being conveyed. That is not the case with mineral interests, which are often highly fractionated, sometimes having hundreds of owners in a single tract.

Mineral title examiners frequently come across common drafting errors relating to quantity of interest that result in clouds upon title. For instance, assume that Mineral Owner A conveys an undivided 1/10 interest in Blackacre to Mineral Owners B, C, and D in equal shares. Mineral Owner B consults with his divorce attorney in Arizona, who claims to be able to draft deeds in North Dakota. Said attorney drafts a deed and copies verbatim the legal description of the prior conveyance being "an undivided 1/10 interest in Blackacre," despite the fact that Mineral Owner B only owns an undivided 1/30 interest in Blackacre. This scrivener's error now has the potential to become a root deed and eliminate other interests, assuming that all other aspects of the MRTA are met.

Numerous complications also exist in tracts with aliquot parts. As an example, Mineral Owner A owns five net mineral acres in the NE<sup>1</sup>/<sub>4</sub> of Section 1 and intends to convey all of his interest to Mineral Owner B. Mineral Owner A conveys by Mineral Deed an undivided 5/160 interest in the NE<sup>1</sup>/<sub>4</sub>. The NE<sup>1</sup>/<sub>4</sub> of Section 1 is unlikely to contain exactly 160 acres, resulting in either an under-conveyance or over-conveyance of Mineral Owner A's interest.

Additionally, many clients do not know the specific quantity of mineral interest. This is especially true in probate matters where a grandchild may be attempting to administer the estate of a grandparent who died several decades prior. Standard form mineral deeds typically include a space for inserting the precise interest being conveyed.<sup>147</sup> However, because of issues concerning unknown quantity of interest and the high probability of

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146. See Johnathan M. Starble, *Navigating Connecticut's Marketable Record Title Act: A Roadmap for the Practitioner*, 81 CONN. B. J. 369, 372 (2007).

147. See JOHN S. LOWE, OWEN L. ANDERSON, ERNEST E. SMITH, & DAVID E. PIERCE, *FORMS MANUAL TO ACCOMPANY CASES AND MATERIALS ON OIL AND GAS LAW 210-14* (5th ed. 2008).

misstating the actual interest owned, practitioners have often turned to conveying all or some fraction of the grantor's interest, such as the following language:

Grantor does hereby grant, convey, transfer and assign unto the Grantee all of the Grantor's undivided interest in and to all of the oil, gas, and other minerals, in and under and that may be produced from the following described real property.

Although this issue has yet to be examined by the North Dakota Supreme Court, these broad conveyances fail to precisely describe what interest is purportedly conveyed, and it is unlikely such conveyances would be found acceptable as a root deed establishing an unbroken chain of title.

Recently, some practitioners have sought means of avoiding probate by use of the MRTA. While "title transaction" is defined to include "any transaction affecting title to real estate, including by will or descent from any person who held title of record at death," the means of fulfilling the MRTA requirements by such methods are uncommon.<sup>148</sup> Proof of Death and Affidavits of Heirship are insufficient for purposes of the MRTA. Simes notes this fact:

Obviously, there are distinct limits to the use of affidavits. They cannot supply a deed of conveyance in the chain of title where none has been executed. They are not conveyances, but are only instruments for the preservation of rebuttable evidence of certain facts . . . It may also be said that affidavits should not be used to establish facts which could much more satisfactorily be established by other means. Thus the Iowa court, in applying a very broad affidavit statute, refused to permit its use as a substitute for administration of a decedent's estate, where the decedent had died recently and there was no reason why administration was not practicable.<sup>149</sup>

Simes further notes that some jurisdictions have no provision for a judicial proceeding to determine heirship, and in such cases affidavits may be relied on for such purposes.<sup>150</sup> "In some jurisdictions, at least as to an earlier state of the law, this may be necessary, since, in effect, the affidavit of heirship was a standard muniment of title just as the decree determining heirship is in many states today. If such is the state of the local law, the

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148. See N.D. CENT. CODE § 47-19.1-02(2) (2013).

149. SIMES & TAYLOR, *supra* note 89, at 58 (citing *Siedel v. Snider*, 44 N.W.2d 687 (Iowa 1950)).

150. *Id.* at 62.

model acts should be modified accordingly.”<sup>151</sup> North Dakota, however, has adopted the Uniform Probate Code, which provides for judicial determination of heirs in intestate proceedings.<sup>152</sup> North Dakota Title Standard 12-01 provides that “persons not claiming through a will may establish their title by proof of the decedent’s ownership and death and their relationship to the decedent. The determination of title must be made by an order of the court.”<sup>153</sup> Alternatively, a personal representative may be appointed to confirm title to the assets of the estate in such heirs or devisees.<sup>154</sup>

One can imagine scenarios in which the MRTA may apply to estate proceedings. For instance, a personal representative’s deed of distribution from a foreign domiciliary personal representative whose powers have not been established in North Dakota and which specifies the interest conveyed would be treated no differently than a wild deed. Similarly, a deed from an unadjudicated heir purporting to convey an identifiable interest in land may act as a root deed. Instances such as this will be rare and will be further complicated by the potential for competing chains of ownership.

### C. POSSESSION & 2013 LEGISLATIVE AMENDMENTS

Neither the Michigan act nor the Model Act require that the person claiming title be in possession.<sup>155</sup> Instead, in the Model Act, possession is treated as a shield for the owner of record to fend off claims of those attempting to invoke the act.<sup>156</sup> North Dakota, along with South Dakota and Nebraska, requires possession by the claimant and provides explicitly for the filing of an affidavit to evidence such possession of record.<sup>157</sup> The specific language of the Act requires that the claimant “is in possession of

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151. *Id.*

152. *See generally* N.D. CENT. CODE ch. 30.1 (2013).

153. N.D. TITLE STANDARDS § 12-01 (State Bar Ass’n N.D. 2012).

154. *Id.* (citing N.D. CENT. CODE § 30.1-12-08(4) (2011)).

155. SIMES & TAYLOR, *supra* note 89, at 347.

156. *Id.* Section 4(b) of the Model Act provides:

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

*Id.* at 8.

157. *Id.* at 347.

the interest.”<sup>158</sup> The purpose of such a requirement, in contrast to the Model Act, appears to be an attempt to protect the interests of a senior grantee out of possession from being cut off by a junior grantee who is also out of possession.<sup>159</sup>

The available case law concerning possession only acts to define situations in which no possession is found. In *Taylor v. Pennington County*, certain landowners sought to enjoin the construction of a paved county highway over an existing dirt road. The county road was established in 1901 by petition and was consistently used as a public roadway. The county failed to record the notice required to preserve its interest under the Marketable Title Act. However, the South Dakota Supreme Court held that the landowners were not able to invoke the Marketable Title Act because they were not in possession of the easement. In making its decision, the court noted that the South Dakota act differed from other marketable title statutes that did not require the person invoking the statute to be in possession of the property.

The North Dakota Supreme Court has held that in order to invoke the MRTA one who claims the interest must be in possession of the interest claimed. Thus, in *Northern Pacific Railway Co. v. Advance Realty Co.*, the court held that possession of the surface did not constitute possession of the severed minerals, and therefore, the MRTA would not cut off an outstanding mineral interest.<sup>160</sup> “A mere claim, for whatever time, unaccompanied by actual possession, can give no right under the statute.”<sup>161</sup> Furthermore, the court held that actual possession was required: “the oil and gas leases . . . while evidence of possession, do not constitute actual possession sufficient for adverse possession of the severed mineral interest.”<sup>162</sup> Prior to 2013, actual possession required production of the mineral estate.<sup>163</sup>

In 2013, the North Dakota Legislature enacted amendments to the MRTA that extended the benefits of the MRTA to severed mineral owners.<sup>164</sup> North Dakota Century Code section 47-19.1-02(2) now expressly includes the reservation of minerals in defining “title

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158. N.D. CENT. CODE § 47-19.1-01 (2013).

159. Barnett, *supra* note 146, at 63.

160. N. Pac. Ry. Co. v. Advance Realty, 78 N.W.2d 705, 719 (N.D. 1956).

161. Sickler v. Pope, 326 N.W.2d 86, 93 (N.D. 1982) (citing Bilby v. Wire, 77 N.W.2d 882, 889-90 (N.D. 1956)).

162. *Id.*

163. See generally 2012 N.D. Att’y Gen. Op. 2012-L-11.

164. 2013 N.D. Sess. Laws ch. 351, § 1; see also Ken G. Hedge, *North Dakota—Oil & Gas*, MIN. L. NEWSL. 23 (Rocky Mt. Min. Law Foundation 2013).

transaction.”<sup>165</sup> Possession may be established by affidavit. Formerly the affidavit need only include the legal description of the real estate and reflect that the record titleholder is in possession of such real estate.<sup>166</sup> As amended, the affidavit must show that the person is in possession of *the interest* in real estate.<sup>167</sup> Although this seems to be a minor detail, it now appears that the affidavit must describe what exactly is being claimed. The most substantive change to the MRTA is found in the last sentence of North Dakota Century Code section 47-19.1-07:

For the purpose of this chapter, the fact of possession of an interest in real estate referred to in section 47-19.1-01 may be shown of record by one or more affidavits containing the legal description of the real estate and showing that the person is in possession of the interest in real estate. The recorder shall record the affidavits in the miscellaneous records and index the same against the real estate. An affidavit of possession may not be filed before the expiration of twenty years from the recording of the conveyance or other title transaction under which title is claimed. The holder of an interest in severed minerals is deemed in possession of the minerals if that person has used the minerals as defined in section 38-18.1-03 and the use is stated in the affidavit of possession provided for in this section.<sup>168</sup>

A mineral interest is now deemed to be in possession if it falls under one of the provisions of “use” as defined by the Dormant Mineral Act. A mineral interest is deemed to be used when (1) there is actual production; (2) when the mineral is subject to a lease, mortgage, assignment, or conveyance of the mineral interest; (3) the interest is subject to an order to pool or unitize; (4) taxes are paid on the mineral interest by the owner or the owner’s agent; or (5) a statement of claim is recorded.<sup>169</sup> There is no case law that defines what is actually required of possession; specifically, it is ambiguous if the MRTA requires continuous possession or simply possession of the interest at the time in which the claim is made. The legislative adoption of “uses” under the Dormant Mineral Act to define possession only raises serious questions as to its application. For instance, if continuous possession is required during the twenty year unbroken chain,

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165. N.D. CENT. CODE § 47-19.1-02(2) (2013).

166. 2013 N.D. Laws ch. 351, § 4.

167. N.D. CENT. CODE § 47-19.1-07 (2013).

168. *Id.*

169. *See* N.D. CENT. CODE § 38-18.1-03 (2013).



will brief periods in which the mineral interest is not leased invalidate a claim under the MRTA? Or, if the mineral interest is unleased, but the claimant files a statement of claim two years prior to invoking the marketable title act, does he or she still have possession?

“The actual possession requirement previously established by North Dakota case law with respect to the [MRTA] served a legitimate purpose, as it does with adverse possession claims.”<sup>170</sup> The uses expounded upon in the Dormant Mineral Act were designed to prevent the forfeiture of a real property interest by requiring minimal efforts from their owners. The inclusion of these same uses in the MRTA now allows strangers to substantiate possession of a mineral interest and potentially wrangle title of the minerals from legitimate owners with the same minimal effort. By defining possession by these various uses, the Legislature has created a situation that will increase unmarketability.

In the past, producers of mineral interests exercising sound business practices would obtain title opinions covering the real property—typically before commencing operations—but at the very least, before distribution of royalty interests. Conveyances or leases of mineral interests from strangers to title would often be identified in the title opinion but could be “disregarded, unless a title examiner has actual notice or knowledge (through sources other than the record) of the interest of the grantor.”<sup>171</sup> This process acted in some ways as a safeguard from errant claims. Now, if a mineral deed appears of record with an error in the legal description followed by a statement of claim relying upon the incorrect legal description, and perhaps then a lease, these errant instruments cannot be disregarded because they have the ability to ripen into actual title by way of the MRTA. This problem is compounded by the fractionated nature of mineral interests. It becomes difficult, if not impossible, for a mineral owner to know if a claimant under the MRTA is making a claim against his or her mineral interest or the mineral interest of another.

The North Dakota Supreme Court has cautioned against the use of oil and gas leases in the context of adverse possession, holding that while leases may offer evidence of possession, they do not constitute actual

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170. Hedge, *supra* note 164, at 24 (explaining “[a]ctual possession of a surface estate is open and visible to the whole world, such that if someone has actual possession of the surface estate for a period in excess of 20 years, and bases their claim on an instrument of record for more than 20 years, one can feel fairly confident that there are no other legitimated adverse claimants to the land.”).

171. N.D. TITLE STANDARDS § 2-01 (State Bar Ass’n N.D. 2012).

possession sufficient for adverse possession.<sup>172</sup> “To hold otherwise would be to allow any person in possession of a severed surface estate to lease the mineral estate beneath his land for the requisite statutory period and then claim valid title to the mineral estate against the record owner by adverse possession.”<sup>173</sup>

#### D. A CALL FOR REFORM

While the 2013 legislative changes were no doubt well-intended, the ramifications were likely unexpected. Serious consideration should be given to the requirement of possession and the important role in which it plays in the MRTA. The Legislature should first clarify whether possession is required for the full, unbroken chain of title, some lesser amount of time, or if, in fact, it is only necessary at the time in which a claimant invokes the MRTA. Defining possession of mineral interests by the minimum uses described in the Dormant Mineral Act should be repealed, and an actual production requirement should be reinstated. To resolve concerns about ancient title defects in a chain, the Legislature should explore the possibility of enacting specific curative statutes directed at the most common title defects: tax titles, homestead conveyances without proper execution or acknowledgment, minor defects in estate conveyances, and the like. A definition for root deed should be added to the MRTA specifying exactly what may or may not constitute the commencement of an unbroken chain of title. In addition, thought should be given to the interaction of the MRTA and other acts affecting conveyances, such as the Uniform Probate Code, so that some level of uniformity can be maintained. Last, any such legislation should be clear as to whether it is prospective or retroactive.

#### IV. ALIENATION OF HOMESTEAD

The sanctity of the family home is an American ideal. Homestead laws seek to protect the family dwelling place from creditors of either spouse and prevent the alienation of the homestead by one spouse without the other's consent. This section will examine the history and development of homestead laws in North Dakota, the application of homestead laws to the mineral estate, and finally consider whether such application is outmoded given the creation of surface owner protections.

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172. Sickler v. Pope, 326 N.W.2d 86, 93 (N.D. 1982).

173. *Id.*

## A. HISTORY OF HOMESTEAD LAWS

Laws protecting the homestead trace their origins to a statute of the Republic of Texas in 1839.<sup>174</sup> The policy reasons for homestead laws vary from state to state. The Supreme Court of Iowa has stated:

“The Law is based upon the idea that, as a matter of public policy, for the promotion of the property of the state, and to render independent and above want each citizen of the government, it is proper he should have a home—a homestead—where his family may be sheltered and live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.”<sup>175</sup>

The safeguards afforded by these homestead provisions were not limited to the debtor but also his family. “The Convention . . . engrafted this beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband.”<sup>176</sup> In turn, the protection of the homestead from external creditors naturally extended to protecting spouses and dependents from internal sources—alienation of the homestead by the owner. Early California decisions likened these homestead rights as something akin to joint tenancy.<sup>177</sup> In fact, when read in conjunction with various probate code provisions, there are several similarities.<sup>178</sup>

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174. George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289 (1950).

175. *Chalress v. Lamberson*, 1 Clarke 435, 439 (Iowa 1855).

176. *Cook v. McChristian*, 4 Cal. 23, 26 (1854).

177. *Taylor v. Hargous*, 4 Cal. 268, 273 (1854) (“It is turned into a sort of joint tenancy, with the right of survivorship, at least as between husband and wife, and this estate cannot be altered or destroyed, except by the concurrence of both, in the manner provided by law.”). *Taylor* was subsequently overturned in part. See *Gee v. Moore*, 14 Cal. 472, 477 (1859).

178. *Barber v. Babel*, 36 Cal. 16, 17 (1868) (“But we do not perceive why the character of the right, as defined, does not *substantially* approach very near a joint tenancy, although not created in precisely the same way, even if not a technical joint tenancy at common law. In the homestead estate most of the unities of the joint tenancy are found, for it is created by the same instrument and at the same time. The homestead right and the joint interests are created by the executing, acknowledging, and recording of the declaration. The new character of the estate . . . accruing by one and the same conveyance, (or act,) commencing at one and the same time, and held by one and the same undivided possession. If the husband controls the property during the coverture, it is not because he has a greater, more valuable, or different interest in the homestead from that of the wife, but because the law has made him the head of the household and devolved upon him the duty of management, not for his own interest merely, but for the joint benefit of both. And since the amendment of 1862, the right of survivorship, the grand incident of joint tenancy, is added. The main substantial difference now seems to be, the want of power in one of the parties to sever the tenancy, or convey it all, without the concurrence of the other in the mode prescribed. But however this may be there is a joint interest in the homestead—a joint *holding*, if not a *technical joint tenancy*.”) (internal quotation omitted).

North Dakota has recognized the importance of the homestead since adopting its constitution in 1889,<sup>179</sup> and it has equally utopian reasons for enacting its homestead provisions:

The object of the homestead exemption law is the protection of the family to afford an asylum for the protection and support of the family in order that such family and children may be protected from the enervating effects of poverty, which to a large degree is the recruiting ground of disease and crime, and to provide an opportunity whereby such children may be properly developed physically, morally, and intellectually to assume and perform the true and proper duties of citizenship, and thus strengthening the state.<sup>180</sup>

#### B. DEFINITION OF HOMESTEAD

What constitutes a homestead has changed over the course of time. As the word implies, the homestead is “the house, outbuildings and adjoining land owned and occupied by a person or family as a residence.”<sup>181</sup> Because homestead provisions are ultimately designed to protect the family against creditors, jurisdictions have necessarily debated the extent to which a debtor is entitled to protection. This leads to important discussions on not only the value of the homestead property, but also the extent of the area to which one is entitled to claim. As originally enacted, North Dakota defined homestead as follows:

Homestead Exempt. A homestead owned by either husband or wife, not exceeding in value \$5,000, consisting of a dwelling house in which the homestead claimant resides, and all its appurtenances, and the land on which the same is situated, shall be exempt from judgment lien and from execution or forced sale, except as provided in this chapter.<sup>182</sup>

In 1895, the definition of homestead was amended to limit the homestead to not only \$5,000.00, but also “if within a town plat, not exceeding two acres in extent, and if not within a town plat, not exceeding

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179. N.D. CONST. art. XVII, § 208 (1889). Article six, section twenty-two of the North Dakota Constitution reads, in part: “The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law.” N.D. CONST. art. XI, § 22.

180. *Swingle v. Swingle*, 162 N.W. 912, 912 (N.D. 1917).

181. BLACK’S LAW DICTIONARY 850 (10th ed. 2014).

182. 1891 N.D. Sess. Laws ch. 67, § 1.

in the aggregate more than one hundred and sixty acres.<sup>183</sup> In 1943, the value of the homestead limitation was increased to “\$8,000.00 over and above liens or encumbrances, or both” for those homesteads located within a town plat, and for homesteads not within a town plat the value limitation was completely removed from the equation.<sup>184</sup> The value limitation on homesteads within a town plat was increased to \$25,000.00 in 1951,<sup>185</sup> and to \$40,000.00 in 1967.<sup>186</sup> In 1977, the Legislature did away with area limitations for both homesteads within and without of a town plat, reverting back to a strictly value based definition and increased the allowable value to \$60,000.00.<sup>187</sup> In 1979, the Legislature repealed archaic language concerning the “head of family” and further increased the allowable value to \$80,000.00.<sup>188</sup> And finally in 2009, the Legislature increased the allowable value to \$100,000.00.<sup>189</sup> The North Dakota Century Code section 47-18-01 currently defines the homestead as follows:

The homestead of any individual, whether married or unmarried, residing in this state consists of the land upon which the claimant resides, and the dwelling house on that land in which the homestead claimant resides, with all its appurtenances, and all other improvements on the land, the total not to exceed one hundred thousand dollars in value, over and above liens or encumbrances or both. The homestead shall be exempt from judgment lien and from execution or forced sale, except as otherwise provided in this chapter. The homestead may not embrace different lots or tracts of land unless the lots or tracts of land are contiguous. For purposes of this section, “contiguous” means two or more tracts of real property which share a common point or which would share a common point but for an intervening road or right of way.<sup>190</sup>

Notably, the title of the current statutory provision continues to refer to area—something that has not been present in the definition of homestead since 1977.

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183. N.D.R.C. § 3605 (1895).

184. N.D.R.C. § 47-1801 (1943).

185. 1951 N.D. Sess. Laws ch. 277, § 1.

186. 1967 N.D. Sess. Laws ch. 362, § 1.

187. 1979 N.D. Sess. Laws ch. 488, § 7.

188. 1979 N.D. Sess. Laws ch. 489, § 1.

189. 2009 N.D. Sess. Laws ch. 276, § 8.

190. N.D. CENT. CODE § 47-18-01 (2013).

### C. ALIENATION OF HOMESTEAD

Like most jurisdictions in the United States, North Dakota, has codified statutes that seek to protect the family home from alienation by the owner without the consent of his or her spouse. North Dakota first enacted homestead laws in 1891 as part of the Second Session of Laws. The first provision concerning alienation of the homestead was found in chapter 67, section 4 as follows: “§ Acknowledgement of Husband And Wife. The homestead of a married person cannot be conveyed or incumbered [sic] unless the instrument by which it is conveyed or incumbered [sic] is executed and acknowledged by both husband and wife.”<sup>191</sup> The provision has changed little over the course of time.<sup>192</sup> The current version has been modified to remove any limitation on alienation of the homestead based upon value: “The homestead of a married person, without regard to the value thereof, cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both the husband and wife.”<sup>193</sup> Courts have interpreted a conveyance of the homestead to include a conveyance of any form of interest including sales contracts,<sup>194</sup> contract for deeds,<sup>195</sup> leases,<sup>196</sup> mortgages,<sup>197</sup> and outright conveyances of fee simple absolute.<sup>198</sup>

A perplexing conflict exists between the current definition of homestead and the restrictions on alienation. The basis for determining the extent of homestead property is value.<sup>199</sup> However, a conveyance of homestead property completely disregards this limiting factor, resulting in the question of what exactly cannot be conveyed without being executed and acknowledged by husband and wife. For instance, assume that O owns free and clear the NE $\frac{1}{4}$  consisting of 160 acres and valued at \$10,000.00 per acre. Assume further that within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ , O has a modest three-bedroom ranch style home with a two-car garage confined to one acre with an unencumbered value of \$90,000.00. Pursuant to North Dakota

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191. 1891 N.D. Sess. Laws ch. 67, § 4.

192. *See, e.g.*, N.D.R.C. § 5608 (1913); N.D.R.C. § 5052 (1905); N.D.R.C. §3608 (1899); N.D.R.C. §3608 (1895).

193. N.D. CENT. CODE § 47-18-05 (2013).

194. *Silander v. Gronna*, 108 N.W. 544 (N.D. 1906).

195. *Larson v. Cole*, 33 N.W.2d 325 (N.D. 1948).

196. *Jessen v. Pingel*, 257 N.W. 2 (N.D. 1934); *but see Wegner v. Lubenow*, 95 N.W. 442 (N.D. 1903).

197. *Grotberg v. First Nat. Bank*, 210 N.W. 21 (N.D. 1926).

198. *Severtson v. Peoples*, 148 N.W. 1054 (N.D. 1914).

199. *See* N.D. CENT. CODE § 47-18-01 (2013).

Century Code section 48-18-01,<sup>200</sup> the homestead could be limited to the one acre with home and the remainder subject to execution of judgment and division pursuant to North Dakota Century Code section 48-18-12.<sup>201</sup> However, if O is married, it is unclear whether O is prohibited from conveying, for instance, the one acre on which the home is located—the SE $\frac{1}{4}$ NE $\frac{1}{4}$ —or the full NE $\frac{1}{4}$  without joinder of his or her spouse. This issue is compounded further if O also owns the NW $\frac{1}{4}$ , a contiguous parcel, and could claim the entire N $\frac{1}{2}$  as being subject to North Dakota Century Code section 47-18-05.

It is plausible that the reference to value was included to prevent the argument that a \$500,000.00 home located on a one-acre platted parcel was somehow exempt from the requirements of North Dakota Century Code section 47-18-05 due to the fact that it exceeds the \$100,000.00 allowable value of a homestead; but if that is indeed the case, it has other implications. Our neighboring states do not have such provisions for disregarding value. However, both Minnesota and South Dakota limit the homestead by area.<sup>202</sup>

Prior to various legislative amendments, the conflict between the definition of homestead and alienation of homestead did not exist. In *Severtson v. Peoples*, a deed executed by Ernest S. Severtson and Pearle E. Severtson, husband and wife, purported to convey “11 lots in Block 7, and 7 lots in [B]lock 4 in the village of New Rockford” to the defendant.<sup>203</sup> The plaintiffs, however, alleged that the wife did not acknowledge the deed and that she executed it under coercion, intimidation, duress, and undue influence by the defendant. The trial court found in favor of the plaintiffs and ruled:

[a]s to the homestead interest of said Pearle E. Severtson and Ernest S. Severtson, her husband, in said premises as defined by law, which said homestead interest is to be ascertained as provided

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200. *Id.*

201. N.D. CENT. CODE § 47-18-12 (2013).

202. *See* MINN. STAT. §§ 507.02, 510.02 (2014) (providing that a homestead may include any quantity of land not to exceed 160 acres or a value of \$390,000.00 or if used for agricultural purposes \$975,000.00). Until 2007, Minnesota also distinguished between platted lots within a city and un-platted lands located outside of a city by defining homestead as up to a one-half acre platted lot or 160 acres of un-platted lands. *See also* S.D. CODIFIED LAWS § 43-31-4 (2013) (“If within a town plat the homestead must not exceed one acre in extent, and if not within a town plat, it must not embrace in the aggregate more than one hundred sixty acres.”); MONT. CODE ANN. §§ 70-32-104, 70-32-301 (2013).

203. *Severtson*, 148 N.W. at 1054. The definition of homestead at the time of *Severtson*, constituted two acres within a platted town site, with a value that does not exceed \$5,000.00. *Id.* at 1056.

by law, and that said deed be decreed to convey no interest or estate in, or lien or incumbrance [sic] upon said homestead interest in said property.<sup>204</sup>

On appeal the North Dakota Supreme Court was unable to determine what the trial court intended, noting that the trial court failed to make a determination of what constituted the homestead and appeared to leave such a finding for a later time and proceeding. In its decision, the *Severtson* court cited Chief Justice Bartholomew's opinion in *Foogman v. Patterson*:

“While the party may select his homestead from any portion of a tract much larger than the law allows for a homestead, it necessarily follows that no homestead can be identified until the selection is made.” . . . It is ‘the homestead as created, defined, and limited by law’ that is absolutely exempt. We have already seen what that means. A mere floating homestead right, unattached to any land in a manner that can identify the . . . homestead, cannot create an absolute exemption in land that may subsequently be designated and identified as a homestead.<sup>205</sup>

The court then concluded that a deed will not be adjudged to be void in toto when it covers not only the homestead but also other lands. It will, in such a case, be declared void merely as to the homestead. In offering direction to the trial court, the North Dakota Supreme Court noted that the plaintiff alleged to reside only upon the lots in block 7 and that those lots in block 4 were not contiguous.<sup>206</sup> Because they were not contiguous, there was no possibility of finding that the homestead covered all of the described lands.

On rehearing, the court was presented with the very argument that the Legislature has now constructed—that the area and value of the homestead of plaintiffs are wholly immaterial when the homestead is conveyed without the execution and acknowledgement of both spouses where the rights of creditors are in no way involved.<sup>207</sup> The court noted that the Legislature limited the homestead not only to creditors, but also to heirs.<sup>208</sup> In view of

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204. *Id.*

205. *Id.* at 1057 (citing *Foogman v. Patterson*, 83 N.W. 15 (N.D. 1900)).

206. *Id.*

207. *Id.* at 1058.

208. *Id.* The current application of homestead limitations to heirs is found at North Dakota Century Code section 30-16-09, which provides:

If the court finds that the homestead selected in an estate exceeds in value any limitation fixed by law and that the property cannot be divided without material injury, the order setting it apart must determine the amount of such excess, and thereafter the property to the extent of the excess so determined may be subjected, after all of the



such policy, the court correctly asked “how can it be seriously contended that no such restrictions or limitations were contemplated in favor of vendees?”<sup>209</sup> There appears no basis for arguing that North Dakota Century Code section 47-18-05 was intended to expand the definition of homestead when the underlying public policy rationale is to preserve the homestead for both spouses against the decisions of a single spouse.

It is impossible for a title examiner to make any conclusions as to the size of homestead when the homestead is defined by value. The North Dakota Title Standards presume that any conveyance of the surface includes homestead property.<sup>210</sup> The general rule applied by practitioners and those associated with real estate closings has been that it takes “one to buy, two to sell.” In other words, if real property is being conveyed, the surface is involved, and the owner is married, both husband and wife must sign regardless of whether the real property constitutes homestead or not.<sup>211</sup> It is a simple bright-line rule that provides the protection necessary to insure that such a conveyance is valid. However, it also avoids confronting the ambiguity in the definition of the current statute.

#### D. ALIENATION OF THE HOMESTEAD MINERAL ESTATE

At common law, the owner of land in fee simple absolute was said to own the land from heaven to hell.<sup>212</sup> The landowner alone was entitled to prospect for, sever, and remove from the land anything found on or beneath the surface.<sup>213</sup> A mineral interest is a real property interest created in place.<sup>214</sup> It is well established that a general conveyance of land without exception or reservation conveys to the grantee both the surface and mineral

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other available property has been exhausted, to the payment of debts in the same manner as other property.

N.D. CENT. CODE § 30-16-09 (2013).

209. *Severtson*, 148 N.W. at 1058-59.

210. N.D. TITLE STANDARDS § 2-02 (N.D. State Bar Ass'n 2012). This standard requires evidence of marital status or evidence that the property conveyed did not constitute the grantor's homestead when a conveyance has been recorded and no spouse has joined or where marital status is not indicated anywhere in the deed. *Id.*

211. An alternative, if the real property being conveyed is in fact non-homestead, is to execute and record an affidavit consistent with the requirements of North Dakota Century Code sections 47-19-11 and 47-19-12 evidencing that the premises do not constitute the homestead of the grantor or the grantor's family. Such affidavit may be executed solely by the grantor, without joinder of the grantor's spouse; however, it is insufficient to include the same recitals within the conveyance itself. N.D. TITLE STANDARDS § 2-02 (N.D. State Bar Ass'n 2012).

212. See PATRICK H. MARTIN & BRUCE M. KRAMER, OIL AND GAS LAW § 202, (9th ed. 2011) (“Cujus est solum, ejus est usque ad coelum et ad inferos.”).

213. *Id.*

214. *Texaro Oil Co. v. Mosser*, 299 N.W.2d 191, 194 (N.D. 1980). See also *Schulz v. Hauck*, 312 N.W.2d 360, 361 (1981); *Payne v. A. M. Fruh Co.* 98 N.W.2d 27 (N.D. 1959).

estates.<sup>215</sup> However, a conveyance of minerals “gives to the mineral owner the incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals.”<sup>216</sup> The same holds true for the typical oil and gas lease.<sup>217</sup> The result is that the mineral estate is deemed to be the dominant estate.<sup>218</sup>

The underlying question, then, is whether or not a mineral deed or lease can be or should be deemed to be an alienation of homestead. In *Franklin Land Co. v. Wea Gas, Coal & Oil, Co.*, the Kansas Supreme Court addressed this very question.<sup>219</sup> The court held “that a lease of a homestead, under which the lessee takes possession of the premises in such a way as to interfere with the possession and enjoyment by the wife of the homestead, is such an alienation of the homestead as, under the constitution and statute . . . requires joint consent of the husband and wife.”<sup>220</sup> The court, after analyzing the lease, determined that the lessee was lawfully entitled to occupy as much or all of the surface as he found “necessary [in order] to erect thereon derricks and enginehouses; to prospect for gas, coal, oil, or any other mineral substance; and if anything valuable is found, to erect buildings in which to store such product.”<sup>221</sup> Thus, the key factor is not the extraction of minerals from the property, but to what extent the surface is impacted by such activities.

Similarly, the Texas Civil Appellate Court found that a contract conveying all the oil, gas, coal, and other minerals, together with right of ingress and egress and reserving an undivided one-tenth to the grantor, was invalid. The court noted “the right to construct machinery for the boring and digging of wells, and the right to erect derricks, build tanks, and place boilers, engines and machinery . . . would destroy the homestead use of the property, or to at least a portion of the same” and that the contract did not limit the amount of land the company could take for such purposes.<sup>222</sup>

The conveyance of homestead property and the underlying minerals has appeared before the North Dakota Supreme Court on a number of

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215. *Schulz*, 312 N.W.2d at 361 (citing *Kadrmas v. Sauvageau*, 188 N.W.2d 753, 755 (N.D. 1971)).

216. *Christman v. Emineth*, 212 N.W.2d 543, 550 (N.D. 1973).

217. *Feland v. Placid Oil Co.*, 171 N.W.2d 829, 834 (N.D. 1969).

218. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 136 (N.D. 1979); *see also* Ernest R. Fleck, *Severed Mineral Interests*, 51 N.D.L. REV. 369 (1974).

219. *Franklin Land Co. v. Wea Gas, Coal & Oil Co.*, 23 P. 630 (Kan. 1890).

220. *Id.* at 632.

221. *Id.*

222. *S. Oil Co. v. Colquitt*, 69 S.W. 169, 170-71 (Tex. Civ. App. 1902).

occasions—seemingly always in the context of fraud. In *Dixon v. Kaufman*, Clarence and Elizabeth Dixon executed a mineral deed to W. C. Kaufman, Jr., and the Dixons alleged that they were led to believe the document signed was an oil lease in which they would receive an eighth royalty.<sup>223</sup> The grantee’s agent took the instrument “to a notary public who had previously taken acknowledgements for the Dixons and was familiar with their signatures.”<sup>224</sup> Although disputed by Elizabeth Dixon, the notary claimed to have confirmed with her by telephone that she and her husband executed the document.<sup>225</sup> The notary completed the certificate of acknowledgment attached to the deed.<sup>226</sup> The deed included the SW $\frac{1}{4}$  of Section 31, Township 160 North, Range 82 West, being the plaintiff’s homestead.<sup>227</sup> The North Dakota Supreme Court found that any conveyance of homestead property without proper acknowledgement was void, relying solely on a similar case from Illinois, *Logue v. Von Almen*.<sup>228</sup>

Two similar cases often cited for the proposition that a mineral conveyance of homestead property that does not comply with the requirements of North Dakota Century Code section 47-18-05 is void are *Hoffer v. Crawford* and *Dockter v. Crawford*.<sup>229</sup> In both cases, the plaintiffs alleged that mineral deeds to defendant, D. W. Crawford, were obtained by fraud.<sup>230</sup> In each case, the mineral deeds conveyed minerals underlying the plaintiffs’ homesteads as well as other lands.<sup>231</sup> The husband and wife in both cases executed the mineral deed at their homes and did not appear before a notary public.<sup>232</sup> Crawford conceded that neither mineral deed was

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223. *Dixon v. Kaufman*, 58 N.W.2d 797, 804 (N.D. 1953).

224. *Id.* at 804.

225. *Id.*

226. *Id.*

227. *Id.* at 800.

228. *Id.* (citing *Logue v. Von Almen*, 40 N.E.2d 73 (Ill. 1941)). While *Logue* fails to analyze why a mineral deed that conveys an interest in homestead property would be void, it was well established in Illinois that such was the case. The Supreme Court of Illinois addressed this issue in *Bruner v. Hicks*, where the court found that an oil and gas lease that:

assigns the right to use, possess, and enjoy a portion of said premises for the purpose of mining and operating for oil and gas, and laying pipe lines and building tanks, stations, and structures thereon to take care of said products, deprived [the homestead claimants] of a portion of their homestead, and, said homestead not having been waived or released in accordance with the terms of the statute, said lease was void.

82 N.E. 888, 891 (Ill. 1907).

229. *Hoffer v. Crawford*, 65 N.W.2d 625 (N.D. 1954); *Dockter v. Crawford*, 65 N.W.2d 691 (N.D. 1954).

230. *Dockter*, 65 N.W.2d at 692.

231. *Id.*

232. *Id.* at 693.

effective as to homestead property.<sup>233</sup> Consequently, the North Dakota Supreme Court held, without need for further discussion, that no title to the minerals in or under the homesteads passed to D. W. Crawford.<sup>234</sup>

#### E. HOMESTEAD APPLICATION IN LIGHT OF NORTH DAKOTA SURFACE PROTECTION LAWS

It is important to remember that the body of case law first asserting homestead protection to minerals is derived from an era that offered little credence to the surface owner. The images of Boiler Avenue in Spindletop lined with as many derricks as physically possible evidence the tremendous impact that drilling practices of the time had on the surface estate.<sup>235</sup> It was said that the derricks on Spindletop “were so close together that workmen laid planks from one wooden structure to the next so they could make a quick escape when an oil fire flared up.”<sup>236</sup> It was an era in which the mineral developers were allowed unrestricted use of as much of the surface as necessary for their operations. The concept of a dominant mineral estate, however, began to evolve.<sup>237</sup> The North Dakota Supreme Court adopted the “accommodation doctrine” in 1979, holding that the owner of a dominant mineral estate must make reasonable accommodations when using the surface for developing and producing the minerals on particular land.<sup>238</sup>

North Dakota first enacted the Surface Owner Protection Act in 1975.<sup>239</sup> The Oil and Gas Production Damage Compensation statutes were later enacted in 1979.<sup>240</sup> The Oil and Gas Production Damage Compensation Act provides for numerous safeguards for the surface owner.<sup>241</sup> North Dakota Century Code section 38-11.1-04 requires the

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233. *Id.*

234. *Id.*

235. Rance L. Craft, *Of Reservoir Hogs and Pelt Fiction: Defending the Ferae Natura Analogy Between Petroleum and Wildlife*, 44 EMORY L.J. 697, 701 (1995). Discovery of oil at the Spindletop salt dome near Beaumont, Texas led to the drilling of 440 wells on 125 acres in a year’s time. The overproduction of Spindletop led Captain Anthony F. Lucas, who made its first discovery in 1901, to note: “The cow was milked too hard, and moreover she was not milked intelligently.” *Id.*

236. *Id.* at 700 n.19 (quoting RICHARD O’CONNOR, *THE OIL BARONS: MEN OF GREED AND GRANDEUR* 81 (1971)).

237. *See* Fleck, *supra* note 218 (“The severance of the mineral estate from the surface estate in land has caused some problems, litigation and legislation over the years, but these were minimized by general acceptance of the doctrine of mineral estate dominance. Today, however, there appears to be an erosion of this concept and an increased concern for the rights of the surface owner.”).

238. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 136 (N.D. 1979).

239. *See* 1975 N.D. Sess. Laws ch. 321, §1; N.D. CENT. CODE ch. 38-18 (2013).

240. *See* 1979 N.D. Sess. Laws ch. 396, §4; N.D. CENT. CODE ch. 38-11.1 (2013).

241. *See generally* N.D. CENT. CODE ch. 38-11.1 (2013).

mineral developer to pay the surface owner for damages sustained, lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations.<sup>242</sup> A surface owner who obtains his or her water supply from underground sources is entitled to the cost of making repairs, alterations, or construction that will ensure the delivery of water in equal quality and quantity as before drilling operations.<sup>243</sup> The surface owner is further entitled to payments "for loss of agricultural production and income caused by oil and gas production and completion operations,"<sup>244</sup> damages sustained for loss of agricultural production caused by mining activity, and to the fair market value of a farm building that comes within five hundred feet of a surface mining operation.<sup>245</sup>

In addition to compensation, various permitting requirements have been enacted for not only the drilling and production of oil and gas, but for surface mining as well. North Dakota Century Code section 38-08-5(2) provides safeguards to surface owners by prohibiting the issuance of a drilling permit within five hundred feet of an occupied dwelling, except in limited circumstances.<sup>246</sup> If such permit is issued "within one thousand feet of an occupied dwelling," the owner of such dwelling may request the operator to place "the location of all flares, tanks, and treaters utilized in connection with the permitted well" farther away from the dwelling than the well bore if such location can be accommodated reasonably within the well pad.<sup>247</sup> Similarly, before the Public Service Commission may issue a permit to surface mine land, each surface owner must provide statements of consent, a mineral lease, or surface lease from the surface owner.<sup>248</sup> No surface coal mining is permitted within five hundred feet of any occupied dwelling unless approved by the owner thereof.<sup>249</sup> Finally, areas within five

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242. N.D. CENT. CODE § 38-11.1-04 (2013).

243. N.D. CENT. CODE § 38-11.1-06 (2013); *see also* N.D. CENT. CODE § 38-11.2-07 (2013).

244. N.D. CENT. CODE § 38-11.1-08.1 (2013); *see also* N.D. CENT. CODE § 38-11.2-04 (2009).

245. N.D. CENT. CODE § 38-18-07 (1) (2013).

246. N.D. CENT. CODE § 38-08-05(2) (2013).

247. *Id.*

248. N.D. CENT. CODE § 38-18-06 (2013). "Surface owner" is defined as the person or persons who presently have valid title to the surface of the land, their successors, assigns, or predecessors in title, regardless of whether or not a portion of the land surface is occupied for a residence. N.D. CENT. CODE § 38-18-05(10) (2013). This definition excludes a spouse who does not have title.

249. N.D. CENT. CODE § 38-14.1-07 (2013); *but see* N.D. CENT. CODE § 38-14.1-08 (2013) ("The designation of an area as unsuitable for all types or certain types of surface coal mining operations does not prevent the mineral exploration of such an area.").

hundred feet of an inhabited rural residence must be considered exclusion areas for energy conversion facilities and energy transmission facilities unless waived by the owner.<sup>250</sup>

While some may contend that the protections afforded to North Dakota surface owners remain inadequate, one cannot deny that the protections enacted satisfy the public policy rational for all homesteads—regardless of whether the homestead is located on lands with unified estates or lands in which the minerals have been severed. In fact, as surface protections have evolved, it is difficult to justify inclusion of the mineral estate in the definition of homestead. There appears little reasoning for treating unified estates any different than severed estates.

By removing minerals from the definition of homestead, common errors in mineral conveyances may be eliminated. Frequently instruments attempt to circumvent the homestead requirements by identifying the grantor as a “married person dealing in his or her sole and separate property” when in fact the grantor’s spouse must still execute and acknowledge the instrument. Oftentimes in an attempt to cure a void homestead conveyance a party will obtain a ratification or separate deed executed and acknowledged from the originally-omitted spouse alone. However, a separate instrument from the non-joining spouse does not meet the requirements of N.D. Cent. Code sect. 47-18-05; both spouses must execute and acknowledge the curative instrument.<sup>251</sup> This is not to suggest that the definition should be amended to exclude minerals to rectify poor drafting on behalf of those who should have greater understanding of the laws of North Dakota, but it does reflect the all-too-common belief that a sole owner of minerals has the right to convey without limitation. Until and unless such a change is made to the definition of homestead, best practices require practitioners and landmen to be diligent in obtaining proper execution and acknowledgement from both husband and wife of any conveyance of a mineral interest in which the grantor also owns a surface interest in the conveyed lands.

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250. N.D. CENT. CODE § 49-22-05.1 (2013). Notably, “owner” is not defined by the statute and does not appear to require the owner’s spouse to also waive such restrictions; nor does it require waiver from the actual inhabitant. The right to enter upon the property for such purposes however would be a conveyance requiring the execution and acknowledgement by a spouse if the property is deemed to be homestead.

251. *See* N.D. TITLE STANDARDS § 2-05 (N.D. State Bar Ass’n 2012); *see also* Portland Credit Union v. Hauge, 169 N.W.2d 106 (N.D. 1969); *Neset v. Rudman*, 74 N.W.2d 826 (N.D. 1956).

## V. CONCLUSION

The doctrine of after-acquired property, the Marketable Record Title Act, and alienation of homestead are three issues common to any real estate attorney's practice. A cursory understanding of any of these issues may give practitioners or lawmakers an erroneous sense of enlightenment. Without fully understanding the history, the policy rationale, and the development of both statutory and case law of each topic, practitioners and lawmakers alike are prone to encountering unintended consequences. Just as the portion of the iceberg lurking underneath the surface of the water threatens passing ships with their demise, the application of these topics without a sufficient understanding of each, especially in relationship to mineral interests, will result in serious and substantial consequences. Thus, practitioners must give serious consideration to the 2013 legislative amendments to the doctrine of after-acquired title and the Marketable Record Title Act and must not only understand the implications of the amendments, but also address the consequences created by the changes. Legislators must give further consideration to the changes they enacted and decide whether or not such amendments accomplished the intended goal without creating unintended consequences and without inflicting harm upon the status of real property titles. The methodical and well-reasoned evolution of laws protecting surface owners from the exploration and development of mineral resources should cause lawmakers to question whether or not the century-old application of homestead laws remain applicable to mineral interests.

Property law and real estate titles are necessarily bound to predictability and certainty.<sup>252</sup> Any changes made to well-established real property law must first be painstakingly analyzed and thoughtfully enacted. Practitioners too must master the nuances and develop a firm understanding of the complex issues that lie hidden beneath the surface of a cursory review. Only then will unintended consequences—the collision with the unseen portion of the iceberg—be avoided.

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252. *Lario Oil & Gas Co. v. EOG Res., Inc.*, 2013 ND 98, ¶ 17, 832 N.W.2d 49, 54 (VandeWalle, C.J., specially concurring); *James v. Griffin*, 2001 ND 90, ¶ 15, 626 N.W.2d 704, 709; *see also* Owen L. Anderson & Charles T. Edin, *The Growing Uncertainty of Real Estate Titles*, 65 N.D. L. REV. 1 (1989).