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EDITOR'S NOTE: This article was originally published in the February and March 1939 DICTA. It is now published as revised by Mr. Morris to include new curative statutes, amendments to old ones and decisions of the Colorado Supreme Court during the intervening ten years, as well as to include references to pertinent title standards and to eliminate matter now obsolete. An alphabetical index to the subject-headings will be printed at the end of the article.

No lawyer likes to turn down a title as unmerchantable. Occasionally a disappointed owner and would-be seller or a real estate broker may feel that a lawyer takes a fiendish glee in rejecting a title as unmerchantable, but this feeling is without any foundation.

The title to real estate, which a lawyer is called upon to examine and pass upon, is the title that is shown by written instruments of record. Necessarily, therefore, the examination of and passing on the title is a technical matter of examining these papers which have been filed of record and determining whether they show a title that appears good or whether there are defects in the title so shown.

The attorney making the examination does so on behalf of a client who desires to purchase the property or to make a loan upon it. If he passes the title as good, his labors after completing the examination are comparatively simple, consisting of writing a brief opinion stating the title is good, subject of course to such encumbrances, restrictions, tax liens, etc., as may exist, preparing the necessary papers and closing up the deal. In such case his client is relieved and satisfied, the owner of the property is likewise and everyone is happy. But, if the lawyer turns down the title as unmerchantable, his troubles have just commenced. There follow arguments between him and the attorney for the seller, the explaining to his client why he feels compelled to reject the title to the property the client is anxious to buy, the preparation of an opinion setting forth the facts concerning the defect and the reasons why same render the title unmerchantable, and, perhaps, a session with the seller or the real estate agent, or both. All of this involves a large amount of time and discussion and conditions which can not be considered enjoyable to the attorney, with no additional compensation to him for the same. No one is happy.

But a lawyer, of course, can not pass the title because rejecting it would impose upon him additional time, work and unpleasantness. If he finds in the title a defect which under the law or under the recognized practice would render the title unmerchantable, he must reject it. If he does not do so, he is not true to his client and he subjects himself to the danger of having his client come back to him in the future because of such title being rejected by an attorney examining for a prospective purchaser or lender.

There are various kinds and degrees of defects in titles. It requires an expert knowledge and a nice sense of discrimination to distinguish between defects which may be considered as immaterial and of no consequence, on the one hand, and defects which are substantial, on the other hand. And a defect which is purely a technical one and which does not mean that the purported owner of same does not, as a matter of fact, own the property, nevertheless may render the title unmerchantable on the face of the records.

The foregoing are platitudes but they are an introduction to statements as to the reasons which have prompted the passage of the various statutes which, especially during the last twenty-eight years, have from time to time been passed by the Colorado Legislature to remedy various defects in record titles and to make titles to real estate more merchantable. From time to time during such period, groups of lawyers, a substantial portion of whose practice consists of examination of titles, have conferred together, discussed curative statutes which might be passed, agreed upon their phraseology and assisted in having them put through the Legislature. They did this in the interests of the public and, in a sense, against their own selfish interests in that the passage of a number of these statutes has meant that lawyers would not be employed to bring suits to quiet title which they would have been employed to bring had the statutes not been passed.

In selecting defects to be remedied by curative statutes, and in preparing the statutes, there was required a fine sense of balance between matters, on the one hand, which involved actual substantive rights of which the owners thereof might be deprived by the legislation, and, on the other hand, purely technical matters which involved no substantive rights of which the owners would be deprived by the legislation. It is one thing to prepare hastily a statute to remedy a certain kind of defect in the title, but it is another thing altogether to guard against actual interests or property rights being cut out thereby. Therefore the number of defects in titles which can be eliminated by legislation without unjustly cutting out actual property rights is not unlimited.

The legislation which was thus conceived by lawyers or groups of lawyers to remedy technical defects in titles in this manner falls into two classes: one class consists of those statutes which make certain things appearing of record *prima facie* evidence of certain matters; and the other class consists of those statutes which impose periods of limitation upon the assertion of rights and claims. It is believed that statutes falling within either of these two classes are valid and constitutional. Patton on Titles 224-233.

It is not the assumption of the writer in preparing this article that the lawyers do not know of these curative statutes and that they do not follow them. On the contrary, the writer knows that the attorneys who examine titles are familiar with them and follow them. The purpose of this article is to collect in one place, in an alphabetical arrangement, these various curative statutes which have been passed from time to time over a long period

and which appear in the statutes in various places, in order to provide a source of ready reference to which the lawyer can turn to find quickly the statute he desires, together with an explanation of its purpose.

ABSTRACTS. By 1927 S. L. 600, Sec. 34, 1935 C.S.A. Ch. 40, Sec. 140, it is provided that an abstract of title certified by any reputable Colorado abstracter or abstract company incorporated under the laws of Colorado may be used to establish *prima facie* evidence that the chain of title is as shown by the abstract except as to any of the instruments of conveyance or record thereof or certified copy thereof which may be offered in evidence, and that the Court may take judicial notice of the repute of the abstracter, and that the absence of tax sale certificates from such abstract for any period of time covered by the abstract shall be *prima facie* evidence of the payment of taxes during such period by the party relying upon any chain of title shown by such abstract. In *Hochmuth v. Norton*, 90 Colo. 453, 9 Pac. (2d) 1060, it was held that under this section the abstract of title, when admitted in evidence without limitation, is "*prima facie* evidence that the chain of title is as shown thereby." The purpose of this section was to do away with the previously required laborious task of proving in an action the title of a litigant by introducing in evidence, one by one, the recorded copy of each and every instrument making up the chain of title of such litigant from the very beginning of such chain, necessitating the carrying from the office of the Recorder to the court room a large number of heavy books, the identification thereof, and testimony with regard thereto of the Recorder or his Deputy; and also to make simple the proving *prima facie* of the payment of taxes for a period of seven years so as to bring the case within the provisions of 1935 C.S.A. Ch. 40, Secs. 143 and 144.

ACKNOWLEDGMENTS. Prior to 1927 the form of acknowledgment set out in the Colorado statute (1921 Comp. Laws Sec. 4899) was one quite different from the form used in most of the other states of the Union, particularly in that the Colorado form contained the words "to be his act and deed for the uses specified therein." Repeatedly, examining attorneys would find in the title acknowledgments which omitted either the phrase "to be his act and deed" or the phrase "for the uses specified therein" without the substitution of any equivalent words. It was felt generally by examining attorneys that each of these two separate phrases was a substantial portion of the statutory form, so that, if either of them was omitted without substitution of equivalent words, the acknowledgment was a nullity. The omission of one or the other of these phrases very often occurred because a deed was prepared, executed and acknowledged in another state upon a form printed for use in that state and containing not the Colorado form of acknowledgment, but the form of acknowledgment in use in that state. To remedy this situation, several sections were prepared and adopted in 1927. One of these (1927 S. L. 585, Sec. 1, 1935 C.S.A. Ch. 40, Sec. 107; now amended by 1939 S. L. 289-290, 1935 C.S.A. Suppl. Ch. 40, Sec. 107) provided a very

short and simple form of acknowledgment which, as to an individual, merely reads: "The foregoing instrument was acknowledged before me this..... day of....., 19....., by....," thereby omitting the troublesome words "to be his act and deed for the uses specified therein." Another section (1927 S. L. 587, Sec. 2, 1935 C.S.A. Ch. 40, Sec. 108) provided that, in addition to the officers then empowered to take acknowledgments within or without the United States, instruments may be acknowledged before any notary public having a notarial seal. This was to correct the condition created by the previous statute (1921 Comp. Laws Sec. 4891 sub. Third) not having permitted an acknowledgment to be made before a notary public outside of the United States or its possessions. Another section (1927 S. L. 588, Sec. 4, 1935 C.S.A. Ch. 40, Sec. 110) provided that all instruments affecting title to real property in this state which shall have been theretofore executed or should be thereafter executed purporting to have been acknowledged or proved out of this state before a notary public or other officer empowered by the laws of this state to take acknowledgments, if the form of acknowledgment be in substantial compliance with the laws of the state or territory where taken or in substantial compliance with the requirements of the present statutes of Colorado, shall be deemed *prima facie* to have been properly acknowledged or proved before proper officers. This section made good any acknowledgment previously made in a form used in the state where it was made but not in accordance with the previously prescribed Colorado form, and also any acknowledgment which had been previously made if it was substantially in the form prescribed by the present statutes and was taken by an official authorized by the present statutes to take acknowledgments. By 1947 S. L. 354, Secs. 1 and 2, 1935 C.S.A. Suppl. Ch. 142, Sec. 257 (1) and Ch. 40, Sec. 11 (1), respectively, the short form of acknowledgment set out in said Sec. 107 was declared to constitute a proper form of acknowledgment to tax deeds and to the statutory short form of deed set out in 1935 C.S.A. Ch. 40, Sec. 11. Our Supreme Court has held in *Colpitts v. Fastenau,* 117 Colo. 594, 192 Pac. (2d) 524, that, even without this 1947 statute, the short form could properly be used as the acknowledgment to a tax deed.

ACKNOWLEDGMENTS BY PERSONS IN ARMED FORCES, ETC. 1943 S. L. 217-218, as amended by 1947 S. L. 354-356, 1935 C.S.A. Suppl. Ch. 115, Sec. 3A, contained provisions authorizing acknowledgments in greatly simplified form to be made before commissioned officers of certain ranks in the armed forces of the United States by members of the armed forces of the United States, merchant seamen outside the limits of the United States included within the forty-eight states and the District of Columbia, and certain other persons outside said limits. Each of such statutes contained provisions validating acknowledgments complying substantially with its provisions, even though they were made before the effective date of the statute.

ACKNOWLEGMENTS OF INSTRUMENTS REMAINING OF RECORD MORE THAN TWENTY YEARS. A large number of defects in titles arise through

defects in the acknowledgments to instruments in the chain of title. In order to correct these defects arising from defective acknowledgments or total lack of acknowlegments, where the instruments in question have been of record for a long time, there was passed in 1913 (1913 S. L. 319; 1921 Comp. Laws, Sec. 4906) a statute which, as amended in 1927, appears as 1935 C.S.A. Ch. 40, Sec. 111 and as amended in 1937 appears as 1937 S. L. 481, 1935 C.S.A. Suppl. Ch. 40, Sec. 111. These statutes provided that instruments affecting title to real property which have remained or shall have remained of record in the office of the Recorder of the county where the real property affected is situate for a period of twenty years, although unacknowledged or not acknowledged according to law, shall be received and may be read in evidence and the same or the record thereof or a certified copy of the record thereof shall be received and may be read in evidence without additional proof of the execution thereof in the same manner and with the same force and effect as if they had been properly acknowledged and proved according to law. The 1937 amendment, for the same reasons as are mentioned herein under the heading Recording a Long Time After Execution of Instrument, inserted in the statute the words "irrespective of the length of time that may have elapsed between the date of any such instrument and the date when same was so recorded. Because of this statute it is unnecessary and useless for an examining attorney to devote any time to checking the sufficiency in form of an acknowledgment to an instrument if it has been of record for twenty years because, even if he finds the acknowledgment defective, such defect is of no consequence in view of the language of the statute.

ACKNOWLEDGMENTS—PLACE OF TAKING BY NOTARIES. Prior to 1947, a notary public had no authority to take an acknowledgment outside the limits of the county for which he was appointed. Occasionally an attorney has had to turn down a title because of an acknowledgment which contained in its venue the name of a county other than the one which appeared on his seal. And there was no reason why a notary should not be permitted to take acknowledgments and affidavits anywhere in the state. Why should not a Denver notary be able to cross the boundary line of the City and County of Denver and take an acknowledgment in Englewood, Aurora or Lakewood? Accordingly there was passed 1947 S. L. 678-679, 1935 C.S.A. Suppl. Ch. 113, Sec. 2, which provided that all of the acts which notaries are authorized to perform may be performed either within the county in which their bond is filed or within any other county or counties within the state of Colorado. It further provided that all acknowledgments theretofore taken and all official acts performed by notaries public within the state of Colorado but outside of the county within which their official bond is filed were confirmed and made valid, if otherwise correct. 1949 S. L. 534 permits the recording of a copy of the oath and bond of a notary in any county in the state, in addition to the county of his residence, and authorizes the Recorder of any county in which it is recorded to issue a certificate of magistracy.

AFFIDAVITS. Particularly in former years, affidavits were filed for record in an attempt to fill the gap in a chain of title caused by lack of administration or determination of heirship proceedings or to remedy variances in names as they appeared in different instruments or to remedy other defects of the same general nature. This practice was quite common in some of the smaller communities. However, such affidavits were not admissible in evidence in a suit relating to the title to the property. For reasons similar to those mentioned in the paragraph entitled "Recitals Prima Facie Evidence", a statute was passed in 1941 (1941 S. L. 605, Sec. 1; 1935 C.S.A. Suppl. Ch. 40, Sec. 117 (1)) providing that all statements relating to death, intestacy, heirship, relationship, age, sex, names and identity of persons contained in affidavits which have remained or shall have remained of record for the period of twenty years in the office of the Recorder of the county where the real property affected by the facts stated in such affidavit is situated shall be accepted and received as *prima facie* evidence of the facts stated in such affidavits insofar as such facts affect the title to real property. It is to be noted that no statements which relate to any matters other than those specified in the statute, to-wit: death, intestacy, heirship, relationship, age, sex, names and identity of persons, can be accepted as *prima facie* evidence. For example, a statement in an affidavit that the affiant is the owner of certain real estate by virtue of a deed executed and delivered by the owner which has been destroyed and was never recorded can not be received in evidence or given any consideration as supporting the claim of title of the affiant, even though the affidavit has been of record for twenty years.

BUILDING AND USE RESTRICTIONS. Considerable trouble has been encountered by examining attorneys through there appearing in the chain of title (usually in a deed of conveyance) provisions which not only impose building and use restrictions but also provide for the forfeiture of the title in the event that such restrictions are violated. An attorney will naturally hesitate about passing the title for the making of a loan by a client if his client's lien can be cut out through the title of the owner being forfeited because of the owner violating the restrictions. Because of this, and for other reasons, there was passed 1927 S. L. 606, Secs. 46 and 47, 1935 C.S.A. Ch. 40, Secs. 153 and 154, which provide that building restrictions and all restrictions as to the use or occupancy of real property shall be strictly construed and that restrictions which provide for the forfeiture of title to or an interest in real property because of the violation of the restrictions on other real property (the parcels of real property being owned by different persons) shall be construed as applying only to the property embraced in the restriction and owned by the party on whose property the violation of the restriction occurred and that no action shall be commenced or maintained to recover possession of real property or to enforce the terms of any restriction concerning real property or to compel the removal of any building or improvement because of the violation of any of the terms of any restriction unless said action is commenced within one year from the date of the viola-

tion for which the action is sought to be brought or maintained. The limitation contained in Section 154 was held by our Supreme Court to bar an action to enforce forfeiture of title in *Wolf v. Hallenbeck*, 109 Colo. 70, 123 Pac. (2d) 412. In *Seeger v. Puckett*, 115 Colo. 185, 189, 171 Pac. (2d) 415, the Court held that the facts of that case did not bring it within the operation of Section 154. In 1948, in *Shelley v. Kraemer*, 334 U. S. 1, and *Hurd v. Hodge*, 334 U. S. 24, the United States Supreme Court held that state courts are prohibited by the provisions of the Fourteenth Amendment from enforcing restrictive covenants and agreements against the ownership or occupancy of real property by persons of any race. These decisions were discussed in an article by Wilson P. Walcher in the October 1949 DICTA.

CONSTRUCTION OF CURATIVE STATUTES. As is seen from a glance through this article, a large number of the curative statutes mentioned herein were adopted in 1927 and were in Chapter 150 of the Session Laws of that year. Section 44 on page 605 thereof, being 1935 C.S.A. Ch. 40, Sec. 151, states that it is the purpose and intention of the 1927 Act to render titles to real property and every interest therein more secure and marketable and that it is declared to be the policy in this state that *said act and all other acts and laws* concerning or affecting title to real property and every interest therein and all recorded instruments, decrees and orders of court of record, including proceedings in the suits wherein such orders or decrees may have been entered, shall be liberally construed, and with the end in view of rendering such titles absolute and free from technical defects, and so that subsequent purchasers and encumbrancers may rely on the record title, and so that the record title of the party in possession shall be sustained and not be defeated by technical or strict construction. That this was the purpose, intention and policy of the Legislature has been recognized and expressly stated by our Supreme Court in the following four decisions: *Birkby v. Wilson*, 92 Colo. 281, 285, 19 Pac. (2d) 490, which involved the statutes discussed under the heading "Liens—Extinguishment of"; *Federal Farm Mortgage Corporation v. Schmidt*, 109 Colo. 467, 473, 126 Pac. (2d) 1036, which upheld and applied the sections discussed under the heading "Decrees, Judgments and Official Deeds"; *Wolf v. Hallenbeck*, 109 Colo. 70, 73, 123 Pac. (2d) 412, which applied the statute mentioned under the heading "Building and Use Restrictions"; and *Colpitts v. Fastenau*, 117 Colo. 594, 598-599, 192 Pac. (2d) 524, which held to be applicable to tax deeds the short form of acknowledgment provided by 1935 C.S.A. Suppl. Ch. 40, Sec. 107 mentioned under the heading "Acknowledgments".

CONTRACTS OF SALE. See Options to Purchase.

CORPORATE RESOLUTIONS AND MINUTES. Occasionally the showing of record of action taken by a meeting of the stockholders or of directors of a corporation is required to supplement or support a conveyance or encumbrance executed by the corporation or to remedy an apparent defect in the title. A certified copy of the minutes or a portion thereof is not, in and of

itself, admissible in evidence in the absence of an express statute to that effect, and much less is the copy of it in the records of the Recorder admissible. Therefore the institution and completion of a civil action or of a proceeding to perpetuate testimony was required. Because of this, the Legislature in 1941 passed a statute (1941 S. L. 354-355, 1935 C.S.A. Suppl. Ch. 63, Sec. 22), which made admissible as *prima facie* evidence a certified copy of a resolution purporting to have been adopted by a meeting of the board of directors or of the stockholders of a corporation or of the minutes or a portion or portions of the minutes of such a meeting, when the same purports to be certified by an officer of such corporation and to have the seal of such corporation affixed to the certification. It also made admissible as *prima facie* evidence the record of such certified copy in the office of the Recorder of the county in which the real estate affected is situate or a certified copy of such record, certified by the Recorder, when the certified copy of the resolution or minutes shall have been filed for record in his office.

CORPORATIONS, CONVEYANCES BY. In 1927 there were passed two sections relating respectively to execution in the name of a corporation of a deed before the filing of its incorporation papers and to execution in the name of a corporation of a deed after expiration of its existence where there was an attempted renewal or extension of its existence. Such sections are 1927 S. L. 607, Secs. 49 and 50, 1935 C.S.A. Ch. 40, Secs. 156 and 157. The first of these sections provides that, if at the time of the delivery of a deed describing the grantee as a corporation, no incorporation papers have been filed and if thereafter proper incorporation papers shall be filed, the title to the property shall vest in the grantee as soon as the grantee is incorporated and no other instrument of conveyance shall be required. The second section provides that where the corporate existence of any corporation shall expire and there shall be an attempted renewal or extension of its corporate existence, either within the time provided for by law or thereafter, a conveyance thereafter by such purported corporation shall vest in the grantee the interest of the former corporation. As to cases where the deeds had been executed before the time when these sections went into effect, it is provided in the first of such sections that it shall be conclusively presumed that the title vested in the incorporators in trust for the grantee and that said incorporators properly conveyed the real property to the grantee when the grantee was incorporated unless within one year from the time the section went into effect there shall be filed in the office of the proper Recorder a written explanation or statement of the transaction signed and acknowledged by the proper parties. It is provided in the second of said sections that the title or interest so conveyed shall be presumed to have been properly passed to the grantee unless an action be brought within one year from the time the section became effective to establish a different result.

DEATH, CERTIFICATES OF. It very often is necessary in order to have a merchantable title that the death of a person be *prima facie* shown on the records. This arises most frequently in cases where property was held in joint

tenancy or in cases where a life estate was devised or conveyed. By 1935 C.S.A. Ch. 78, Sec. 128, a certified copy of the record of the death of one dying in Colorado made and kept in accordance with Sections 104 to 114 of said Chapter is made *prima facie* evidence of the facts therein stated. This, however, left the question of whether, if the death occurred outside of Colorado, a certified copy of the certificate of death issued by the official of the foreign state would be admissible in evidence in a Colorado court and certainly, if it was recorded in the office of the Recorder, the copy thereof in the records of the Recorder would not be admissible in evidence. Therefore in 1927 there was passed a statute (1927 S. L. 591, Sec. 11; 1935 C.S.A. Ch. 40, Sec. 117) providing that a certificate of death issued by a public official (whose apparent official duties include the keeping of records of death) of any state, territory, county, parish, district, city, town, village, province, nation or other governmental agency or subdivision thereof or a copy of any such certificate of death certified by such public official or by the county clerk and recorder of any county in the State of Colorado in whose office the same or a certified copy thereof shall have been recorded shall, insofar as the death may affect any interest in real property, be *prima facie* evidence of the death so certified and of the time and place of such death and shall be admissible in evidence in any court in Colorado, and that such method of proving death shall not be exclusive. In Title Standard No. 36, it is stated that for the showing of record of the death of an owner in joint tenancy the recording of a certificate of death under this statute is sufficient without the recording of the supplementary affidavit mentioned in 1935 C.S.A. Ch. 92, Secs. 1 and 2, but that the supplementary affidavit affords means of establishing identity in case of variance in names.

DECREES, JUDGMENTS AND OFFICIAL DEEDS. 1927 S. L. 603-604, Secs. 39 and 40, 1935 C.S.A. Ch. 40, Secs. 146 and 147, as amended by 1945 S. L. 272, 1935 C.S.A. Suppl. Ch. 40, Sec. 146, contain provisions which are probably the most helpful statutory provisions that have ever been passed in Colorado in the removal of defects in titles which otherwise would require the titles to be rejected as unmerchantable. Said Section 146 provides that no action shall be commenced or maintained against a person in possession of real property to question or to attack the validity of or to set aside upon any ground or for any reason whatsoever any final decree or final order of any court of record of this state or any instrument of conveyance, deed, certificate of sale or release executed by any private trustee, successor in trust, Public Trustee, sheriff, marshal, county treasurer, public officer or officers or appointee of a court when such document shall be the source of or in aid of or in explanation of the title or chain of title or right of the party in possession or any of his predecessors or grantors, insofar as the same may affect the title or explain any matter connected with the title in reference to said real property, if such document shall have been recorded and have remained of record in the office of the Recorder where said real property is situated for a period of seven years. Said section further provides that

any and all defects, irregularities, want of service, defective service, lack of jurisdiction or other grounds of invalidity, nullity or causes or reasons whereby or wherefore any such document might be set aside or rendered inoperative must be raised in a suit commenced within said seven-year period and not thereafter. Said Section 147 provides that persons under legal disability at the time the right of action first accrued and who at the time of the expiration of the limitation applicable are still under such disability shall have two years from the expiration of a limitation to commence action and no action shall be maintained by such persons thereafter. In this connection, see Limitations—Persons under Disability. Said Section 146 provides that its provisions shall not apply to any of the following cases: forged documents; during the pendency of an action commenced prior to the expiration of said seven-year period to set aside, modify or annul or otherwise affect such document if notice of such action has been filed as provided by law; when such document has been by proper order or decree of competent court avoided, annulled or rendered inoperative; and where the party who brings the action to question, attack or set aside the validity of such document or his predecessor shall have been deprived of possession within two years of the commencement of the action. The result of these two sections is that where a certified copy of a decree entered in a suit affecting the title to real estate, whether it be a foreclosure action or a suit to quiet title or an action for declaratory judgment or any other character of action affecting the title to real estate, shall have been of record in the office of the Recorder of the county wherein the real estate in question is situated for the period of nine years (the seven years provided by Section 146 plus the two years provided by Section 147) prior to the time of the examination of the title, and the person in whose favor such decree was entered or his successors in interest shall be in possession of the property at the time of the examination and for the period of two years immediately prior thereto, and no notice of pendency of an action to attack or set aside such decree is shown by the records and no order or decree affecting or setting aside such decree is shown in the files of the original suit or by the records in the Recorder's office, then the decree as entered by the court and the certified copy thereof as set out in the records of the Recorder can be accepted by the examining attorney as being valid and binding according to the terms and provisions on their face as against those named therein as defendants and those who have acquired interests from them subsequent to the filing of the *lis pendens* or the certified copy of the decree, irrespective of any defects and irregularities there may be in the securing of service of summons in such action or in any other proceedings in such action prior to the entry of the decree. That this is the result of these two sections is made clear by the decision of our Supreme Court in *Federal Farm Mortgage Corporation v. Schmidt,* 109 Colo. 467, 126 Pac. (2d) 1036, in which the Court held that, under 1935 C.S.A., Ch. 40, Secs. 146-151, a title was marketable even though derived through foreclosure action in which the service of summons was fatally defective. See also *Munro v. Eshe,* 113 Colo. 19, 29, 156

Pac. (2d) 700. And the same result follows as to releases of Deeds of Trust by Public Trustees, and also as to Public Trustees' Deeds, Sheriffs' Deeds, Special Masters' Deeds, Executors' and Administrators' Deeds, Treasurers' Deeds and other conveyances, certificates of sale and releases executed by officials included in the language of the section. A concrete illustration of the effect of these sections can be cited in the case of Public Trustee's Deeds. In the article prepared by the writer and published in the November 1936 issue of DICTA entitled "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", which article was prepared with the idea of furnishing a guide to attorneys in carrying through foreclosure proceedings by sale by the Public Trustee, there were set out the various steps and proceedings that should be taken in the foreclosure and the manner in which they should be taken to comply with the statutes and the law. In such article particular attention was paid to the matter of the notice of the sale that was to be given. With respect to such notice it was stated that the publication of the notice of sale and the mailing of such notice are the very heart of the foreclosure proceeding, and that the publication and mailing of the notice of sale in strict compliance with the provisions of the statute are necessary to confer power on the Public Trustee to sell the property. However, under said Sections 146 and 147, it is immaterial whether notice of the sale was given in conformity with the provisions of the statute or not, and whether other proceedings were properly taken in the foreclosure, if the Public Trustee's Deed shall have been on record for nine years and no notice of pendency of action to set same aside is shown in the records of the Recorder, and no decree setting it aside is shown in the records of the Recorder, and the grantee in such Public Trustee's Deed or his successor in interest shall be in possession of the property at the time of the examination and shall have been in such possession for two years immediately prior thereto. With reference to this matter of possession, our Supreme Court, in *Federal Farm Mortgage Corporation v. Schmidt, supra,* at pages 474-475, held that the title derived through the instrument referred to in these sections is marketable if the instrument has been of record for nine years without an action being commenced to attack it and if the person claiming under such instrument is in actual possession even though there is no showing as to how long his possession has existed. The 1945 amendment inserted in said Section 146 the words "county treasurer" so as to make it clear that the provisions of the statute should apply specifically to tax deeds. After this was done, Title Standard No. 47 was issued, based on the sections discussed in this subdivision as so amended, stating that after a treasurer's deed has been of record for nine years or more and is the source of title of the party in possession, the title is marketable without a supporting decree. It must be borne in mind that these sections operate only to prevent the setting aside of the instruments after the same shall have remained of record for the specified period, and to make them good according to their terms and that they do not remedy defects such as misnomer or omission of necessary parties or error in description of property.

DEEDS. See also: Corporations, Conveyances by; Decrees, Judgments and Official Deeds; Descriptions — Numbers and Letters in; Homesteads; Names, Variances in; Official Sales; Recitals Prima Facie Evidence; Recording a Long Time after Execution of Instrument; Seals; Signatures of those Acting in Representative Capacity; Trustees; Unrecorded Instruments—Against Whom Invalid; Wills—Powers of Sale under; and the various subdivisions herein relating to Acknowledgments and Estates and Joint Tenancy.

DESCRIPTIONS—NUMBERS AND LETTERS IN. There is authority for the holding that the words "Lots numbered 1 to 10", without the addition of the word "inclusive", convey only the lots to but not including 10 and therefore such a description conveys only lots numbered 1 to 9, inclusive, and does not convey lot numbered 10. Many titles were rejected because of the omission of the word "inclusive". Feeling that when a grantor executes a deed conveying "lots numbered 1 to 10" he intends to convey all ten lots, irrespective of what the technical interpretation given to same might be, there was passed in 1927 a section (1927 S. L. 593, Sec. 15; 1935 C.S.A. Ch. 40, Sec. 121) providing that all instruments wherein the parcels of property affected are not separately enumerated or listed, but are described as being from one numbered, lettered or designated parcel to another, shall be construed as including the first and last designated parcels, and also the intervening parcels, unless a contrary intention be expressly and clearly set forth in the instrument.

ESTATES—CLAIMS NOT FILED WITHIN THE SIX MONTHS. Until 1949, the statute (1935 C.S.A. Suppl. Ch. 176, Sec. 195) provided that all demands not filed within the prescribed period shall be forever barred unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case his claim shall be paid pro rata out of such subsequently discovered estate, saving however, persons of unsound mind or minors, the term of one year after their respective disabilities be removed. Because of this, if a piece of real estate was overlooked in the administration proceedings and was not included in the inventory, it continued to be subject to claims against the estate which had not been filed during the original period of administration of the estate but which might be asserted long after the closing of such original proceedings. There was no period after the expiration of which an attorney could positively say that no such claim could be asserted against the property. While the general statute of limitations might operate to bar the claim, there were a number of conditions under which the claim would not be barred, even at the expiration of twenty years from the date of death. For example, the obligation upon which the claim was based might have been payable in installments, the last one of which was fifteen or twenty years after the date of the obligation and therefore the statute of limitations would not begin to run until the maturity of the last installment. Again, if a claimant should die and an heir or legatee of such claimant was a minor or of unsound mind,

the statute of limitations would not run while such heir or legatee continued under disability. To remedy this situation, the Legislature in 1949 amended said Section 195 so as to provide that all demands not filed within the time provided in said Chapter 176 shall be forever barred, unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case his claim shall be paid pro rata out of such subsequently discovered estate, provided, that such creditor shall have filed his claim in the estate within six years from the death of the testator or intestate. The 1949 amendment contained a further provision that if the testator or intestate died more than five years and six months before the effective date of the 1949 amendment, creditors shall have the period of six months (and no more) after the effective date of the 1949 amendment within which to file their claims in the estate in order that they may be paid out of such subsequently discovered estate. This amendment is 1949 S. L. 770-771, Sec. 17.

ESTATES—COMMENCED IN WRONG COUNTY. In 1949 the Legislature passed a statute which provides that if the administration of any estate shall have been commenced before the county court of a county which is not proper under the provisions of 1935 C.S.A. Ch. 176, Sec. 71, and if the petition filed therein supports the jurisdiction in which it is brought, such court shall nevertheless have jurisdiction to proceed with and administer the estate, and the legality and validity of the acts, proceedings and orders of such court and of the acts of the personal representatives shall not be affected or questioned upon the ground that such administration is being or was had in the wrong county. Such statute further provides that any person in interest may, within thirty days after the passage of said statute, or within thirty days after he is served with any notice in such estate proceedings, or within thirty days after he is apprised of such estate proceedings, and not thereafter, file a motion in such court to have the administration proceedings transferred to the proper county. These provisions are by the statute made applicable to estate proceedings commenced prior to its effective date as well as subsequent thereto. This statute is 1949 S. L. 767-768, Secs. 10 and 11.

ESTATES—FORECLOSURE OF DEEDS OF TRUST AGAINST. The statute passed in 1905 (1905 S. L. 290) as amended by 1917 S. L. 391, 1935 C.S.A. Ch. 176, Sec. 208, provided that no mortgage, deed of trust or other security constituting a lien or encumbrance on any property owned by any person at the date of his death or on the date of adjudication of mental incompetency or which secures an indebtedness constituting a claim against the estate of any decedent or mental incompetent shall be foreclosed except in accordance with and under the conditions prescribed by such statute. One of such conditions was that such a deed of trust could not be foreclosed by sale by the Public Trustee during the period of one year after the death or adjudication unless the claim shall have been first proven and allowed or (if the amount secured be not a claim against the estate) until the validity of the encum-

brance and the amount secured thereby shall have been first duly proved in the estate proceedings and permission given by the County Court for such foreclosure by sale. Under this provision, even though the proceedings for the foreclosure by sale by the Public Trustee of a deed of trust appeared entirely valid and regular upon the face of the records in the office of the Recorder and in the office of the Public Trustee, nevertheless the sale might have been in violation of the provisions of such statute because of the person owning the property having died or been declared incompetent, or the person primarily liable on the indebtedness secured thereby having died or been adjudged incompetent, and the foreclosure sale having been made less than a year after such death or adjudication of incompetency, and no permission to foreclose by sale having been secured from the County Court. To be assured that something like this might not have happened which would impair the validity of the foreclosure it would be necessary for the examining attorney to ascertain whether the owner or any person primarily liable on the indebtedness had died or been adjudged incompetent within a year prior to the foreclosure sale and, if so, whether permission to foreclose by sale had been given by the County Court. Therefore there were passed in 1931 four sections (1931 S. L. 793-794, Secs. 1-4; 1935 C.S.A. Ch. 40, Secs. 65-68) which, as amended by 1939 S. L. 282-284 and 1945 S. L. 740-741, Sec. 9; 1935 C.S.A. Suppl. Ch. 40, Secs. 65-68 and Ch. 176, Sec. 208, provided: that all Deeds of Trust, theretofore or thereafter executed to a Public Trustee, may be foreclosed by such Public Trustee in the usual manner, notwithstanding the fact that the indebtedness secured may constitute a claim against the estate of a deceased person or a mental incompetent and notwithstanding the death or mental incompetency of one or more of the owners of the real estate covered by it; that such foreclosure shall be good against the mental incompetent and against the heirs at law, legatees, devisees, creditors, conservators, guardians, executors and administrators of any decedent or mental incompetent and all persons claiming by, through or under such decedent or mental incompetent; that notice of the foreclosure proceedings shall be given in the usual manner to the grantor in the Deed of Trust foreclosed at the address stated therein as though living and mentally competent and to all persons having interests then of record; that no notice of the foreclosure proceedings need be given to any heir at law, legatee, devisee, creditor, conservator, guardian, executor or administrator of the decedent or mental incompetent or to any person claiming by, through or under the decedent or mental incompetent unless the claim or interest of such person then appears of record; that no deficiency claim or judgment shall be made or allowed against the estate of any incompetent person or decedent where the foreclosure sale of the encumbrance securing such indebtedness shall have been made subsequent to the adjudication of mental incompetency of the incompetent person or subsequent to the death of the decedent, unless prior to such foreclosure sale the claim upon the indebtedness secured by the encumbrance shall have been filed in such estate on or before the expiration of the

period for creditors to file claims of the fifth class, and unless prior to such foreclosure sale either such claim shall have been allowed in such estate or permission to sell in such foreclosure shall have been granted by the Court administering the estate; and that the interest and claim in and to the real estate of all mental incompetents and all persons claiming by, through or under the mental incompetent or decedent, including minors and mental incompetents, shall be terminated and concluded by such foreclosure unless they shall redeem within the time prescribed by law. The 1939 statute contained a limitation of one year after its effective date upon any action to attack the validity of or set aside any Public Trustee's sale made prior to said effective date or any Certificate of Sale or Trustee's Deed issued by any Public Trustee upon such sale upon the ground that no court order permitting the foreclosure had been obtained in the estate.

ESTATES—SALES IN, NOT TO BE INVALIDATED. In 1949 there was passed a statute providing that sales of real or personal property made by a personal representative under the power conferred upon him by a will or under the the provisions of Ch. 176, 1935 C.S.A. shall not be invalidated by any order thereafter entered revoking, annulling or setting aside the order admitting such will to probate or the order or letters of appointment of such personal representative. This statute is 1949 S. L. 768, Sec. 14.

GIFT TAXES, LIEN OF. The Gift Tax Law passed in 1937 (1937 S. L. 611-612, Sec. 10(b)) provided that the gift tax shall be a lien upon the property embraced in gifts made during the calendar year for ten years from the time the gift is made but that any part of the property (other than real property against which a statement of lien shall have been filed) embraced in the gift which is sold by the donee to a *bona fide* purchaser for an adequate and full consideration in money or money's worth shall be released from such lien. This made the question of whether real estate, which was the subject of the gift and had been conveyed by the donee, was still subject to the lien for the tax dependent upon whether the conveyance by the donee to the person who acquired it from him was pursuant to a sale of it and was for an adequate and full consideration, and upon whether it was to a *bona fide* purchaser. This rendered it difficult for an attorney to pass a title where the records showed upon their face circumstances which indicated that a gift may have been made of the property subsequent to the effective date of the 1937 Act, such as the surnames of the grantor and grantee in the deed being the same, the absence of revenue stamps or the statement in the deed that the consideration was love and affection or that the deed was a gift. Under such circumstances, the purchaser from either an immediate or a remote grantee of the donee would be put upon inquiry to determine whether the property was a gift and, if so, whether the gift tax had been paid upon it or, in the alternative, whether the transfer of it by the donee was upon a sale to a *bona fide* purchaser for an adequate and full consideration in money or money's worth. Accordingly, this section was amended in

1941 (1941 S. L. 453-454, 1935 C.S.A. Suppl. Ch. 75A, Sec. 10(b) so that, after stating the limitation of the lien for gift tax to ten years from the time the gift was made, it limited such lien to property belonging to the donor and to the donee. It provided that such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until a statement of lien for the gift tax shall have been filed in the office of the Recorder of the county wherein is located the property embraced in the gift, and that the filing of such statement shall not affect the validity of any prior lien. The 1941 statute further provided that all liens which, prior to its adoption, existed against any property under the provisions of the 1939 statute (which amended the 1937 Gift Tax Law) shall, thirty days after the effective date of the 1941 statute, cease to be valid against any mortgagee, pledgee, purchaser or judgment creditor. It is to be noted that the 1941 statute omits all reference to the good faith of the purchaser or mortgagee and to the consideration for the purchase or mortgage and that it uses the words "*any* mortgagee, pledgee, purchaser or judgment creditor".

HOMESTEADS. Previous to 1927 the statutes relating to the encumbering or conveying of property, upon the margin of the record title to which an entry of homestead had been made (1921 Comp. Laws, Secs. 5924-5931) required a rather complicated procedure including the husband and wife joining in the execution of the same instrument and the wife voluntarily, separate and apart from her husband, signing and acknowledging it, and the officer taking the acknowledgment fully apprising her of her rights and the effect of signing the instrument, and the acknowledgment to such instrument expressly stating compliance with the foregoing. Occasionally it was found that such a conveyance was signed by only one of the spouses and afterwards a conveyance was signed by the other. More frequently it was found that there was some technical insufficiency or omission in the certificate of acknowledgment so that such certificate of acknowledgment did not show an exact compliance with the terms of the statute. Feeling that too much red tape and technicality in the present day and age should not be thrown around the conveyance or encumbrance of homesteaded property, and that all that should be required for such conveyance or encumbrance should be such signatures and acknowledgments as would be required if the two spouses owned the property as tenants in common, there was passed in 1927 a statute (1927 S. L. 952, Sec. 12, 1935 C.S.A. Ch. 40, Sec. 119) which provided that to convey or encumber a homestead both husband and wife must execute a conveyance or encumbrance of their respective interests therein, and that the same may be one instrument signed by both of them or by their separate instruments, and that no special form of acknowledgment other than the form provided to be used in other conveyances shall be necessary. Also, previous to the passage of this act difficulty was sometimes encountered in one or the other of the following circumstances: a person who, though unmarried, was nevertheless the head of a family and entitled to a homestead,

owned the property and entered it as a homestead, in which case, when a conveyance or encumbrance of the property was to be made, there was no spouse to join in the execution of the instrument and there was no way except by suit in which it could be established of record, even *prima facie,* that the owner of the property was unmarried and that therefore it was not necessary that his or her spouse also execute the instrument; and one of two spouses owned the property and either of the spouses entered it as a homestead and the spouse who was not the record owner died or was divorced, in which case it was either impossible or exceedingly difficult to obtain the signature of the former spouse who was not the record owner and, although under the law, because of the death or divorce, the signature of such spouse was not necessary to the validity of the conveyance or encumbrance, nevertheless it was difficult to show of record the death or divorce. To cover these situations the said section in the 1927 law provided that, if the homestead be claimed by a person who at the time of the conveyance or encumbrance thereof be not married, a statement to that effect in such instrument shall be *prima facie* evidence of such fact.

INHERITANCE TAX LIENS. As is stated in Title Standard No. 14, there was, at the time of the adoption of said Standard, no period of limitation whatsoever upon the lien of the Colorado Inheritance Tax upon real estate owned by a decedent who died after April 17, 1909, as the statute provided that the inheritance tax shall be and remain a lien upon the property passed and transferred until paid. Consequently, extreme care had to be used by the title examiner to see that a proper inheritance tax receipt or release had been obtained which correctly described the real estate, title to which he was examining. This necessitated examining the files in the county court to find the inheritance tax receipt, if it had not been filed with the Recorder, even in estates that were as much as thirty or thirty-five years old, and often it was necessary to secure a new receipt because of an error in the description of the property in the original receipt. In cases where the real estate in question was not inventoried in the estate, an inheritance tax receipt or release covering it had to be obtained because none had been secured during the original administration proceedings, even though they had been commenced as far back as 1910. It was true that the statute contained an exception where the transfer was by deed or grant in the hands of a *bona fide* purchaser or encumbrancer without notice; but, while this provision might free from the lien property transferred by the decedent by way of gift in contemplation of death when the property had been by the donee sold or encumbered to a *bona fide* purchaser or encumbrancer without notice, it could have no effect to terminate the lien upon property which passed by descent or devise. To remedy this situation, the Legislature enacted 1945 S. L. 394-395 which imposed a limitation of fifteen years from date of death upon the continuance of the lien of the inheritance tax upon real property. And in 1947 the Legislature made a further amendment which left intact the limitation of the lien to fifteen years from date of death and provided that

the inheritance tax lien on real property then existing on transfers from decedents who died prior to May 16, 1933 shall cease to exist one year after the effective date of the 1947 amendment (which effective date was April 14, 1947) unless within that period there is recorded in the county where said real property is situate a notice of lien of inheritance tax describing the real estate charged with the lien, the name of the decedent from whom the property passed and the amount of the tax claimed to be due, and that such notice of lien should thereafter remain a valid lien against said property for a period of one year from the date of the recording thereof unless sooner released. This amendment is 1947 S. L. 538, Sec. 2, 1935 C.S.A. Suppl. Ch. 85, Sec. 38. Therefore, if the decedent has been dead at least fifteen years at the time of the examination of the title, the examiner need not pay any attention to whether the inheritance tax has been paid.

JOINT TENANCY, CREATION OF. As appears from what was said by our Supreme Court in *Eisenhardt v. Lowell,* 105 Colo. 417, 424-425, 98 Pac. (2d) 1001, the authorities are in conflict upon the question of whether a joint tenancy can be created by a deed which purports to convey the property to the person named as the grantor and another person or other persons. The Court said that it was inclined to favor the view that a joint tenancy could so be created but added that, since it was unnecessary to a determination of the question there presented, it did not expressly so hold. Attorneys often encountered situations where a person who was the sole owner of the real estate conveyed the property to himself and another person as joint tenants and, because of the conflict of the decisions outside Colorado and there being no Colorado decision settling the question, many attorneys rejected the title when derived through a deed executed by the grantee who was not the original owner. Accordingly, the Legislature in 1939 enacted a statute which expressly validated estates in joint tenancy whether in a grant, devise or conveyance thereafter made from one person to others, or from one person to himself and another or others, or from tenants in common to themselves or to themselves and another or others, or from joint tenants to themselves and another or others (1939 S. L. 285, 1935 C.S.A. Suppl. Ch. 40, Sec. 4). Title Standard No. 61, which was promulgated May 20, 1949, states that a conveyance made prior to the effective date of the 1939 statute creates a joint tenancy if it is sufficient in form to create a joint tenancy pursuant to the 1939 statute.

JOINT TENANCY NOT TO BE AFFECTED BY WILL OR CODICIL. Colorado attorneys were startled in 1938 to learn that in *Estate of Liden (Hauser v. Foster),* 103 Colo. 58, 65, 82 Pac. (2d) 775, our Supreme Court had held that an instrument creating a joint tenancy speaks as of the time of the execution of that instrument and that a will speaks as of the time of death, and that therefore it must follow that, if a will creates a situation inconsistent with a joint tenancy, the will must control and that, since one of the joint tenants died leaving a will which gave the residue of his estate to a person

other than the surviving joint tenant, the will was clearly inconsistent with survivorship so that, as to his estate, the will was controlling and on his death his interest in the property passed not to the surviving joint tenant but to the residuary legatee and devisee. The Court, as supporting this conclusion, cited *Walker v. Drogmund,* 101 Colo. 521, 74 Pac. (2d) 1235, although in that case the Court, on page 529, said that the right of a survivor is preferred above any devise or testamentary conveyance which the decedent can make, and that any attempt to devise property affected by survivorship is inconsistent with such status. This language used in *Walker v. Drogmund* was in accordance with the understanding of the attorneys as to what was the law. The decision in *Estate of Liden* resulted in a chaotic condition because, if an attorney passed a title derived through a conveyance by the surviving joint tenant, he had no assurance that there might not already have been admitted to probate, or might not thereafter be admitted to probate, in some one of the sixty-three counties in Colorado a will of the deceased joint tenant which contained a specific or residuary devise to someone other than the surviving joint tenant, by reason of which the decision in *Estate of Liden* would require a holding that the deed from the surviving joint tenant did not convey the entire title to the property but only the fractional interest therein which the surviving joint tenant held immediately before the death of the decedent. Therefore, at the next session of the Legislature there was passed 1939 S. L. 287-288, 1935 C.S.A. Suppl. Ch. 92, Secs. 18-20, which provided that no will, codicil or other testamentary disposition or testamentary provision of one of the owners in joint tenancy of real estate shall destroy or affect the joint tenancy or prevent the entire title and interest owned by the joint tenants from becoming vested upon his death in the joint tenant or joint tenants who shall have survived him and that, upon such death, all of the interest and title which, immediately before such death, was owned by all of the joint tenants shall become vested in the survivor or survivors of such joint tenants in spite of and without regard to the provisions of a will or codicil of the joint tenant so dying or the admission to probate of same, and without regard to whether such will or codicil was executed before or after the creation of the joint tenancy. This statute further provided that it shall be conclusively presumed that no will, codicil or other testamentary disposition or testamentary provision of one of the owners in joint tenancy of real estate who shall have died prior to the effective date of the 1939 statute has destroyed or affected the joint tenancy or prevented the entire title and interest owned by the joint tenants from becoming vested upon his death in the joint tenant or joint tenants who survived him, unless an action to assert or establish the contrary shall have been brought prior to the expiration of six months from the effective date of the 1939 statute, and unless also a *lis pendens* stating that such action has been commenced shall have been filed for record within said six months in the office of the Recorder of the county in which the property so owned in joint tenancy is situate.

JUDGMENTS. See Decrees, Judgments and Official Deeds.

LIEN NOTES. There has been a practice on the part of certain firms and companies of having the property owner sign a short instrument constituting in effect both a promissory note and a mortgage upon real property. In most cases these instruments were executed to roofing companies and in them the property owner agreed to pay the roofing company a certain amount in certain installments for a new roof or for roofing repairs and gave to the roofing company a lien upon the property for the payment of same. These instruments were acknowledged in the same manner as other instruments affecting title to real estate and were then recorded. Usually before these instruments were recorded they were discounted by the roofing company to a finance company and in such cases the recorded copy of the lien note showed an endorsement from the roofing company to the finance company on the back of the instrument. These endorsements were never acknowledged. Later, upon payment of the indebtedness, the finance company would execute and acknowledge a quit claim deed purporting to operate as a release of the lien note. However, since the lien note was, in law and in fact, a mortgage upon real estate, an endorsement or assignment thereof was in effect an assignment of a mortgage on real estate and such assignment could not be accepted as showing of record the assignment of the mortgage unless it was acknowledged. So that, since the assignment was only by endorsement and was not acknowledged, the endorsement was not *prima facie* evidence of the assignment and so the later quit claim by the endorsee could not be accepted as releasing the lien note. And very often, when attempts were made to locate the roofing company in order to secure a release from it, it was found that it had folded up and the officers or partners thereof could not be found. In order to remedy this condition a statute was passed in 1937 (1937 S. L. 479-480, Sec. 2, 1935 C.S.A. Suppl. Ch. 40, Sec. 107 (1)) which provided where an instrument, which by its terms constitutes a promise or obligation for the payment of money, and also by its terms creates a lien on real estate as security for the payment thereof, shall at the time it shall have been recorded (whether such recording be the original recording or a recording subsequent to the original one) have borne upon its face or upon its back an assignment, transfer or endorsement thereof, such instrument and such assignment, transfer or endorsement, or the recorded copy thereof, or a certified copy of the recorded copy thereof, shall be admissible in evidence as and constitute *prima facie* evidence of such transfer, assignment or endorsement of such instrument from the person whose purported signature is affixed thereto to the person named therein, irrespective of whether such assignment, transfer or endorsement shall have been acknowledged in the manner provided by law for the acknowledgment of instruments relating to or affecting title to real property, or acknowledged at all. Such section further provided it should be applicable to all of such instruments which shall have been executed prior to the time when such section took effect, as well as to all such instruments which are executed after the time when the section took effect.

LIENS—EXTINGUISHMENT OF. Occasionally there appears in the abstract a deed of trust or mortgage executed forty or fifty years prior to the time of examination, with no release thereof or foreclosure thereof shown by the records. No doubt in many cases this was due to the owner of the property having paid the indebtedness secured by the encumbrance but having omitted to secure and record a release or, having secured the release, having omitted to record it, or to the owner having conveyed the property to the holder of the encumbrance and the latter having neglected to have his encumbrance released of record. It had been held by the Colorado Supreme Court that no statute of limitations bars foreclosure of a Deed of Trust by sale under the power contained therein, but that foreclosure sale under the Deed of Trust can be made no matter how long it may be made after the maturity of the indebtedness. *Holmquist v. Gilbert,* 41 Colo. 113, 92 Pac. 232; *Foot v. Burr,* 41 Colo. 192, 92 Pac. 236; *Brereton v. Benedict,* 41 Colo. 16, 92 Pac. 238; *Walters v. Webster,* 52 Colo. 549, 123 Pac. 952; *Rowe v. Mulvane,* 25 Colo. App. 502, 139 Pac. 1041. It had also been held by our Supreme Court in *Folda Real Estate Co. v. Jacobsen,* 75 Colo. 16, 223 Pac. 748 that, although an action upon a promissory note may be barred by the statute of limitations, nevertheless an action to foreclose a mortgage securing such note is not barred by the statute of limitations. See also *Birkby v. Wilson,* 92 Colo. 281, 285, 19 Pac. (2d) 490. Feeling that there should be some way of clearing off these old encumbrances which apparently had been forgotten long ago by all persons connected therewith, there were passed in 1927 a number of sections (1927 S. L. 593-598, Secs. 16-29) which in substance provided: that no lien upon real property created by mortgage, trust deed or other instrument securing the payment of an indebtedness shall remain a lien for a period longer than seven years after the final payment of principal is due and payable as shown by the recorded instrument and that such instrument shall cease to be a lien and the record thereof shall cease to be notice after such seven years unless it be extended and the lien and notice thereof renewed and continued by the recording during such seven years of an instrument signed by the beneficiary or by the owner of the indebtedness secured, clearly describing the mortgage, trust deed or other instrument and setting forth the date to which the payment of the indebtedness has been extended; that, if such extension be recorded within such seven years, the original instrument creating the lien shall continue and be in full force and effect for the further period of seven years from the date when the final payment of principal becomes due and payable as set forth in said extension, with the right to make similar successive renewals or extensions of the lien, provided, however, that the original extension and all additional and further extensions shall, in no event, extend the lien of the original mortgage, trust deed or other instrument beyond a total of thirty years. Such sections further contained provisions to the effect that instruments creating liens as security for indebtedness which were of record at the time the sections went into effect and in which the final payment therein

provided was then past due shall, for the purpose of such sections, be considered as having become due at the time the sections went into effect and that the time for payment may be extended within seven years thereafter in conformity with the provisions of such sections and, if not so extended, such instruments shall, seven years after the sections went into effect, cease to constitute notice for any purpose and thereafter purchasers or encumbrancers shall not be bound thereby. Such sections further provided that if, prior to the expiration of the period, as defined in such sections, during which any such instrument creating a lien shall constitute notice, there shall be filed in the office of the Recorder of the proper county a notice of an action pending to foreclose such lien or a notice of foreclosure proceedings thereon by a Public Trustee or other proper official, then the lien created by such instrument shall not terminate and the notice granted by the recording thereof shall continue until final disposition of the action or foreclosure proceeding. Such sections contained other provisions to carry out the general purpose herein shown. Our Supreme Court in *Birkby v. Wilson,* 92 Colo. 281, 19 Pac. (2d) 490 held that, under these sections, a mortgagee was not barred from instituting a suit to foreclose a mortgage securing a note due December 1, 1924 until March 28, 1934 (the end of the original seven years from the effective date of 1927 Act), and then only in the event that the lien of the mortgage and the indebtedness have not been kept alive pursuant to the provisions of these sections. The Legislature in 1933 (1933 S. L. 798-802) amended the 1927 sections so as to change the words "seven years" wherever they appeared to "fifteen years," thereby postponing from March 28, 1934 to March 28, 1942 the time when the limitations in the 1927 Act should be effective. The provisions of the 1927 Act as amended by the 1933 Act are 1935 C.S.A. Ch. 40, Secs. 122 to 135. Title Standard No. 49 is based upon these sections.

LIMITATIONS—LIEN BARRED WHEN INDEBTEDNESS IS BARRED. As was stated in *Birkby v. Wilson,* 92 Colo. 281, 285, 19 Pac. (2d) 490, our Supreme Court held in *Folda Real Estate Co. v. Jacobsen,* 75 Colo. 16, 223 Pac. 748 that foreclosure by suit of a mortgage on real estate is not barred although an action upon the note secured by such mortgage is barred by the statute of limitations. The effect of this decision was apparently to enable a mortgage on real estate to be foreclosed no matter how long a period may have elapsed after the maturity of the indebtedness secured thereby and even though there had not been any partial payment, new promise or acknowledgment that would waive the bar of the statute of limitations as against a suit on the indebtedness. Because of this there was passed in 1927 a statute (1927 S. L. 598, Sec. 27, 1935 C.S.A. Ch. 40, Sec. 133) which provides that the lien created by any instrument shall be extinguished at the same time that the right to commence a suit to enforce payment of the indebtedness secured by the lien is barred by any statute of limitation of this state. This section was discussed in *Birkby v. Wilson, supra.*

(Mr. Morris will conclude his article in the December issue.)