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Chas. C. White

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The Title Man's Idea of Real Property Law Reform

CHAS. C. WHITE†

That the law of real property is in need of reform will be controverted by no one who is conversant with its needless complications. In England, where the need of reform has been more seriously felt than in America, a century's attempts at real property law reform have culminated in the revolutionary Law of Property Act of 1922. That we in America have not so seriously felt the need of reform has been due to the existence from Colonial times of our recording system and to our comparative freedom from involved entailments and complicated settlements of land.

Because of the fact that, in the older states especially, we are getting so far away from the source of title and because of the fact that there are so many rules and practices which conflict with the theory of our recording acts, it has become practically impossible to "deduce from the records" a marketable title to land. The title man's idea of real property law reform is fundamentally that it should be possible to determine the condition of title from an examination of the records alone. As I understand it, this is the basic idea of the recording system. It is certainly the basic idea of all schemes for title registration. But even in England, where title registration has had its most strenuous advocates, it has been thought necessary first to simplify the laws of conveyancing before attempting any general scheme of registration.

In 1913 The American Title Association adopted Fifteen Proposals for the reform and simplification of the law pertaining to real estate titles. The proposals were re-endorsed in 1923, and a committee was appointed to formulate laws to carry out the Association's ideas. Since these proposals embody the collective opinion of the leading title men in this country, it has been thought that a discussion of the committee's recommendations will give to the profession generally the title man's idea of real property law reform. The recommendations of the committee were adopted at the New Orleans convention in October, 1924, and it is the purpose of the association to seek to have

†Of the Cleveland Bar; Title Officer, The Land Title Abstract and Trust Company; Chairman of the Committee on Law Reform, American Title Association.
the recommendations, or the ideas embodied therein, enacted by the various state legislatures.

It might be said in passing that The National Conference on Uniform Laws, at its meeting in Philadelphia last summer, appointed a committee to which was referred the association's Fifteen Proposals.

The American Title Association's proposals and the recommendations of its committee as to the form of law to carry out each proposal will be taken up and discussed in numerical order.

Proposal No. 1: "In all states where the limitation on actions to recover lands is longer than ten years, reduce it to that period, and abolish the saving clauses for persons under disability; or in the alternative, provide a longer limitation, say fifteen years, which will render titles absolute, regardless of disabilities."

Recommendation: Be it enacted, etc. "An action for the recovery of the title to, or possession of, real property shall be brought within (15) years after the right to institute it shall have first accrued to the plaintiff or to the person through whom he claims. And it is further provided that (15) years actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for (15) years, by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of of such land a full and complete title."¹

The necessity for statutes making it possible to acquire title by adverse possession has nowhere been more forcibly put than in an article by Prof. Henry W. Ballantine.² He says:—"If we had a scientific system for the registration of titles, adverse possession would be of far less importance. ***. But under our crude conveyancing and recording systems this doctrine is indispensable as a protection to just titles. Every title in the country may easily come to depend to a greater or less extent upon adverse possession. In spite of our elaborate books of record, possession remains the great source, muniment, and quieter of titles to land"³. (And further on), "The efficiency of the doctrine of adverse possession in quieting title is greatly impaired by reason of two exceptions to the operation of the statute, viz., that of disabilities and that of future estates"⁴.

It will be noted that the law as recommended, seeks only to remove the exceptions in favor of persons under disability, and is silent as to

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¹The States having some period of limitations without a saving clause are California, Florida, Iowa, Kentucky, Mississippi, Missouri, New Jersey, North Dakota, South Dakota, Virginia, and West Virginia.
²32 Har. L. Rev. 135.
³Ibid., at p. 143.
⁴Ibid., at p. 145.
adverse possession against reversioners and remaindermen. Many of those to whom the question was submitted advised the incorporation of a clause relating to reversioners and remaindermen, but the committee did not deem it wise to go further than the original proposal. It will also be noted that the recommendation leaves the vexing question of "privity" untouched.

As to the question of adverse possession against remaindermen, we again quote Prof. Ballantine. "By a somewhat daring piece of judicial legislation it has been held in Iowa and Nebraska that, where the statutes give a person out of possession an equitable remedy to quiet title, a remainderman may be barred by adverse possession where he has notice of the adverse holding."5

The Ohio statute on adverse possession provides that "An action to recover the title to or possession of real property, shall be brought within twenty-one years after the cause thereof accrued ***,*** and that an action to quiet title may be brought *** by a person out of possession, having, or claiming to have, an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."7

It would seem that an interpretation of the above statutes in accordance with the Iowa and Nebraska rulings, uninfluenced by any preconceived notions as to the law of adverse possession, would be merely common sense and not "daring judicial legislation." But the courts of Ohio have not so held, possibly because the law as to adverse possession was laid down prior to the passage of that part of the quiet title act quoted above.

Investigation shows that no state has one definite statute of limitations making a definite period of adverse possession without excepting the rights of persons under disability. Several states, however, provide a shorter period of adverse possession excepting the rights of persons under disability, and another statute providing an ultimate period beyond which no action can be brought, notwithstanding the existence of disabilities. This is in accordance with the English statute which provides a twelve-year limitation, with six-year saving clauses as to persons under disability, and an ultimate period of thirty years beyond which all claims are barred.

The period of fifteen years recommended by the committee is a compromise period and can be changed to suit the views of the different state legislatures.

5 Ibid., at p. 146.
6 G. C., sec. 11219.
7 Ibid., sec. 11901.
Mr. Niblack, in his "An Analysis of the Torrens System," has this to say about saving clauses:—"There is a general feeling that all saving clauses in statutes, by which persons of any description are given time beyond the decree for the assertion of their rights, are un-scientific and unnecessary for the administration of the law and of justice. Suits to quiet, confirm and establish titles are very numer-ous, but instances in which injustice was done by the entry of a decree in such a case, and in which the injustice was corrected by a pro-ceeding begun within the period of reviewing the decree, are not numerous. Stale, vague and neglected interests in the title to land are a hindrance to its merchantability, and it reasonably may be in-sisted that those who hold them shall place on record some notice of their names, addresses and interests, or shall take some steps to assert their interests, prior to the entry of a decree quieting title against them, and not afterward. A non-resident owner, not in possession, should take measures for the protection of his rights in case they are attacked. In other words, a person claiming an in-terest in lands may be called upon to exercise some such diligence in protecting his interest as he would exercise in his commercial affairs. After all, it may be merely a question of policy whether the law shall be most favorable to the interests of those who have uncertain claims, or who have not taken the means to make their names and addresses known, as claimants of the land, or of those who own the lands, occupy them or pay taxes on them, and desire to deal with them."

As an illustration of the difficulty of depending upon apparent adverse possession as a quieter of titles, take this situation in Ohio:—In 1860 A, a married woman, 18 years of age, conveys to B, her husband not joining therein, the deed being therefore void under the Ohio law as it then existed. A's husband dies in 1910 and in 1915 A sues B in ejectment. B, not being able to defend his title under the void deed, sets up the defense of 50 years adverse possession. In view of the fact that all the disabilities of married women were re-moved in Ohio in 1887, it would seem that B had acquired title by adverse possession in 1908, 21 years after the removal of A's dis-ability. But see Ham v. Kunzi which holds that "her rights must be determined by the statute of limitations in force at the time her right of action accrued, and the removal of her disabilities by said amendment did not have the effect to cause the statute of limitations to begin to run against her." It would seem therefore that B's defense of adverse possession would not be good, and that a reliance

\footnote{At p. 99.}
\footnote{56 Oh. St. 531 (1897); quotation from headnote.}
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by a title examiner upon 50 years apparent possession might lead to serious difficulties.

Proposal No. 2: “A ‘Lis Pendens’ law in those states which have no such law, providing generally that no suit in any court shall affect the title to land unless a notice of lis pendens is filed in the office of the recorder or register of deeds.”

Recommendation: Be it enacted, etc. “On all actions in which the title to or any interest in or lien upon real property is involved or affected or is brought in question by either party, any party thereto at the time of filing the complaint or any time thereafter during the pendency of such action may file for record with the register of deeds of each county in which any part of the premises lies, notice of the pendency of the action containing the names of the parties, the object of the action and a description of the real property in such county involved, affected or brought in question thereby. From the time of the filing of such notice and from such time only, the pendency of the action shall be notice to purchasers and encumbrances of the rights and equities of the party filing the same to the premises. When any pleading is amended in such action so as to alter the description of, or to extend the claim against the premises affected, a new notice may be filed with like effect. Such notice shall be recorded in the same book and in the same manner in which mortgages are recorded and may be discharged by an entry to that effect on the margin of the record by the party filing the same or his attorney in the presence of the register, or by writing executed and acknowledged in the manner of a conveyance whereupon the register shall enter a minute thereof on the margin of such record. Provided, however, that such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. And the court, in which the said action was commenced, may in its discretion at any time after the action shall be settled, discontinued or abated on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be cancelled of record in whole or in part by the register of deeds of any county, in whose office the same may have been filed or recorded, and such cancellation shall be made by an endorsement to that effect on the margin of the record.”

The writer has never been persuaded as to the advisability of a Lis Pendens law in his own jurisdiction, since it means a useless duplication of the records. However, thirty-nine states have such

*The states not having a Lis Pendens law are Delaware, Illinois, Maine, Maryland, New Hampshire, Ohio, Oregon, Pennsylvania, and Tennessee.
laws and the recommendation above embodies the best features of the laws examined.

Proposal No. 3: “A statute validating defective acknowledgments that have been of record for one year, so worded as to cover future cases as well as past.”

Recommendation: Be it enacted, etc. “When any deed heretofore or hereafter executed and recorded, conveying real estate, shall have been or shall be of record in the office of the recorder of the county within this state in which such real estate is situated, for more than twenty-one years, and the record thereof shows that there is a defect in such deed for any one or more of the following reasons: (here insert such defects as are desired to be cured) such deed and the record thereof shall be cured of such defects and be effective in all respects as if such deed had been legally made, executed and acknowledged, provided, however, that any person claiming adverse title thereto, if not already barred by limitation or otherwise, shall have the right at any time within twenty-one years after the time of recording such deed, or in the case of deeds of record for more than twenty-one years prior to the effective date of this act, then within one year after the effective date of this act, to bring proceedings to contest the effect of such deed; and provided further that nothing herein contained shall be construed to operate on any suit or action now pending or which may have been heretofore determined in any court of this state, in which the validity of the making, execution or acknowledgment of any such deed has been or may hereafter be drawn in question.¹⁰

All the states require certain formalities in the execution of deeds, but any examiner of titles knows that deeds lacking the required formalities are constantly being placed on record, under which deeds the grantees go into possession and exercise all the rights of complete ownership, legal and equitable. Most states have recognized the necessity of passing curative acts from time to time, curing past defects. The above recommendation is an attempt so to word a curative act as to be both retrospective and prospective and to obviate the necessity of passing new curative acts from time to time.

Since proposals numbers 4 and 5 are intimately associated they will be discussed together.

Proposal No. 4: (As introduced)—“A statute permitting married persons to convey their lands without their consorts joining, excepting in the case of homestead, and permit no claim of homestead to be asserted unless a homestead is designated of record by either husband or wife.”

¹⁰The states having a general curative statute, prospective and retrospective, are Kansas, Michigan, and Texas.
Proposal No. 4: (As amended)—"A statute permitting married women to convey their lands without their husbands joining, excepting in the case of homestead, and permit no claim of homestead to be asserted unless a homestead is designated of record by either husband or wife."

Recommendation as to Joinder of Consort: Section 1: "Married women of the age of (18) years or upwards may convey and transfer land or any estate or interest therein, except the homestead, vested in or held by them in their own right, without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried."

Section 2: "Married men of the age of (21) years or upwards may convey and transfer lands or any estate or interest therein, except the homestead, vested in or held by them in their own right, without being joined in such conveyance by the wife, as fully and perfectly as they might do if unmarried."

It will be noted that the above recommendation is based upon Proposal No. 4 as originally introduced and not as amended.

Recommendation as to Homestead: Section 1: "Every person who is head of a family and whose family resides within this state, may hold as a homestead, exempt from attachment, execution, and forced sale, real property to be selected by him or her, which homestead shall be in one compact body, not to exceed in value the sum of $.......... and shall consist of the dwelling house in which the claimant resides and the land on which the same is situated, or of land the claimant shall designate, provided the same be in one compact body."

Section 2: "Any person wishing to avail himself or herself of the provisions of the foregoing section shall make out under oath, his or her claim in writing, showing that he or she is the head of a family, and also particularly describing the land claimed and stating the value thereof; and shall file the same for record in the office of the recorder in the county where the land lies."

The value of the homestead may be fixed in accordance with local requirements.

Proposal No. 5: "Abolish inchoate dower in states where it still exists, or better still, abolish dower altogether and give a wife an interest in fee simple in lands of which her husband dies seized."

Recommendation of Law to Abolish Inchoate Dower Only: Be it enacted, etc. "If any person die intestate leaving a widow she shall be entitled to dower in one-third part of all the lands of which her husband died seized or possessed, or of which he was the equitable owner, or of which at decease he held the fee simple in reversion or remainder, but dower shall not be assigned to a widow in real property of which the de-
ceased husband, at decease, held the fee simple in reversion or
remainder, until the termination of the prior estate.”

*Recommendation of Law to Abolish Dower Entirely:* Be it
enacted, etc. “The estates of curtesy and dower are abolished
and neither husband nor wife shall have any interest in the
property of the consort other than as provided in the statutes of
descent and distribution.”

There are thirteen states which still require the joinder of husband
in wife’s deed for purposes other than to release his inchoate dower,
curtesy, or statutory interest. It would seem that this relic of a by-
gone age ought everywhere to be abolished and that the policy of the
law should be to recognize the modern idea of the independence of
husband and wife. For those states which still require the joinder of
husband or wife in deeds of the consort’s real property (for purposes
other than releasing the inchoate interest as husband or wife) the
above statute as to joinder of consort was recommended.

In discussing proposal No. 5 in his report to The American Title
Association, the writer reported as follows:—

“Bold indeed is he who attacks this ancient institution,
hallowed as it is by tradition and encrusted with the prejudices
of centuries. It happens that your chairman has long believed
that dower has outlived its usefulness and in this position he
seems to be in quite respectable company, for the revolutionary
Property Act of 1922 in England has abolished curtesy and
dower entirely. It has also been abolished in quite a number
of the states of the Union, but *unfortunately many states in*

**States requiring joinder of husband for purposes other than to release in-
choate interest are:** Alabama, Connecticut, Delaware, Florida, Illinois, Indiana,
Kentucky, Missouri, New Jersey, North Carolina, Pennsylvania, Tennessee and
Vermont.

**States having common law dower (or a larger life interest) are:**—Alabama,
Arkansas, Delaware, Florida, Illinois, Kentucky, Maryland, Massachusetts,
Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, North
Carolina, Ohio, Oregon, Rhode Island, South Carolina, Virginia, West Virginia
and Wisconsin.

**States having life interest in land owned at death:**—Connecticut, Georgia,
Tennessee.

**Fee simple interest in land owned during coverture:**—Indiana, Iowa, Kansas,
Maine, Minnesota, Nebraska, Pennsylvania and Utah.

**Fee simple in land owned at death:**—Colorado, Mississippi, North Dakota,
Oklahoma, South Dakota, Vermont and Wyoming.

**Community property:**—Arizona, California, Idaho, Louisiana, Nevada, New
Mexico, Texas and Washington.

**Inchoate Dower:**—Delaware, Florida, Illinois, Kentucky, Maryland, Massa-
chusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York,
North Carolina, Ohio, Rhode Island, South Carolina, Virginia, West Virginia,
Wisconsin.

**Inchoate Statutory interest (other than dower):**—Alabama, Arkansas, Indiana,
Iowa, Kansas, Maine, Minnesota, Nebraska, Oregon, Pennsylvania and Utah.

The only states where joinder of consort is not necessary for some purpose are—
California, Connecticut, Georgia, Mississippi, North Dakota, Oklahoma, South
Dakota, Tennessee, Vermont and Wyoming.
which it has been abolished have substituted either a larger life interest or a fee simple in all lands owned during coverture. Which, of course, results in substituting a larger inchoate interest than heretofore existed, and it is the inchoate interest that we as title men are interested in abolishing.

Eight states have the system of "Community Property" and are therefore not interested in the question of dower; three states have substituted for dower a life interest in property owned at death; seven states have substituted for dower a fee simple interest in land owned at death.

Nineteen states retain common law dower and therefore have inchoate dower; eleven states have substituted for dower either a life estate, or fee simple interest in all lands owned during coverture and therefore have an inchoate statutory interest to deal with.

"It follows from the above that there are thirty states that require joinder of husband in wife's deed or wife in husband's deed either to release dower or curtesy, or to release the statutory interest that has been substituted therefor."

The writer believes that the ideas herein expressed as to dower meet with the approval of progressive title men and teachers of law throughout the country, and the opinion is growing that there should be substituted for dower a definite fee simple interest in land of which the deceased consort died seized.

As between the parties there is no radical objection to the continuance of dower, but in the modern cosmopolitan community, it is absolutely impossible to determine the marital status of grantors in deeds of record, the existence of inchoate dower can not be determined, and its ultimate assertion is always at the expense of the innocent purchaser who has relied upon the record title. The supposed advantages that are inherent in the idea of inchoate dower could be provided by some form of tenancy by the entireties, or by simply providing that all deeds or devises to husband and wife as such, shall create a tenancy for the joint lives of the husband and wife, with remainder in fee simple to the survivor.

John Smith acquired title to certain premises in Cuyahoga County, Ohio, and the record title shows three mortgages executed by him as a single man, and the conveyance by him to the present owner describes him as "John Smith, single." The present owner executed a mortgage to a Cleveland bank and the bank was recently notified that one Sarah Smith was the lawful wife of John Smith when he acquired the title, and is still his lawful wife, and that she will claim her dower rights in the property. Any title examiner can give innumerable instances of dower interests which no search of the record title can disclose.
Proposal No. 6: "An absolute bar to the foreclosure of mortgages ten years after their maturity (or perhaps a shorter period) unless they are renewed of record."

Recommendation: "We recommend the following form of law which has been recommended by The Cleveland Bar Association, with such period, other than 21 years, as seems advisable in the local jurisdiction. The Uniform Mortgage Act proposed by The National Conference on Uniform Laws provides a ten year limitation."

Be it enacted, etc. "The record of any mortgage which remains unsatisfied or unreleased of record for more than twenty-one years after the last due date of the principal sum or any part thereof, secured thereby as shown in the record of such mortgage, shall not be deemed to give notice to or to put on inquiry any person dealing with the land described in such mortgage that such mortgage debt remains unpaid or has been extended or renewed; and as to subsequent bona fide purchasers and mortgagees for value, the lien of such mortgage shall be deemed to have expired; the mortgage creditor, however, shall have the right at any time to refile in the recorder's office the mortgage or a sworn copy thereof for record, together with an affidavit stating the amount remaining due thereon and the due date thereof, as extended, if it be extended, and thereupon, subject to the rights of bona fide purchasers and mortgagees for value theretofore acquired or then vested, such refiling shall be deemed to be constructive notice of such mortgage only for a period of twenty-one years after such refiling, or for twenty-one years after the stated maturity of the debt, whichever be the longer period; provided, however, that as to such mortgages of record at the time of the effective date of this Act, the constructive notice of their recording shall not be deemed to have expired in any event prior to two years from and after the effective date of this Act."

Any examiner of titles can give innumerable instances of the record existence of old mortgages, long since paid and forgotten, but which have never been cancelled of record and which therefore cloud the title. It is submitted that there is no injustice in requiring the refiling of the mortgage, or some other instrument of extension, if the mortgagee desires the continuance of his mortgage as a lien. Many states have a law substantially embodying this proposal, and the so-called Torrens laws quite generally provide that mortgages shall cease to be a lien on registered land after a certain definite period.

The writer had an experience some years ago which shows how the existence of a mortgage uncancelled on the records may constitute an

\[\text{States having a definite limitation as to foreclosure or mortgages are Alabama, Arkansas, Georgia, Illinois, Iowa, Louisiana, Minnesota, Mississippi, Nevada, North Carolina, Oregon, South Dakota, Tennessee, Texas, West Virginia and Wyoming.}\]
irremovable cloud on a title. The facts were substantially as follows:—
On January 1, 1870, A executed a mortgage to B to secure two notes
for $1,000 each, payable in one and two years respectively. On the
margin of the record is an assignment dated August 1, 1870, as
follows, “For a valuable consideration, I hereby assign all my right,
title and interest in and to the within mortgage and the second note
therein described to C, the first note having been assigned to other
parties.” On September 1, 1873, the mortgage is cancelled of record
by C.

It will readily be seen that the record here shows a mortgage, un-
cancelled in so far as the first note is concerned, and there is no method
of quieting title, because there is no known party against whom to
bring a quiet title suit, as the Ohio statutes provide only for suits
against “unknown heirs and devisees” of some definite person. I
know of no method of quieting title against the “unknown assignee of
a mortgage,” and yet there is no doubt that the mortgage in question
was long since paid.

Proposal No. 7: “Short statutory forms of deeds and mort-
gages. Providing that the form shall imply all the usual
Covenants.”

Recommendation:

(a) Warranty Deed

Warranty deeds for the conveyance of land may be sub-
stantially in the following form: The grantor (name) for and
in consideration of (consideration) in hand paid conveys and
warrants to (name) the following described real estate
(description) situated in the county of ......................
State of ......................

Dated this ............... day of ...................... 19 ....
(Signed) ......................

Every deed in substance in the above form when otherwise
duly executed shall be deemed and held a conveyance in fee
simple to the grantee, his heirs and assigns with covenants
on the part of the grantor.

That at the time of the making and delivery of such deed
he is lawfully seized of an indefeasible estate in fee simple in
and to the premises therein described, and has good right and
full power to convey the same;

2. That the same were then free from all encumbrances;
and

3. That he warrants to the grantee, his heirs and assigns
the quiet and peaceable possession of such premises and will
defend the title thereto against all persons, who may lawfully
claim the same; and such covenants shall be obligatory upon
any grantor, his heirs and personal representatives as fully and
with like effect as if written at full length in such deed.
(b) QUIT CLAIM DEED

Quit Claim Deeds may be in substance in the following form:

The grantor (name) for the consideration (consideration) conveys and quit-claims to (name) all interest in the following described real estate (description) situated in the County of........................................... State of........................., dated this......................... day of....................... 19........

(Signed)...........................13

As to short form mortgage we recommend Section 34 of The Uniform Mortgage Act proposed by The National Conference on Uniform Laws.14 Short form deeds are authorized by the statutes of thirty states, but their use seems never to have been popular with lawyers. The writer sees no particular necessity for them, except as a device for reducing the volume of the records. Short form mortgages have not been so generally used as short form deeds, for the reason that the meaning of the statutory covenants has not been stated with sufficient particularity. If the use of the form recommended in the Uniform Mortgage Act should become general, it would quite materially decrease the volume of the records and incidentally the recording fees.

Proposal No. 8: (As introduced)—“Barring claims against unadministered estate, say in seven years after death. Possibly five years would be better.”

Proposal No. 8: (As amended)—“Barring claims against unadministered estates after three years from the date of death unless letters of administration have been taken out within that period.”

Recommendation: Be it enacted, etc. “No real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within (6) years from the date of the death of such decedent. Provided, that in the case of persons who died prior to the effective date of this act, suits to subject such real estate to the payment of the debts of such deceased person, if not already barred, shall not be barred hereby prior to the expiration of one year from the effective date of this act.”15

One of the most bothersome questions in connection with titles is the matter of their descent through estates, administered and un-

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13 The only states not having short form deeds are Alabama, Georgia, Indiana, Kentucky, Louisiana, Maine, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island and South Carolina.

14 Because of the length of the statutory covenants implied by the Short Form Mortgage, we have not copied the form in this article.

15 States having a limitation against unadministered estates:—Colorado, Florida, Georgia, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Nebraska, New York, North Carolina, Rhode Island, Utah, Washington, West Virginia.

States not having a law of limitation against administered estates are Arizona, Delaware, Florida, Indiana, Illinois, Maryland, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Wisconsin and Wyoming.
administered. The recommendation above is designed to take care of
the case of unadministered estates. It would seem that all states
ought to have a definite limitation as to debts against administered
estates, but in my own state of Ohio, it is practically impossible to
state what the limitation is as to the rights of creditors to subject
land to the payment of debts, and the same seems true in some other
jurisdictions. The Kentucky statute, which seems broad enough to
include both administered and unadministered estates is as follows:—

“When the heir or devisee shall alien before suit brought,
the estate descended or devised, he shall be liable for the value
thereof, with legal interest from the time of alienation, to the
creditors of the decedent or testator; but the estate so alienated
shall not be liable to the creditors in the hands of a bona fide
purchaser for valuable consideration, unless action is instituted,
within six months after the estate is devised or descended, to
subject the same.”

In Ohio it has been decided in Hoiles v. Riddle, that the statute of
limitations does not start to run against an estate until the appoint-
ment of an executor or administrator, and in Faran v. Robinson, an
administrator was permitted to sell land for the payment of debts
sixteen years after the filing of a final account, showing the estate
apparently solvent. Surely, in Ohio at least, there is crying need for a
definite limitation of the right of creditors to subject real property
to the payment of debts.

Proposal No. 9: “Simplifying certificates of acknowledgment
and abolishing separate examination of wife in states
where it is still required.”

Although the committee recommended the adoption of the form
of acknowledgment sponsored by The National Conference on Uni-
form Laws, the writer is of the opinion that the form is unnecessarily
prolix. There is no statutory form of acknowledgment in Ohio, but
the form in general use, to-wit, “Before me a ——— personally
appeared the above named ——— who acknowledged that ——— did
sign the foregoing instrument and that the same is ——— free act and
deed,” is, with the necessary changes to fit the number and charac-
ter of the parties executing the instrument, sufficient. I am told that
the requirement in most states that the acknowledging officer certify
to the identity of the parties has become largely a matter of form.
If so, why require it?

1674 Oh. St. 173 (1906).
1717 Oh. St. 243 (1867).
18Separate examination of wife is required in Alabama, Arkansas, Delaware,
Florida, North Carolina, North Dakota, South Carolina, Tennessee.
It does seem that every state should have a law to the effect that deeds executed in another state with the formalities required in that other state are as valid to all intents and purposes as if executed according to the laws of the local state. Only eighteen states have such a law.

There are still nine states that retain the archaic idea of separate examination of the wife in the acknowledgment of deeds. No valid reason can be seen for the retention of this practice.

Proposal No. 10: “Abolishing private seals and witnesses in deeds and mortgages in states where they are still required.”

Recommendation: Be it enacted, etc. “Section 1: The use of private seals upon all deeds, mortgages, leases, bonds and other instruments and contracts in writing, is hereby abolished and the addition of the private seal to any such instrument or contract in writing hereafter made, shall not affect its validity or legality in any respect, or its nature as a legal instrument.

“Section 2: All deeds, mortgages, or other instruments in writing for the conveyance or encumbrance of real estate, or of any interest therein, which have heretofore been executed without the use of a private seal are notwithstanding hereby declared to be legal and valid and of the same effect in all respects as they would have had heretofore if sealed in all courts of law or equity in this state.”

Only sixteen states require witnesses (either one or two), and only fifteen states retain the requirement of private seals. No definite form of law was recommended for the abolition of witnesses, since the object can be accomplished only by re-casting the statute as to execution of deeds in the particular state where abolition of witnesses is required.

Proposal No. 11: “Dispensing with the necessity for words of inheritance to convey a fee simple, and providing that unless otherwise specifically expressed, a deed shall convey all the estate that the grantor had.”

Recommendation: Be it enacted, etc. “The term ‘heirs’ or other words of inheritance shall not be necessary to create or convey an estate in fee simple and every conveyance of real estate shall pass all the estate of the grantor therein unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant.”

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19Private seals are required in Connecticut, Delaware, Florida, Illinois, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, Vermont, Virginia and Wisconsin.

20The word “heirs” is necessary to fee simple in Connecticut, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, Ohio and South Carolina.
It is not necessary at this date to argue the advisability of the above recommendation. Only ten states retain the necessity of words of inheritance to convey a fee simple.

Proposal No. 12: “A statute abolishing the blanket lien of judgments and requiring a specific description of record of the property sought to be held.”

Recommendation: Be it enacted, etc. “Whenever judgment shall have been or may hereafter be rendered in any court of record, execution to collect the same may be issued to the sheriff, or other proper officer of any county of this state; and successive or alias executions may be issued one after another, upon the return of any execution unsatisfied in whole or in part, for the amount remaining unpaid upon any such judgment. Such execution shall be made returnable not less than twenty nor more than ninety days from the date thereof.”

“Whenever an execution shall be issued against the property of any person, his goods and chattels, lands and tenements, levied upon by such execution, shall be bound from the time of such levy.”

“Each and every levy by execution on real estate heretofore or hereafter made shall cease to be a lien on such real estate, and shall become and be void at and after the expiration of five years from the making of such levy, unless such real estate be sooner sold thereon.”

The above recommendation is copied from the Michigan Statutes and from the title man’s standpoint is all that could be desired. It will be argued that the title man’s standpoint is wholly selfish and that he is losing sight of the possible rights of the judgment creditor. To which he answers that the rights of the judgment creditor are no more important than those of the innocent purchaser for value, and it is the purchaser for value that often suffers the penalty of the blanket lien of judgments. As Mr. Niblack says in the work referred to above, “in counties where there are various courts, all of whose judgments are a lien on real property, the scheme of the general judgment lien may be properly characterized as diabolical.”

In cosmopolitan communities, where there are hundreds of persons of the same name, and where, because of the various ways of spelling the same foreign name, no one can say when the court is going to

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21Judgments are a lien from rendition in Arkansas, Delaware, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Jersey, Ohio, South Carolina, Tennessee, Virginia, Washington and West Virginia.

From docketing:—Arizona, California, Florida, Georgia, Indiana, Minnesota, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah and Wisconsin.

From recording:—Alabama, Colorado, Kentucky, Louisiana and Mississippi.

From levy:—Connecticut, Massachusetts, Michigan, New Hampshire, South Carolina, and Vermont.
apply the doctrine of *idem sonans*, the burden put upon the title
man and his client the purchaser or mortgagee is an almost im-
possible one. Why should not the burden of identifying the property
sought to be held under a judgment be put upon the shoulders of the
judgment creditor, rather than that the burden of identifying the
person against whom the judgment is obtained be put upon the
shoulders of the innocent purchaser?

The present state of the law in the matter of judgment liens is that
judgments are not liens at all in four jurisdictions; they are liens
from rendition in fifteen jurisdictions, from docketing in nineteen
jurisdictions, from levy in five jurisdictions, from filing transcripts in
three jurisdictions, from recording in a register's office in three juris-
dictions; and four jurisdictions (Ohio, Kansas, Nebraska, and Wy-
oming) have the ridiculous and utterly indefensible system of allowing
judgments to date back to the first day of the term in which they
are rendered.

Proposal No. 13: “Provide that when a conveyance is made
to a trustee and the powers of the trustee and the nature of the
trust are not disclosed of record, the trustee’s deed shall pass
the full title.”

Recommendation: Be it enacted, etc. “The use or appear-
ance of the words, “trustee,” or “as trustee,” or “agent,” or
words of similar import, following the name of the grantee in
any deed of conveyance or mortgage of land heretofore or here-
after executed and recorded, without other language showing
a trust or expressly limiting the grantee’s or mortgagee’s powers,
or for whose benefit the same is made, or other recorded in-
strument showing the same and the terms and provisions
thereof, shall not be deemed to give notice to or put upon
inquiry any person dealing with said land that a trust or agency
exists, or that there are beneficiaries of said conveyance or
mortgage other than the grantee and such as are disclosed by
the record, or that there are any limitations on the power of
the grantee to convey or mortgage said land, or to assign or
release any mortgage held by such grantee, and as to all sub-
sequent *bona fide* purchasers, mortgagees, and assignees for
value, a conveyance or mortgage or assignment or release of
mortgage by such grantee, whether his name be followed by
the words “trustee,” or “as trustee,” or “agent” or words of
similar import, or not, shall convey or shall be deemed to have
conveyed or assigned a title or lien, as the case may be, free from
the claims of any undisclosed beneficiaries, and free from any
obligation on the part of any purchaser, mortgagee or assignee
to see to the application of any purchase money; provided only,
that this act shall not apply to suits now pending or heretofore
determined in any court of this state, nor to suits brought
prior to the expiration of two years from the effective date of
this act in which any such deeds of conveyance or mortgages heretofore recorded are called in question, or in which the rights of any beneficiaries in the lands described therein are involved; and nothing herein contained shall deprive the original grantor, or trustor or undisclosed beneficiary, or any one claiming under them from bringing suits other than suits affecting the land the subject of such conveyance or mortgage.”

Twelve states have passed laws substantially embodying the above proposal. Prof. Austin Wakeman Scott has succinctly stated the law as to deeds to a trustee as follows:—“If one takes a conveyance as purchaser or mortgagee from a person whose name in the document of title is followed by the word “Trustee,” or other words indicating a fiduciary character, he is chargeable with notice of the existence of a trust.” As between the immediate parties, there is no particular hardship in the requirement that a purchaser from a trustee whose powers are not disclosed of record should be obligated to investigate the trustee’s powers. But after successive transfers from the trustee’s grantee and his successors in title, it becomes impossible for the title examiner to determine whether or not the terms of the trust, if there was any trust, were properly carried out, and to the extent of his inability to learn the facts the purchaser has to assume the burden of a possible defect in title. It is just another case of punishing the wrong party. If the trustor has seen fit to put the title behind the curtain of an undisclosed trusteeship, why should the purchaser be obligated to look behind the curtain?

The records of Cuyahoga County, Ohio, are plastered with old deeds to grantees who are designated “Trustee.” Many of these deeds were made under the mistaken idea that by taking title in the name of “John Smith, Trustee,” the wife of John Smith was in some mysterious manner deprived of her dower. In most cases there was no trusteeship at all and the designation “trustee” is nothing more than “descriptio personae”—but after a lapse of years when the parties to the deed can not be located it is impossible to determine whether or not there was any trusteeship, and the rule of law that the purchaser must at his peril investigate the alleged trusteeship puts upon his shoulders an unreasonable burden.

Proposal No. 14: “Make it mandatory upon a court in granting a decree of divorce, to adjust and determine all property rights of both parties, and in the case of real estate, require a record of the decree in the office of the register of deeds.”

Deeds to “Trustee” presumptively pass the full power to sell and convey in Arkansas, California, Colorado, Florida, Maine, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Oklahoma and Oregon.

34 Har. L. Rev. 456.
**Recommendation:** Be it enacted, etc. "Before pronouncing a decree of divorce from the bonds of matrimony, the court shall require evidence of the property and estate of the parties, and shall order such division of said property and estate as to the court shall seem just and right having due regard for the rights of each party and their children, if any. The decree of divorce shall specifically describe the real estate of the parties affected by the decree, situated in this state, and any such decree affecting the title to real estate shall be recorded in the county in which such real estate is situated."24

The above recommendation is adapted from the Arizona statute and seems the only law on the subject embodying the idea in Proposal No. 14. Since property and divorce laws differ so radically in the different jurisdictions, it is practically impossible to formulate a uniform law, if indeed such a law be desirable.

**Proposal No. 15:** "Limit the time during which a testator can suspend the alienation of land—say, twenty years."

The writer, as chairman of the committee which formulated the above recommendations, felt himself utterly disqualified to make any recommendation as to Proposal No. 15. So far as he was able to ascertain from correspondence with title men, lawyers, and teachers of law in all the states of the union, the experience of those states which have attempted to substitute a "suspension of alienation" statute for the common law "rule against perpetuities" has not, in the opinion of those best qualified to judge, been satisfactory. It is probable that the framers of the original proposal were actuated by a desire to make titles involving future interests in land more freely marketable, rather than by a desire to change the policy of our law with reference to the creation of such interests. If so, the result of free marketability can be accomplished by giving to the courts the wide powers that are provided in Ohio by what is commonly known as "the disentailing act."25 The effect of such a statute is the same as putting future interests behind the curtain of a power of sale as is provided by the English Law of Property Act of 1922. By the Ohio statute the land is readily salable, but its proceeds become "capital money" to which all the future interests, theretofore adhering to the land, are transferred.

Having so far discussed the title man's idea of reform as disclosed by the collective opinion of The American Title Association, it might not be amiss to add a few of the writer's ideas not contained in the

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24Arizona is the only state having a law substantially embodying Proposal No. 14.
25G. C., sec. 11925.
REAL PROPERTY LAW REFORM

above list of recommendations. Some years ago in an article in Ohio Law Reporter on “Some needed reforms in the Ohio laws affecting the title to real property” the writer stated that “an examination of our statutes show that the field for construing wills, in so far as the construing of a will has any effect on titles, is an extremely narrow one. There are two statutes under which a will may be construed. G. C. Section 10567 permits a widow, or widower, before electing to take under a will, to file a suit in the Common Pleas court, asking a construction of its provisions in her, or his, favor. Section 10857 permits an executor, administrator, guardian, or trustee to bring an action ‘asking the direction or judgment of the court in any matter respecting the trust, estate, or property to be administered.’ The Ohio courts, have repeatedly held that suits brought under the guise of suits to construe a will, but the real purpose of which is to obtain the opinion of the court as to questions of title, will not be entertained.”

“While our quiet title statute (G. C. No. 11,901) as it stands at present and as construed by the courts amply provides for the setting of most disputed titles, yet there are cases involving possible future contingent rights, and the rights of persons not in being, that can not always be settled, for the reason that courts will not assume to pass upon the rights of parties who can not be brought before them, but leave these rights to be decided when actual parties arise between whom questions of title may be decided. And yet it ought not to be impossible to so broaden the actions of quiet title and construction of wills as to settle at once and for all time, all questions pertaining to the title to real estate.”

There may be other states where suits to construe wills are as narrow in their limits as the Ohio statute. If so it seems to the writer that in such jurisdictions the Uniform Law on Declaratory Judgment is highly desirable as one of the needed reforms in real property law.

It is also highly desirable that statutes be passed in all the states permitting the alienability and devisability of contingent remainders and forbidding the destructibility of the same, by merger or otherwise; in other words a complete “Contingent Remainders Act.”

If estates tail be permitted, either generally or during the life of the first donee in tail, or if they have been changed to a life estate in the first donee in tail, with remainder in fee simply in the surviving issue, provision should be made for the sale of the land either by the first donee in tail, or by court proceedings as in Ohio.

No discussion of real property reform would be complete without saying something about the “Rule in Shelley’s Case.” Reformers are always supposed to advocate its abolition. In Ohio it still exists in
all its pristine glory. As a reformer I favor its abolition; as a title man
I favor its retention—for it makes a title marketable one generation
sooner and avoids the necessity of a sale under our "disentailing act,"
as would be necessary were the rule abolished and the fee simple
changed to a life estate with a remainder (necessarily contingent) in
the surviving heirs.

To sum up:—The title man's idea of real property law reform is
that the public records should, in so far as possible, tell all the essen-
tial facts about title; that "all equities should be kept off the record";
that the purchaser need not look behind the curtain of the record
title; that conveyancing forms should be simplified and formalities
reduced to a minimum; that, in so far as is humanly possible, land
should be made as freely a marketable commodity as personal property.

Finally, at the risk of being charged with disloyalty to my profession
I have often wondered why, in the older states especially, no attempts
seem ever to have been made to set a period beyond which a purchaser
need not demand a search of title. In other words why not make the
"root of title" some point other than the date of a colonial grant or a
government patent?