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CURATIVE STATUTES OF COLORADO RESPECTING TITLES TO REAL ESTATE

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(Continued from February Issue)

Liens—Extinguishment of. Occasionally there appears on 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 has 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 vs. Gilbert, 41 Colo. 113; Foote vs. Burr, 41 Colo. 192; Brereton vs. Benedict, 41 Colo. 16; Walters vs. Webster, 52 Colo. 549; Rowe vs. Mulvane, 25 Colo. App. 502. It has also been held by the Colorado Supreme Court in Folda Real Estate Co. vs. Jacobsen, 75 Colo. 16, 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. Feeling that there should be some way, other than by suit, of clearing off these old encumbrances that have remained of record for forty or fifty years and which apparently have been forgotten long ago by all persons connected therewith, there was passed in 1927 a number of sections (1927 Sess. L. 593-598, Secs. 16-28) 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 and 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; and 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. However, evidently feeling that these sections might, upon the expiration of the period of seven years from their passage, extinguish encumbrances which were then recognized by the parties as being valid and in full force and effect and upon which payments of interest and perhaps of principal were being regularly made, through the owners of the indebtedness secured by such encumbrances being ignorant of the fact that they must during such seven years file an ex-

tension if their encumbrances were not to be extinguished, and desiring at least to postpone the time when the provisions of these sections would extinguish encumbrances, the Legislature in 1933 (1933 Sess. 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 provisions of the 1927 Act should take effect. As to whether before March 28, 1942, the Legislature will again extend the time when the provisions of the Act shall produce the extinguishment of liens, extensions of which shall not have been recorded in compliance with the Act, or will repeal entirely the provisions of the Act or, on the other hand, will do nothing and permit the provisions of this Act to take full effect remains to be seen. On the one hand, there is the consideration that by these provisions many old and forgotten encumbrances, many of which have been paid though not released of record, will be cleared off of the title to pieces of real estate. On the other hand, there is danger that encumbrancees may lose their investments in the encumbrances held by them through their ignorance of the requirements of the statute, even though such encumbrances are recognized by the parties thereto as being valid and in full force and effect clear up to the time when the extinguishment of these encumbrances takes effect. The provisions of the 1927 Act as amended by the 1933 Act are C.S.A. Chap. 40, Secs. 122 to 134.

Limitations—Lien Barred when Indebtedness Is Barred. In the case of Folda Real Estate Co. vs. Jacobsen, 75 Colo. 16, it was held 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 Sess. L. 598, Sec. 27; C.S.A. Chap. 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.

Limitations—May be Asserted Affirmatively. At common law a statute of limitations is a shield and not a sword; it can at common law be asserted only by way of defense against an action brought by another and not affirmatively as basis for an action. However, 1927 Sess. L. 604, Sec. 41, C.S.A. Chap. 40, Sec. 148, provides that the limitations "herein provided for" (evidently meaning the limitations provided in the entire Chapter 150 of the 1927 Session Laws) may be asserted either affirmatively or by way of defense and may be used in any action as a source of or as a means to establish title or the right of possession or as an aid or explanation of title and that actions may be maintained affirmatively to establish the limitations provided in said Chapter 150 of the 1927 Session Laws.

Mechanic's Liens. One of the most perplexing problems of attorneys examining titles has been the situation where a mechanic's lien claim was filed of record a long time before the examination and the abstract shows no release of the lien claim and nothing indicating any suit brought to foreclose it. The statutes have always imposed a limitation within which to bring the suit to foreclose a mechanic's lien of six months after the completion of the entire work and under the decisions, if the suit was not brought within that period, the lien was lost. However, if the suit had been brought within that period, then the lien was preserved until the determination of such suit and, if such determination was one which sustained the lien, then such lien continued thereafter indefinitely. An attorney might check the records in the office of the Clerk of the County Court and the Clerk of the District Court of the county wherein the real estate was situated and might ascertain from same that no suit to foreclose the lien had been brought in either of said courts; nevertheless the Supreme Court in Fletcher vs. Stowell, 17 Colo. 94 and Burton vs. Graham, 36 Colo. 199, has held that a suit respecting real estate may be brought in any county in the state subject only to the right of a defendant to move for a change of venue and, if no such motion is made, the court has full jurisdiction; therefore, so far as the examining attorney could know, a suit might have been brought in any one of the

sixty-two counties in the state other than the county wherein the real estate was situated to foreclose the lien and such suit might still be pending or a judgment sustaining the lien may have been entered although not followed by any recording of a certified copy of the judgment or a Sheriff's Certificate of Purchase or a Sheriff's Deed. To remedy this situation a statute was passed in 1915 (1915 Sess. L. 333; 1921 Comp. Laws, Sec. 6451; Original 1935 C.S.A. Chap. 101, Sec. 24) which provided that, in order to hold the lien, the suit must not only be commenced within said period of six months but a notice of *lis pendens* must be filed within that period in the office of the Recorder of the county wherein the land involved is situated. However, in the case of Laverents vs. Craig, 74 Colo. 297, the Supreme Court in effect nullified this provision, holding, because of certain phraseology in the statute and because of the general nature of *lis pendens*, that the filing of the *lis pendens* was required by the statute only for the "protection of third parties who might deal with the property in ignorance of the contractor's claim" and that the *lis pendens* is "not a necessary prerequisite of a suit where the action is against the owner of the property, or one primarily liable for the debt". This left for the title attorney the problem as to how his client could "deal with the property in ignorance of the contractor's claim" when the abstract showed a notice of the lien of the contractor. In order to remedy this situation a statute was passed by the 1937 Session of the Legislature (1937 Sess. L. 481, Sec. 4; 1938 Supp. C.S.A. Chap. 101, Sec. 24) changing in various respects the phraseology of the previous statute so as to make it more clear and explicit and adding the words "as against the owner of the property or as against one primarily liable for the debt upon which the lien is based or as against anyone who is neither the owner of the property nor one primarily liable for such debt." To extend these provisions to lien claims filed before the passage of the statute, there was at the same time adopted a section (1937 Sess. L. 482, Sec. 5; 1938 Supp. C.S.A. Chap 101, Sec. 24 (1)) which provides that no lien statement filed for record prior to the date when such section took effect shall "as against the owner of the property or as against one primarily liable for the debt upon which the lien is based or as against anyone who is neither the owner of the property

nor one primarily liable for such debt," hold the property longer than one year after the date when such section took effect unless an action shall have been commenced prior to the expiration of said one year to enforce the same and unless also, prior to the expiration of said one year, there shall have been filed for record with the Recorder of the county in which the property is situated either a notice stating that such action has been commenced or a certified copy of a decree or judgment enforcing such lien rendered in such action or a certificate of purchase evidencing the purchase of the property at a sale thereof made pursuant to the provisions of a decree or judgment rendered in such action or a deed conveying the property under such a sale.

Mortgages. See Liens—Extinguishment of; and Limitations—Lien Barred when Indebtedness is Barred.

Official Deeds. See Decrees, Judgments and Official Deeds; and Official Sales.

Official Sales. It sometimes is found that a Sheriff's Certificate of Purchase or a Public Trustee's Certificate of Purchase was recorded and no Sheriff's Deed or Public Trustee's Deed was ever executed and recorded based upon such sale. Because of this there were passed in 1937 two sections (1937 Sess. L. 472-473, Secs. 1 and 2; 1938 Supp. C.S.A., Chap. 40, Secs. 164 and 164 (1)). Said Section 164 included a new provision that the deed shall be issued by the Trustee, Sheriff or other official within nine months from the expiration of the last period of redemption and not thereafter. Said Sec. 164 (1) provides that, if the person entitled to the deed shall not apply for the deed within such nine months or if no such deed be issued to him within such period, all rights under the Certificate of Purchase, including any rights of any lienor who has redeemed therefrom, shall terminate, and no person shall be entitled to receive such deed, and the official who made the sale shall not have the power to execute such deed. Such section then provides that after such nine months the holder of the Certificate of Purchase, if no redemption has been made, or the lienor last redeeming shall have a lien on the property sold superior and prior to all liens and encumbrances recorded subsequent to the recording of the lien on which the sale was based, for the amount which would have been necessary to redeem the property on the last day of the last period of re-

demption, plus interest thereon and all taxes, insurance premiums and other lawful and proper charges advanced or paid by such person, and that such lien may be enforced only by an action commenced in the proper court to foreclose the same in the manner and method provided by law for the foreclosure of mortgages, and that such lien shall continue in effect only for fifteen months from the date when such person became entitled to a deed, and that after the expiration of such fifteen months, if no action to foreclose such lien has been commenced and no *lis pendens* of such action has been filed as provided by law, then it shall conclusively be presumed that such lien has been paid and discharged and no release or other acquittance shall be necessary or required to discharge such lien. Such section further provides that in cases where the property had been sold before the section took effect and the party entitled to a deed had not received it he may apply for such deed and receive it within nine months from the date that said section became effective and that, if he fails to do so, then he may commence an action within fifteen months from the date when the section became effective to foreclose such lien and not thereafter and that, if no action to foreclose such lien has been commenced and no *lis pendens* of such action has been filed as provided by law within such fifteen months, then it shall be conclusively presumed that such lien had been paid and discharged and no release or other acquittance shall be necessary or required to discharge such lien.

Options to Purchase. Previous to 1927 considerable difficulty was encountered through the owner of property having given an option to purchase the property, which option was recorded but no sale and conveyance thereunder was ever consummated. Such options constituted clouds upon the title because the fact that they were of record gave notice of possible rights of the optionee and anyone dealing with the property was put upon the duty of inquiring as to whether the optionee had, in accordance with its terms, tendered performance and payment and therefor in each such case it was necessary to secure a quit claim deed from the optionee or to quiet title. To remedy these situations there was in 1927 passed a section (1927 Sess. L. 591; C.S.A. Chap. 40, Sec. 116) which provided that recorded instruments of the nature of an option to purchase affecting title to real property under the

terms of which possession is not delivered to the purchaser shall not constitute notice to any person for a period of more than one year after the time specified therein for the conveyance of the property and that after the expiration of such period such instrument shall cease to be notice to any person for any purpose. Such section further provided that all such instruments which shall have been recorded prior to the time the section took effect shall constitute notice only for one year from the time the section goes into effect or for one year from the time in said instruments specified for performance, whichever of the two times shall be the later, and thereafter the same shall cease to be notice to any person for any purpose. Such section contained the proviso that if, prior to the expiration of said period, legal notice of the pendency of an action be filed for record, then such instrument and *lis pendens* shall continue to be notice until three months after the final termination or disposition of the suit. It is to be noted that the provisions of this section relate only to instruments "of the nature of an option to purchase * * * under the terms of which instruments possession is not delivered to the purchaser." Therefore, the provisions of this section do not apply to the customary form of a contract of sale under the terms of which the purchaser makes a down payment and thereafter makes periodical payments and during the period of the making of such payments he is entitled to possession of the property. Particular attention should be given to whether the instrument in question is of the nature of an option to purchase or is of the nature of a binding contract for the sale and purchase and to whether, by the terms of the instrument, possession of the property is delivered to the purchaser.

Public Trustees. See also: Decrees, Judgments and Official Deeds; Estates—Foreclosure of Deeds of Trust Against; Liens—Extinguishment of; Public Trustee's Sales—Place of Sale; Releases before Maturity; Releases of Trust Deeds—to Whom Made; Successors in Trust; and Trust Deeds Merely Liens.

Public Trustee's Sales—Place of Sale. When, a few years ago, the present City and County Building was built and occupied and the old Court House was vacated and shortly thereafter torn down, the situation arose of most deeds of trust, which had been previously executed, having prescribed

that the place of sale thereunder should be either the encumbered premises or the Tremont Street front door of the Court House, and there was no longer any Tremont Street front door of a Court House in Denver. This situation was the subject of some discussion among the attorneys. Accordingly, there were passed in 1933 four sections (1933 Sess. L. 793-794; C.S.A. Chap. 40, Secs. 58-61) which made valid sales by Public Trustees, both those previously made and those made in the future, where they were or are made at the Bannock Street main entrance to the new City and County Building in Denver or at the door, side or entrance of the Court House which shall have been destroyed or removed or the site thereof otherwise changed or at the door, side or entrance of any new Court House or any building or place temporarily serving as a Court House or at the place specified in the trust deed, even though the Court House was not there maintained at the time of the sale or at any door, side or entrance of the new City and County Building in Denver or at any door, side or entrance of a new Court House or building or place temporarily used for a Court House, with provision of a limitation of ninety days after the sections took effect for the bringing of a suit or proceeding based upon a claim that the sale was held at the place designated in the trust deed which was no longer at the time of the sale a Court House, or upon the ground that such sale was held at a place not designated in the trust deed but which was then actually a Court House.

Recitals Prima Facie Evidence. Occasionally in examining a title it is found that there is a defect in the title which requires, in order to correct it, the perpetuation of testimony or a declaratory judgment to establish certain facts or a suit to quiet title and it is found that certain recitals in instruments of record set out the required facts. In the absence of a statute, these recitals would not constitute any evidence but would be self-serving declarations or hearsay. Believing that, where an instrument in the chain of title to a piece of real estate contains a recital of certain facts and such instrument has been of record a long time without anyone bringing any legal proceeding to challenge the truth of such facts, such recitals should be admissible in evidence as *prima facie* evidence of the truth of the facts set forth therein, a statute was passed in 1927 (1927 Sess. L. 589; C.S.A. Chap. 40, Sec. 112) providing that all recitals

contained in instruments affecting title to real estate which have remained or shall have remained of record in the office of the Recorder of the county where the real property affected is situated for a period of twenty years shall be accepted and received as *prima facie* evidence of the facts recited therein, except as to recitals which are mentioned herein under the heading "Reference to another Instrument."

Recording a Long Time after Execution of Instrument. Very often in examining a title an attorney finds that a deed was not recorded until a long time after its execution. In 1928 the Supreme Court in its decision in Larison v. Taylor, 83 Colo. 430, at page 442, said: "There is no presumption of the delivery of a deed where it is not recorded until long after its date." This immediately placed a serious question upon the validity of any deed which had not been recorded until long after its date. It also, in connection therewith, imposed upon examining attorneys the responsibility of passing upon the question of what period would constitute "long after its date," which to the writer is very much like the question "How long is a piece of string?" and also the question of whether, assuming that the deed had not been recorded until long after its date, the defect occasioned thereby would be corrected by any lapse of time after it was recorded and, if so, how long a lapse of time is required. This decision was probably the cause of attorneys receiving more money in fees for bringing suits to quiet title than any other event in the history of the Colorado Bar. To remedy this situation there was passed by the 1937 Legislature an amendment to Section 107, Chapter 40, C.S.A., which was the section prescribing the form of acknowledgment and the effect thereof. Such amendment (which is 1937 Sess. L. 447; 1938 Supp. to C.S.A., Chap. 40, Sec. 107) reenacted the previous statute except that at the end of the last paragraph of the section it added the following language: "irrespective of the length of time that may have elapsed between the date of such instrument and the date when such instrument was recorded. The provisions hereof shall relate and apply to all instruments which shall have been executed prior to the time when this section takes effect, and irrespective of whether such instruments were recorded before or after the time when this section takes effect." However, in the section as it was prepared and handed in for introduction

in the Legislature the last sentence read: "The provisions hereof shall relate and apply to all instruments which shall have been executed prior to the time when this section takes effect, *as well as to all instruments which are executed after the time when this section takes effect, irrespective of whether such instruments shall have been acknowledged before or after the time when this section takes effect* and irrespective of whether such instruments are recorded before or after the time when this section takes effect." However, in the process of going through both Houses of the Legislature with the numerous times it was copied, some clerk apparently, in copying the section at some step of the proceedings, omitted the part which is set out in italics in the foregoing quotation, thereby leaving out all reference to instruments which are executed after the time when the section takes effect and leaving the express language of the section as finally signed by the Governor applying only to instruments executed prior to the time when the section took effect. A bill has been introduced in the present session of the Legislature to amend this section so as to include therein the words that were so omitted.

Reference to Another Instrument. Previous to 1927 attorneys had a great deal of trouble through recorded instruments in the chain of title containing a reference to some other instrument which either was not of record or, if of record, was not correctly described in the reference. This trouble arose most frequently through incorrect description of an encumbrance of record; for example, a deed of record might contain a provision that it was "subject to a mortgage of $2,000.00." In such case there might be of record no mortgage securing $2,000.00 but there might be of record a deed of trust securing $2,000.00 or an encumbrance, either trust deed or mortgage, which originally secured $2,500.00 which amount had at the time the deed was executed been reduced to $2,000.00. The attorneys felt that there was serious danger of it being held that a deed of trust was not a "mortgage" or that, in view of the difference in the amount of the encumbrance mentioned in the deed and the amount of the encumbrance of record, it might be claimed that the one did not refer to the other, with the result that the recital in the deed might be taken to refer to an instrument which had not been recorded and put everyone dealing with the property on notice that there was an

unrecorded "mortgage of $2,000.00." And it was felt that in other cases the reference in an instrument to some other instrument, where the latter was not of record, would put each person dealing with the property upon notice of the existence of such unrecorded instrument, with the duty of pursuing an investigation to ascertain the terms of such unrecorded instrument, with the consequent clouding of the title. To remedy this situation there was passed in 1927 a section (1927 Sess. L. 589; C.S.A. Chap. 40, Sec. 113) providing that, when an instrument affecting title to real estate shall have been recorded and contains a recitation of or reference to some other instrument purporting to affect title to said property, such recitation or reference shall bind only the parties to the instrument and shall not be notice to any other person whatsoever, unless the instrument mentioned or referred to in the recital be of record in the county where the property is situated and, unless it is so recorded, no one other than the parties to the instrument shall be required to make any inquiry or investigation concerning such recitation or reference and that, as to recitations or references contained in instruments recorded prior to the time when the statute took effect, the same shall, after the expiration of one year from the date when the statute took effect, cease to be notice unless the instrument referred to in the reservation, exception or reference be actually recorded within said one-year period.

Releases before Maturity. In the old days many attorneys questioned whether the fact that a release was executed before the maturity of the indebtedness secured by a trust deed did not put any subsequent purchaser or encumbrancee upon inquiry as to whether the note secured by the trust deed was owned by the original payee at the time of the release or, if it had been transferred to someone else before maturity, as to whether the then owner of the note had requested the execution of the release. Accordingly, in 1893 there was passed a section (C.S.A. Chap. 40, Sec. 83) providing that the recital in any release or partial release of a deed of trust of the payment or partial payment of the indebtedness secured by such trust deed shall, as to subsequent purchasers or encumbrancees of the property mentioned in the release, be evidence of such payment so as to give full effect to such release when such release was executed before maturity of said indebtedness, if the

release was duly and legally executed by the proper trustee according to the purport thereof, to the same extent and with the same force as the release of any trust deed when executed after the maturity of the indebtedness.

Releases of Trust Deeds—To Whom Made. Until recent years it had been uniformly held by the Supreme Court that, although a mortgage constituted only a lien, a deed of trust with power of sale conveyed to the trustee the legal title to the property. See decisions cited under the heading "Trust Deeds Merely Liens" herein. Therefore, in a case where the maker of the deed of trust afterwards conveyed the property by quit claim deed and the subsequent release with its usual words of conveyance of title, as well as of release, was made to the person who had executed the deed of trust instead of to the then owner, such release conveyed to the original owner the naked legal title to the property, leaving his grantee owning only an equitable title. Because of this, very often in cases of this kind examining attorneys required quit claim deeds from the original owners. Because of this situation there was adopted in 1893 Sec. 84, Chap. 40, C.S.A., which provides that all releases of deeds of trust theretofore or thereafter made shall be good and valid as to the recitals therein, whether made to the original maker of said deed or to a subsequent purchaser of the premises in such release described, and there was adopted in 1927 a section (1927 Sess. L. 593; C.S.A. Chap. 40, Sec. 120) providing that all instruments executed for the purpose of releasing any lien or encumbrance against real property shall be considered only as discharging and cancelling such lien or encumbrance and that no such release shall convey to any person except the record owner of the property any right, title or interest in the property and that words of conveyance used in any such release shall be construed only as in such section provided.

Representatives. See Executors and Administrators—Conveyances by; Signatures of Those Acting in Representative Capacity; and Trustees.

Seals. Under the common law a seal was required on every instrument conveying or encumbering real estate. No practical purpose is under present-day practice served by the requirement that a seal be so affixed and it very often is found that an instrument affecting the title to real estate was executed

and recorded which did not contain near the signature the word "Seal" or any other form of seal and it was quite uncomfortable to an examining attorney to have to turn down the title because of the omission of this formality. Accordingly, in 1917 there was adopted a statute (1917 Sess. L. 161, Sec. 5; C.S.A. Chap. 40, Sec.15) providing that it shall not be necessary to the proper execution of any conveyance affecting real property that the same shall be executed under the seal of the grantor nor that any seal or scroll or other mark be set opposite the name of the grantor.

Sheriffs' Deeds. See Decrees, Judgments and Official Deeds; and Official Sales.

Signatures of Those Acting in Representative Capacity. It often happens that a person holding an interest in or lien on real estate in an official or representative capacity omits to place following or below his signature to the instrument his official or representative designation, such as "President," "Trustee," etc. Formerly this happened frequently in the execution by a private trustee of a release of a deed of trust through his omitting to place the word "Trustee" after his signature. To correct this, 1927 Sess. L. 605, Sec. 45; C.S.A. Chap. 40, Sec. 152, provides that, where from the body of an instrument it is apparent that a person is conveying or is acting in some official or representative capacity and the signature to the instrument omits the statement of the official or representative capacity it shall be presumed that the official or representative capacity is a part of the signature.

Successors in Trust. Prior to 1894, when the Public Trustee Act was passed, deeds of trust were executed to private trustees. They usually named a successor in trust, in the case of death, refusal or inability to serve, removal, absence, etc., someone else, either a named individual or a designated public official. And even since the passage of the Public Trustee Act the same practice has been followed with respect to trust deeds to private trustees. In cases, particularly under old deeds of trust, where no public official was so designated as successor and both the private trustee and the person named as successor died or moved away or was absent or refused or was unable to act and a release of the deed of trust or a foreclosure sale under it was desired, there was no one who could legally execute the release or make the sale. Because of this situation there was

passed in 1915 a statute (1915 Sess. L. 478-479; C.S.A. Chap. 40, Secs. 62 and 63) which provided that under the circumstances above mentioned the Public Trustee of the county in which the property involved is located should accept and discharge the duties of trustee or successor in trust under such trust deed at the request of any person interested in the property conveyed by it or the debt secured thereby upon satisfactory proof of the death, absence, refusal or inability to act of both the trustee and the successor in trust named in the trust deed; with the further provision that he shall recite the fact of such death, absence, inability or refusal to act in his trustee's deed or deed of release; and with the express provision that the section should not apply to continuing offices or officers named as trustees or successors in trust. And by 1927 Sess. L. 606, Sec. 48; C.S.A. Chap. 40, Sec. 155, it is provided that, upon the death of a sole trustee or the surviving trustee of an express trust created by any written instrument affecting title to real property, the trust shall not descend to the heirs of such trustee nor pass to his personal representative, but that the trust, if then unexecuted, shall vest in the then Public Trustee and his successors in office of the county wherein the real estate is situate, with all the powers of the original trustee, except that, in cases where by law or by the instrument a successor in trust is provided, the trust shall vest in such successor; with the proviso that the District Court may upon application of any party in interest appoint a new trustee.

Trust Deeds Merely Liens. Until 1934, when the Supreme Court used language to the contrary (Wright vs. Halley, 95 Colo. 148, 151-152; Tolland Co. vs. First State Bank of Keenesburg, 95 Colo. 321, 324-325), the Supreme Court had held in numerous cases that deeds of trust (meaning deeds of trust to private trustees executed before the passage of the Public Trustee Act in 1894 and deeds of trust to the Public Trustee executed thereafter) did not merely create liens but constituted conveyances of the legal title to real estate. Stephens vs. Clay, 17 Colo. 489, 491; Reid vs. Sullivan, 20 Colo. 498, 502; Belmont Mining & Milling Co. vs. Costigan, 21 Colo. 471, 479; Holmquist vs. Gilbert, 41 Colo. 113, 118; Foot vs. Burr, 41 Colo. 192, 198; Bankers Building & Loan Association vs. Fleming Brothers Lumber Co., 83 Colo. 335, 338. Some of the complications resulting from these holdings

are mentioned under the heading "Releases of Trust Deeds—To Whom Made" herein. It was felt that there should be no more reason for a deed of trust to be deemed to constitute a conveyance of the legal title any more than for a mortgage to do so and that the intention of the parties to a deed of trust is merely to create a lien to secure an indebtedness. Accordingly there was passed in 1927 a statute (1927 Sess. L. 592, Sec. 12; C.S.A. Chap. 40, Sec. 118) providing that mortgages, trust deeds or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property shall not be deemed a conveyance, regardless of their terms, so as to enable the owner of the obligation secured to recover possession of real property without foreclosure and sale, but the same shall be deemed a lien.

Trustees. Very often there appears in the chain of title a deed to a certain person followed by the word "Trustee." Under the decisions this placed everyone dealing with the property upon notice that the grantee acquired and held the title only in a fiduciary capacity and put anyone dealing with the property upon inquiry as to who were the beneficiaries and the terms of the trust. Very often the grantee did not in reality hold the property in a fiduciary capacity, but acquired it for himself alone and for reasons of his own had the word "Trustee" added to his name. And, even where the grantee did acquire the property in a fiduciary capacity, in a large number of the cases there was no way of placing upon the records in a satisfactory form evidence as to who were the beneficiaries and the terms of the trust, especially where the grantee acquired it for the benefit of others (including often associates of his in the enterprise) who were not named in the deed and there was no written instrument ever executed by the parties evidencing the arrangement or naming the beneficiaries or the terms of the arrangement. In such cases there was no way of making the title good except by a suit to quiet title. To correct this, in 1921 there was passed a statute (1921 Sess. L. 187, Secs. 1 and 2; C.S.A. Chap. 40, Secs. 9 and 10) which provided that all instruments conveying real estate or interests therein in which the grantee is described as Trustee, Agent, Executor, etc., or in any other representative capacity, shall name the beneficiary or beneficiaries so represented and define the trust or other agreement under which the grantee is acting or refer by

proper description to book, page, etc., to an instrument of public record in the county in which the land is located in which such matters shall appear and that otherwise the description of a grantee in any such representative capacity in such conveyance shall be considered and held a description of the person only and shall not be notice of a trust or other representative capacity of such grantee; with the further provision in the second section that, unless within five years after the sections became effective, there was filed for record in such county, so that such record shall appear in the chain of title to the land, a statement duly verified setting forth the name of the beneficiary or beneficiaries and defining the terms of the trust or other agreement establishing the representative relationship or referring by proper description to an instrument of public record in such county in which such matters shall appear, then, at the expiration of such five years, instruments of the kind mentioned in the preceding section, which shall have been executed prior to the time such sections became effective, shall cease to be notice of such trust or representative capacity of the grantee and shall be considered and held to be a description of the person of the grantee only.

Unrecorded Instruments — Against Whom Invalid. Prior to 1927 the statute (1921 Comp. Laws, Sec. 4902) provided that instruments affecting title to real estate from and after the filing thereof for record, and not before, shall take effect "as to subsequent *bona fide* purchasers and incumbrancers by mortgage, judgment or otherwise not having notice thereof." It was held in Carroll vs. Kit Carson Land Company, 24 Colo. App. 217, and Brackett vs. McClure, 24 Colo. App. 524, that, where there are two chains of alleged title to a piece of real estate, such as the fee simple title deraigned from the United States and a tax title, those acquiring claims under one chain are not "*bona fide* purchasers and incumbrancers" as against those claiming under the other chain under such statute and that therefore one claiming title under one of the chains cannot take any advantage under such statute of the failure of one claiming title under the other chain to record the instrument through which he claims such title. These decisions were based upon previous holdings of the Appellate Courts of Colorado cited in the first of these cases that: "A deed duly recorded is constructive notice of its existence, and of its con-

tents, to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons. * * * Such record is constructive notice only to those who are bound to search for it as subsequent purchasers and mortgagees, and all others who deal with it on the credit of the title in the line of which the recorded deed belongs." In the two decisions of the Court of Appeals which have been cited it was held that a decree in a suit to quiet title in favor of the holder of the tax title does not affect one holding the title deraigned from the United States whose conveyance was not recorded and who had not been made a party to the suit. And in the Carroll case it was further held that the provisions of Section 38 of the Code of Civil Procedure relating to *lis pendens* do not apply as against one claiming under a different chain of title than the chain under which the party filing the *lis pendens* claims. The effect of these decisions was to prevent a decree purporting to quiet a tax title from making a merchantable title because, although everyone who, according to the records, owned any interest in or lien upon the original title was made a party, nevertheless it might afterward develop that a deed conveying the original title or an encumbrance upon the original title had been executed and not recorded and in such case the decree would be ineffective as to the grantee or encumbrancee under the unrecorded instrument. As the result there were passed in 1927 two sections (1927 Sess. L. 590, Secs. 8 and 9; C.S.A. Chap. 40, Secs. 114, 115). The first of these sections provides that all instruments affecting title to real property may be recorded in the office of the Recorder of the county where such real property is situated and that no such instrument shall be valid as against any class of persons with any kind of rights, except between the parties thereto, and such as have notice thereof, until the same shall be deposited with such Recorder. The second of these sections provides that the filing of notice of pendency of an action in compliance with law shall from the time of the filing thereof be notice to all persons who may subsequently acquire any right, title, interest or estate in and to the real property described in such notice from any grantor or from any source whatsoever. Said Section 8 (Section 114 of C.S.A.) was before the Colorado Supreme Court for consideration in Moore vs. Chalmers-Galloway Livestock Company, 90 Colo. 548, and its validity,

constitutionality and applicability were sustained by the court in that case as against one claiming under a different chain of title whose conveyance was executed eight years before the passage of the new statute and was not recorded during such eight years or during the period of almost two years after the passage of the new statute.

Use Restrictions. See Building and Use Restrictions.

Wills—Powers of Sale under. In the absence of a statute to the contrary, a power of sale of real estate conferred by will upon an executor cannot be exercised by an administrator with the will annexed unless by the terms of the will the sale of the real estate is mandatory and not discretionary. Because of this there was passed, as a part of the revision made in 1903 of the statutes relating to administration of estates, a section (1903 Sess. L. 504, Sec. 91; 1908 Rev. Stat. Sec. 7167) providing that whenever any testator shall by his last will direct that his real estate or any of it be sold or otherwise disposed of for the payment of his debts or for any other purpose, and no executor be named therein or if the executor named therein refuse such office or be removed or die, the administrator with the will annexed or *de bonis non* may sell, convey and dispose of such real estate in accordance with the provisions of such will in the same manner and with like effect as the executor in such will and duly qualified might have done. It will be noted that in the early part of this section appeared the words, "shall, by his last will, *direct* that his real estate, or any of it, be sold or otherwise disposed of." Because of this titles were very often objected to because the will did not direct the sale of the real estate in question but merely authorized the sale of the real estate by the executor. Because of this the section was amended (1921 Sess. L. 821; C.S.A. Chap. 176, Sec. 156) so as to change the words hereinbefore quoted to "shall, by his last will, *confer power* for the sale of his real estate, or any of it, or for its disposition otherwise."

"IMPORTANCE OF IRISH AND SCOTCH"

"I do not suppose that there ever were two peoples, who, considering how small were their numbers, have made a greater noise in the world than the Irish and Scotch."—*James Bryce, to Society of Pennsylvania, February, 1909.*