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

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ICEBERG, RIGHT AHEAD!
UNINTENDED CONSEQUENCES
TOPICS COVERED

- Doctrine of After-Acquired Title
- Marketable Record Title Act
- Alienation of Homestead
AFTER-ACQUIRED TITLE

ESTOPPEL BY DEED

“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.”
Rensselaer v. Kearney, 52 U.S. 297, 325 (1850). “The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of everyone... 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 honest he should not be allowed to speak.”
“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.” - Melville M. Bigelow, The Law of Estoppel, 418-19 (1913)
A party should not be permitted to hold or recover an estate in violation of his own covenant.

Wise policy to repress litigation.

Prevent circuity of actions.
EARLY CODIFICATION

- N.D.R.C. §47-1015
  
  “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 same passes by operation of law to the grantee, or his successors.”
CONVEYANCE BY WARRANTY DEED

☐ WITNESSETH, for and in consideration of Ten Dollars, grantor does hereby GRANT to the grantee, all of the following real property lying and being in the County of Divide, State of North Dakota, and described as follows, to wit:

   Lot 1, Block 1, Black Acre Subdivision

Globe Gazette – Form 307
WARRANTY:

And the said grantor for himself, his heirs, executors and administrators, does covenant with the grantee that he is well seized in fee of the land and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, except installments of special assessments or assessments for special improvements which have not been certified to the County Auditor for collection, and the above granted lands and premises in the quiet and peaceable possession of said grantee, against all persons lawfully claiming or to claim the whole or any part thereof, the said grantor will warrant and defend.
QUITCLAIM DEEDS

- Historically not considered a conveyance, but a mere release of the grantor’s interest, if any.
- It generally contains no title covenants.
- The grantee has no recourse against the grantor.
- Understood to convey nothing more than the interest 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.
- NO AFTER-ACQUIRED TITLE CONVEYED
QUITCLAIM DEEDS

- *Alsterberg v. Bennet, 106 N.W. 48 (N.D. 1905)*
- “One 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 incumbrances, relying on such protection only as the recording laws afford him.”
QUITCLAIM DEEDS

- “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.”
Aure owned land in fee simple subject to mortgage in favor of the State of North Dakota.

Assignment of Royalty

“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 the gas produced and saved.”

Assignor agrees to warrant and defend the title to the same.
Mortgage was foreclosed, royalty owners included in the foreclosure proceeding, and State of North Dakota acquired title by sheriff’s deed.

Aure repurchased land by way of contract for deed.

Contract was fulfilled and the State of North Dakota issued a quitclaim deed reserving an undivided fifty percent of all oil, gas and minerals.

Did after-acquired title apply to the assignment of royalty?
NDCC 47-1015 does not apply.

Assignment did not purport to grant real property in fee simple, but instead used “all of my right, title, and interest” in and to ten percent royalty.

Quitclaim Deed

No words of quitclaim or release.

Warranty estops the warrantor from asserting against the grantee any after-acquired title derived through any act or conveyance of the warrantor prior to the deed in question.
Bell v. Twilight, 26 N.H. 401 (N.H.1853)

Bell held a mortgage against land owned by Ebenezer Fitts.

Bell “released, sold and quitclaimed” his “right, title, interest, estate and demand” with words of limited warranty to Twilight.

Bell then acquired a life estate interest.

Twilight claims both mortgage interest and life estate were conveyed by the quitclaim deed.
Bell never purported to convey more than he had at the time he executed the deed.

The limited warranty could not be read inconsistent with the grant.

If 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 prohibiting himself from ever acquiring a subsequent interest in the property.
Comstock v. Smith, 30 Mass. 116 (Mass. 1832)

Conveyance of “all their right, title and demand in and unto the premises” with warranty “against the claims and demands of all persons claiming by or under them and not otherwise.”

Covenant is a restricted covenant and is coextensive with the grant or release; he agrees to warrant the title granted or released and nothing more.

Court may not expand the limited warranty into a general one.

No after-acquired title was conveyed.
N.D.C.C. §47-10-19  Implied Covenants

- 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

- That such estate, at the time of execution of such conveyance, is free from encumbrances done, made or suffered by the grantor, or any person claiming under the grantor.
THE MAGICAL WORD “GRANT”

- Hanrick v. Patrick, 119 U.S. 156 (1886)
  - Grantor conveys “one undivided half of all my right, title and interest in and to the following described lands…”

- Limited Warranty
  - Grantor is lawfully seized of an interest in fee-simple of the granted premises aforesaid; that they are free from all incumbrances by me incurred; 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.
THE MAGICAL WORD “GRANT”

- Hanrick v. Patrick, 119 U.S. 156 (1886)
  - Limited warranty relates only to the premises granted and cannot operate as an estoppel preventing the grantors from asserting any 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.
STATE V. KEMMERER

- 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 [their] right, title, estate, interest, property and equity in and to the following real property:”

- South Dakota Codified Laws § 43-25-10 attaches same implied covenants to the word “grant.”
STATE V. KEMMERER

- The use of the word grant in an instrument conveying only the “right, title, and interest of the grantor” is not sufficient to pass after-acquired title.

- S.D. Codified Laws § 43-25-8
  - The use of the word “grant” does not convey after-acquired title, unless words expressing such intention are added.
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 successors and assigns forever, all of their right, title and interest in and to the following tracts...

California Civil Code § 1113 attaches same implied covenants to the word “grant.”
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.
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.
Grantor owned an undivided 1/3 interest

Grantor “do[es] hereby convey and quit claim” to the grantee “all right, title and interest in and to” the described tract.

No warranty.

Court in dicta noted that the quitclaim deed did not use the word “grant” and therefore no implied covenants.
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.

The distinction is a very important one – Aure v. Mackoff - NDCC 47-10-15 does not apply.
The use of the word “grant” in a deed which releases and quitclaims all of the grantor’s right, title and interest does not make such a deed one by which an after-acquired title will pass.

State v. Kemmerer
The use of the word "grant" in a deed which releases and quiets claims all the grantor's right, title and interest, or other words to that effect, does not make such a deed one by which an after-acquired title will pass.

See: State v. Remmerv, 94 NW 771 (South Dakota).

Note: See Section 47-10-15 and 47-10-19, North Dakota Century Code.
The use of the word “grant” in a deed which releases and quitclaims all of the grantor’s right, title and interest does make such a deed one by which an after-acquired title will pass.

1988 – Renumbered 1-08

- Aure v. Mackoff
- 162 A.L.R. 556
War Fork Land Co. v. Carr, 22 S.W.2d 308 (Ky. 1930)

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.
Crockett v. Borgerson, 152 A. 407 (Me.1930)

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 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.
Alice Carkuff conveyed all oil, gas, and other minerals to her four daughters.

Simultaneously, she conveyed the surface to her son James Carkuff.

Four months later, in 1953, she executes 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.”
The quitclaim deed did not contain a reservation of minerals and was not restricted to the surface only.

Several years later, Alice Carkuff reacquired both the surface and the minerals.

Alice Carkuff again conveys the oil, gas, and other minerals to her daughters, and the surface to her son.

Heirs of James Carkuff argue that the 1953 quitclaim deed conveyed after-acquired title because of the word “grant.”
23 Am. Jur. 2d Deeds

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 “remise, release, and quitclaim,” unaccompanied by words of grant.

Where only the grantor’s right, title or interest is quitclaimed, such operative words are conclusive that the instrument is a quitclaim.

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.
The use of the word “grant” does not pass after-acquired title.

“Grant” is limited in this case to Alice Carkuff’s “right, title, and interest” in the property at the time of execution.
POST CARKUFF

- Title Standard 1-06
  - 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.
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.
UNINTENDED CONSEQUENCES

- Warranty Deed which conveys only the grantor’s right, title and interest using the word “grant” still does not convey after acquired title.

- Mineral Deeds often convey “all right, title and interest” of the grantor – does the mineral deed constitute a warranty deed, a quitclaim deed, or something else?

- Assignments of Leases, Royalty, Overriding Royalty

- Personal Representative’s Deeds of Distribution
UNINTENDED CONSEQUENCES

- **Trustee’s Mineral Deed**
  - “Grantor does hereby **grant**, bargain, sell, convey, transfer, assign and deliver... all of grantor’s right, title and interest in and to all of the oil, gas and other minerals in Section 20...”
  - “THIS TRANSFER AND CONVEYANCE IS MADE WITHOUT ANY WARRANTY OF TITLE, EXPRESS OR IMPLIED”
  - “IT is the Grantor’s intent to convey all of its, right, title, and interest in the property described herein to Grantee.”

- What about a quitclaim deed using the word “grant” that specifically negates warranty?
UNINTENDED CONSEQUENCES

- Retroactive application
  - Mineral Deeds from professional landman
  - Individual conveys by quitclaim deed all, right, title and interest and later acquires additional interest through inheritance.
PRACTICE TIPS

- Think twice before using “grant” in a quitclaim deed.
- Understand the difference between a conveyance of the lands and a conveyance of the grantor’s right, title and interest in the lands.
- If the intent is to convey after-acquired title, make specific provision.
MARKETABLE RECORD TITLE ACT
MARKETABLE RECORD TITLE ACT

☐ Marketable Title
  ☐ 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.

☐ Marketable Record Title Acts
  ☐ First adopted in Michigan in 1945 – precursor to the Model Marketable Title Act by Lewis M. Simes and Clarence B. Taylor
  ☐ Enacted in 20 states.
MARKETABLE RECORD TITLE ACT

- 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 and eliminate stale claims.
- The mere passage of time causes the chain of title to grow longer and longer.
- Increased 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.
- Such acts neither declare anybody’s title to be marketable nor define marketability.
MARKETABLE RECORD TITLE ACT

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.
TITLE TRANSACTION

- 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.

- Dennison v. North Dakota Department of Human Services
  - Homestead Certificate

“Affects title” does not require the instrument to change or alter title, it simply must “concern” or “produce an effect” upon title.

Void instruments would affect land titles by casting a cloud or doubt thereon.
UNBROKEN CHAIN OF TITLE

- 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.
“ROOT DEED” or “ROOT OF TITLE”

- Obermiller v. Baasch, 823 N.W.2d 162, 170-71 (Neb. 2012)

[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 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.
“ROOT DEED” or “ROOT OF TITLE”

  - A forged deed or a “wild deed” could constitute a root deed.
  - To determine otherwise “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.”
“ROOT DEED” or “ROOT OF TITLE”

- Straits v. Shepler, 1982 WL 2919 (Ohio Ct. App.)
  - [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.
“ ROOT DEED” or “ROOT OF TITLE”

  
  “[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.”

- 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.”
“ROOT DEED” or “ROOT OF TITLE”

  - Forged conveyance is ineffective as a muniment of title.
  - MRTA contains an inherent defect provision.
  - Void tax deed however was effective muniment of title.

  - In cases of competing chains, a chain of title could not be founded upon a wild deed.
“ROOT DEED” or “ROOT OF TITLE”

  - 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.”
  - A quitclaim deed can serve as a root of title if it evidences an intent to convey an identifiable interest in the land.
  - The lack of warranty was not fatal to the application of the marketable title act.
“ROOT DEED” or “ROOT OF TITLE”

  - Owner of an undivided 1/10 interest delivered a quitclaim deed to the grantee
  - “…all his right, title, interest, estate, claim and demand, both at law and in equity, of, in and to the following described real estate”
  - The conveyance was entirely void of any express terms or any implication that it was intended to convey any specific interest or estate in the land.
  - Grantee dies and estate conveys the entire tract of land.
“ROOT DEED” or “ROOT OF TITLE”


  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.

- Relying upon Frandson v. Casey, 73 N.W.2d 436 (ND 1955)
“ROOT DEED” or “ROOT OF TITLE”

- 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).
“ROOT DEED” or “ROOT OF TITLE”

- 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. 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.
MRTA & MINERALS

- Application of the MRTA to mineral title is far more complex.
- Highly fractionated ownership often results in conveyances of “all of grantor’s right, title and interest.”
 Requirement of Possession

Neither the Michigan act nor the Model Act require that the person claiming to be in title actually be in possession. Instead, possession of the property is a defense used to shield claims from those attempting to invoke the act who are not in possession.
North Dakota, South Dakota and Nebraska require possession of the claimant.

*Northern Pacific Railway Co. v. Advance Realty Co, 78 N.W.2d 705 (N.D. 1956)*

- Possession of the surface does not constitute possession of severed minerals, and therefore the MRTA would not cut off an outstanding mineral interest.
- Oil and gas leases . . . while evidence of possession, do not constitute actual possession sufficient for adverse possession of the severed mineral interest.
MRTA & MINERALS

- N.D.C.C. 47-19.1-07 amended in 2013
- 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.
A mineral interest is deemed to be used when

1. there is actual production;
2. when the mineral interest 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.
UNINTENDED CONSEQUENCES

- Unknown if the MRTA requires continuous possession or simply possession of the interest at the time in which the claim is made.
- If continuous possession is required, will a brief period in which the interest is not leased invalidate a claim under the MRTA?
- If a statement of claim is filed, for how long does it constitute possession?
- *Sickler v. Pope*, 326 N.W.2d 86 (N.D. 1982)
  - Leases may offer evidence of possession, they do not constitute actual possession sufficient for adverse possession.
UNINTENDED CONSEQUENCES

- Uses named in the Dormant Mineral Act were designed to prevent the forfeiture of a real property interest by requiring minimal efforts from their owners.
- These same minimal uses are now used to define possession for the purposes of the MRTA and could potentially be used to wrangle title from legitimate owners.
- Potential to increase unmarketability of title due to competing chains.
UNINTENDED CONSEQUENCES

- The prior requirement of possession provided a necessary safeguard.
  - Title Opinions either prior to commencing operations or at least prior to distribution of royalty interests.
  - North Dakota Title Standard 2-01 would allow stray instruments to be disregarded where no actual notice of the interest was known.
Scrivener Errors

- O conveys an undivided 1/10 interest in Blackacre to A, B, C and D in equal shares.
- B consults with his divorce attorney in Arizona who drafts deeds “all the time.”
- B conveys an undivided 1/10 interest to B1 and B2.
- B only owns an undivided 1/40.
- B1 and B2 may be able to establish title to their individual 1/20 interests upon passage of time.
Acreage Discrepancies

O owns five net mineral acres in the NE¹/₄.

O conveys by Mineral Deed an undivided 5/160 interest in the NE¹/₄ to A.

The NE¹/₄ is actually 164.5 acres.

Mineral Deed has resulted in an over-conveyance to A.

A may be able to establish title to her undivided 5/160 (5.14 net mineral acres) with the passage of time.
PRACTICE TIPS

- **Common Claims**
  - Claim arising under a tax title;
  - Defective quiet title action, mortgage foreclosure, probate proceeding, or sale under a judgment;
  - Alienation of homestead; and
  - Informalities in the execution or acknowledgement of conveyances.

- Title examiners must now scrutinize stray mineral conveyances.

- Consider the use of specific quantity in conveyances.
Probate Avoidance

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.
PRACTICE TIPS

- Probate Avoidance
  - Personal Representative’s Mineral Deed of Distribution from a foreign jurisdiction which specifies the interest conveyed.
  - Mineral Deed from an unadjudicated heir purporting to convey an identifiable interest in the land.
- These scenarios will be rare and likely complicated by competing chains of title.
LEGISLATIVE REFORM

- Requirement of possession should be clarified.
- Actual production requirement for possession.
- Consider specific curative statutes for tax titles, homestead conveyances, minor defects in estate conveyances, etc.
- Define “Root Deed”
- Uniformity between the MRTA and the UPC.
- Prospective or Retroactive application.
ALIENATION OF HOMESTEAD
HOMESTEAD

- Public Policy
  - Origins in the Republic of Texas
  - 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.
  - For the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband.
Homestead is “the house, outbuildings and adjoining land owned and occupied by a person or family as a residence.”

1891 -

Homestead Exempt. A homestead owned by either husband or wife, not exceeding in value of $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.
HOMESTEAD

- 1895 – added acreage limitations 2 acres of platted land or 160 acres of unplatted land.
- 1943 – value increased to $8,000 over and above liens or encumbrances if platted, no value limitation for unplatted lands.
- 1951 – value increased to $25,000.
- 1967 – value increased to $40,000.
- 1977 – acreage limitations removed, value increased to $60,000.
- 1979 – value increased to $80,000.
- 2009 – value increased to $100,000.
HOMESTEAD

- N.D.C.C. § 47-18-01
  - 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.
N.D.C.C. § 47-18-05
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.
HOMESTEAD

- Conveyance of Homestead
  - Purchase and Sales Contracts
  - Contract for Deed
  - Leases
  - Mortgages
  - Deeds
HOMESTEAD

- What cannot be alienated?
- Homestead is defined based upon value.
- A homestead without regard to value cannot be conveyed without the execution and acknowledgement of both spouses.
HOMESTEAD

- H owns free and clear the NE¼ consisting of 160 acres valued at $10,000 per acre.
- Located within the SE¼NE¼, H has a dwelling on one acre with an unencumbered value of $90,000 (total value of land and buildings = $100,000).
- Homestead as defined would limit to the one acre with dwelling.
- Alienation —
  - May H convey the SE¼NE¼?
  - May H convey the NE¼?
  - If H also owns the NW¼, may H convey the N½?
Severtson v. Peoples, 148 N.W. 1054 (N.D. 1914)

Deed executed by both husband and wife conveyed 11 lots in Block 7 and 7 lots in Block 4.

Severtson argued that wife did not acknowledge deed, and that wife was coerced, intimidated, and under duress and undue influence by defendant.

Trial court agreed but made no determination of what constituted the homestead.
Severtson v. Peoples, 148 N.W. 1054 (N.D. 1914)

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

On rehearing the argument was posed that area and value for alienation purposes was irrelevant.

Court noted that Legislature limited the definition of homestead not only to creditors, but also to heirs.

Why should the definition of homestead not be limited in favor of vendees?
Title Examination

Impossible for title examiner to determine homestead.

Presumption that any conveyance by surface owners is homestead.

“One to buy, Two to sell.”

An affidavit by any person, including the grantor or grantee, evidencing that at the time of the execution of the conveyance the premises conveyed did not constitute the grantor’s homestead and that neither the grantor nor any member of the grantor’s family reside thereon is sufficient evidence.
At common law, the owner of land in fee simple was said to own the land from heaven to hell.

Landowner alone was entitled to prospect for, sever, and remove from the land anything found on or beneath the surface.

Mineral interest is a real property interest.

A conveyance of land without exception or reservation conveys to the grantee both the surface and the minerals.
ALIENATION OF HOMESTEAD BY LEASE

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

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.

Lessee was lawfully entitled to occupy as much or all of the surface as he found necessary to erect thereon derricks and enginehouses; to prospect for gas, coal, and oil; and if anything valuable is found, to erect buildings to store such product.
ALIENATION OF HOMESTEAD BY LEASE


- Contract conveying all the oil, gas and other minerals was found to be invalid.

- 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.

- The contract did not limit the amount of land the company could take for such purposes.
ALIENATION OF HOMESTEAD BY LEASE

- Dixon v. Kaufman, 58 N.W.2d 797, 804 (N.D. 1953)
- Dixons executed a Mineral Deed believing it to be an oil and gas lease.
- Grantee’s agent later took the Mineral Deed to a notary who previously acknowledged Dixons’ signatures.
- Deed included the Dixons’ homestead and other lands.
- Court found that any conveyance of homestead property without proper acknowledgement was void.
ALIENATION OF HOMESTEAD BY LEASE

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

Both cases alleged that Mineral Deeds were obtained by fraud.

Both cases husband and wife executed the mineral deeds at their home and never appeared before a notary public.

In both cases, Crawford conceded the deeds were ineffective to convey homestead property.

Court held without discussion that no title to the minerals under the homestead passed to Crawford.
“The cow was milked too hard, and moreover she was not milked intelligently.”

-Captain Anthony F. Lucas
SURFACE PROTECTION LAWS

  - The owner of a dominant mineral estate must make reasonable accommodations when using the surface for developing and producing the minerals on particular land.

- Modern Oil & Gas Leases provide for setbacks from structures – typically no less than 200 feet

- Surface Owner Protection Act (1975) – N.D.C.C. ch. 38-18
SURFACE PROTECTION LAWS

- Oil and Gas Production Damage Compensation Act (1979) – N.D.C.C. ch. 38-11.1
  - 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.
  - Water supply is protected.
  - Entitled to payments for loss of agricultural production and income caused by oil and gas production and completion operations.
SURFACE PROTECTION LAWS

- Permitting
  - N.D.C.C. § 38-08-05(2) prohibits the issuance of a drilling permit within 500 feet of an occupied dwelling.
  - If within 1000 feet, the owner of such dwelling may request the operator to place the location of all flares, tanks, and treaters utilized in connection with the well farther away from the dwelling than the well bore if such location can be accommodated reasonably within the well pad.
N.D.C.C. § 38-18-06

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.

No surface coal mining is permitted within five hundred feet of any occupied dwelling unless approved by the owner thereof.
SURFACE PROTECTION LAWS

- N.D.C.C. § 49-22-05.1

- Areas within five 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.
Should the mineral estate be excluded from the definition of homestead?

- Little justification for disparate treatment of unified estates and severed estates.
- Surface protection acts alleviate issues originally raised by the courts.
- Mineral estate does not fall under the public policy rationale for homestead protection.
- Creditor rights/Value determination

Alienation “Without regard to value”
PRACTICE TIPS

- Assume that all surface is homestead.
- Mineral owners making any kind of conveyance of minerals in lands which they also own the surface should have spouses execute and acknowledge. (or be prepared for curative requirement)
- If spouse’s signature is intentionally lacking, place evidence of record simultaneously with conveyance.
- Proper acknowledgement requires personal appearance before the notarial officer. N.D.C.C. 44-06.1-05