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PREVENTIVE LAW IN REAL PROPERTY

Introduction

One of the prerequisites of a dynamic society is the free titles to real property that must be freely alienable. In the United States we have this freedom to a marked degree.

The reference books in the field of real property have, as their basis, court decisions resulting from situations where there is a conflict of interest relating to title so serious that a judgment or decree of court necessary to establish the rights of the parties. There are, however, thousands of real estate transactions occurring daily in the United States in situations where it is not necessary to go to court, but there are only a limited number of practice books dealing with this branch of real property law. The purpose of this article is to stress the techniques of practice which may obviate the necessity of litigation.

Experience indicates that the great majority of titles are marketable; that some few titles, while presently open to objection, are easily made marketable by securing deeds, releases, or calling for the payment of past due charges against the land; and that the percentage of titles which are clouded with objections is extremely small. Experience further indicates that as properties increase in value, additional care is taken by the owners and their attorneys to see that the title is always freely alienable. Thus, titles to large corporate properties are apt to be in the best possible condition. The old style practice of the family attorney who always found "against the title" is hopelessly outdated, and an attorney with such an outlook damages not only his client but also society at large. Attorneys specializing in the field of real property are under a duty to find "in favor of the title" and if there are valid objections the title should be corrected in such a manner that it will thereafter be freely alienable.

(583)
Practice by attorneys in this manner calls for a large measure of what may be termed "preventive law." An attorney specializing in real property must devise solutions for all kinds of quarrels; he must constantly mediate and conciliate in order to reach a compromise that will satisfy opposing parties, and he should be adept at unraveling business snarls. If, after all this, the parties still fail to agree, it may then be necessary to resort to the courts. It is to be remembered that houses and industries must be built, schools and hospitals must be erected, farm buildings must be repaired, or newly constructed, and these things will be done only as titles to the properties are made freely alienable by agreements among the attorneys and by the settlement of controversies at every level. Real property law thus becomes a part of the social process.

If we were to make a diagram of a breakdown of a large number of title reports for purposes of classification, we would find that there are relatively few questions concerning the sufficiency of the abstract and certificates of the abstractor. The number of situations increases when we come to the subject of descriptions. Questions relating to deeds (their execution, the signing, acknowledging, sealing and other matters) are next in importance, and we reach the height of the curve when we consider liens and encumbrances and probate proceedings. There is a trailing off at the end of the curve, and the number of situations decreases rapidly as we consider future interests, divorce, bankruptcy, tax deeds and miscellaneous matters. The curve in the classification of the title reports will run roughly as follows:
An attorney dealing with the acquisition or sale of real estate is always concerned with two highly important matters: First, he must know how to search, abstract, and judge the title to the property; and second, he must be adept in the preparation of the necessary legal instruments relating to the pending transaction, and he must understand the procedure of closing. In closing real estate transactions it is necessary to consider the varying conditions that are likely to occur. These transactions are simple or complicated depending on the number of parties involved. At one end of the scale A conveys to B; there are two parties involved and the deed is exchanged for a check after taxes and insurance are adjusted. Next, three parties are involved: A conveys to B and there is a mortgage outstanding in favor of C which is to be released. A release of the mortgage must be obtained and recorded and the deed to the new owner must also be recorded. Again, consider the last proposition and add D who is advancing the money under a new mortgage; four parties are thus involved and the proper parties should execute the new mortgage which should be recorded and shown on the abstract when continued. Thus each step makes the closing a little more complicated; for example, at the other end of the scale, assume that money is being advanced to some charitable institution for the construction of a large hospital. At a recent
closing in New York involving four parcels of property in three counties in two states (two counties in the first state and one county in the second state), and where the titles were being insured by five title insurance companies,\(^1\) the parties present at the closing were as follows:

(a) One representative of the lender.
(b) Representatives from each title insurance company.
(c) Representatives from each of three borrowing corporations.
(d) One Bishop along with his Chancellor and his attorney.
(e) One Supreme Court Justice from the State of New York and his secretary.
(f) A counseling attorney representing the borrower for one of the properties.
(g) A firm of attorneys from New York City representing the two remaining borrowers.
(h) A group of Nuns from several places on the eastern seaboard.

\(^1\) Since no one company had sufficient assets to take the entire risk, it was necessary to divide the title insurance between several companies. The "call" for title insurance was as follows:

Title is to be taken on the basis of title insurance and we have now been furnished a preliminary title report from W. J. Guaranty Company of Camden, New Jersey, and we have also been furnished two preliminary title reports from L. T. Corporation of New York, the latter covering the New York properties. The primary risk in this case, in an amount of $250,000 is to be taken by W. J. Guaranty Company of Camden, New Jersey, and the excess risk covering the New Jersey properties, amounting to approximately $2,000,000, is to be divided about equally between L. T. Corporation of Richmond, M. T. Company, and H. T. Guaranty Company of New York. At closing, these companies should furnish the usual mortgagee's policies using the A.T.A. revised form and the several policies covering the New Jersey properties should be identical.

The coverage for the New York properties, amounting in round figures to $750,000 is to be furnished by L. T. Corporation of New York and we should be furnished either one or two title policies (depending upon the practice of the title company), \(i.e.,\) one for the full amount of $750,000 or two for approximately $690,000 for the Olean, New York, property and $60,000 for the Catskill, New York, property. The L. T. Corporation of New York is to furnish mortgagee's policies using Form 280 of L. T. Corporation of New York. The total coverage on all policies should amount to $3,000,000 and all policies should show that the mortgage is a first and paramount lien against the premises in question. The figures given above are not exact figures but we prefer to work in round numbers rather than fractions.
In any such case, it will be well to prepare a detailed outline of the method of procedure to be followed at the closing, and the steps in the outline should be followed closely.

Perhaps the classic closing situation involved the recent transfer of title to the Empire State Building in New York City. When the title was transferred, there were several hundred people present and it was necessary to execute and pass approximately six hundred documents bearing two thousand signatures. To do this they had a preview on the day prior to the closing and the actual closing was completed on the following day in seven and one half hours through use of a thirty-three page memorandum of stage directions for the people involved.\(^1\)

Returning now to closing the transaction, anytime that we examine a large number of abstracts for the purpose of classification, we find that encumbrances are usually of two kinds; first, there are those of a general nature, such as mortgages, taxes, leases, judgments and other matters, and second, there are encumbrances of a special nature, such as easements, covenants, restrictions and tax sales. Objections of a minor nature may be set out if desired and may appear in the opinion; however, the attorney should advise that these minor objections be waived. Usually objections of a serious nature are confined to defects which appear in the devolution of title and many of these defects are capable of correction by calling for particular instruments which may then be recorded and should be shown in the chain of title.

It must be remembered that there are pitfalls resulting from facts external to the record which must be carefully watched in every transaction. These include the rights of parties in possession, mechanics' liens, encroachments, and special assessments for street improvements. An inspection

\(^1\) For a literary description of this and other real estate transactions in which Roger L. Stevens was the moving force, see Kahn, Profiles — Closings and Openings. New Yorker, Feb. 13, 1954, p. 37; Feb. 20, 1954, p. 41.
of the property may reveal that the parties in possession claim some interest in the land; for instance, they may be holding under an unrecorded land contract. This inspection will also show the existence of easements and party driveways, the condition of the buildings and whether or not any repairs have been made within the statutory period which may result in mechanics’ liens. A survey will show any encroachments that may exist and the variations of the physical possession from the record title. In any situation where so many facts and circumstances enter into the establishment of a title, the existence or non-existence of any one of them may be fatal.

I. The Abstracter and His Liability

When examining an abstract, it is very important that the certificate of the abstracter cover the full period of time from government entry down to the date of examination, for it is an elementary rule of law that the abstracter is not liable for mistakes or omissions that occur outside of the period of examination. Thus, an omission of a small fraction of time should be called to the attention of the abstracter, who will either correct and initial the certificate, or furnish an additional continuation covering the omitted period.

Where an abstracter undertakes to continue an abstract, or abstract a title, for a limited period between specified dates only, he need not include anything of record outside of such period, nor anything within such period which does not affect the title; and where he undertakes to examine certain records,

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2 Under the contract the plaintiff was entitled to a record title, and to a true abstract of title showing the state of the record up to the date of conveyance. Waters v. Pearson, 163 Iowa 391, 144 N.W. 1026 (1914).
3 Douglas v. Title Trust Co., 80 Wash. 71, 141 Pac. 177 (1914).
4 An abstracter in simply adding an extension to an old abstract does not certify to or verify the accuracy of entries in such abstract prior to the first date given in his certificate of extension. But where abstracter was to extend an abstract from September 28, 1926 to January 4, 1930, he was held liable under a bond for failing to note a tax sale on November 17, 1928. Marley v. McCarthy, 129 Neb. 880, 263 N.W. 385 (1935).
or the records in certain offices only, the abstract need not contain or set forth any matter not appearing on such records.\(^5\)

In case the certificate of the abstracter does not cover the entire period from the government patent down to the date of examination or if the abstracter has omitted a specified period of time, the examining attorney should require that the abstract be amended or that a new continuation be furnished. Reference is made to abstracts beginning with the date of plat except in the State of Iowa (and possibly other locations) where the attorneys have met and agreed to accept plat abstracts. This further refers to all omissions and discrepancies in the certificates, and if there is an omission of any period of time, no matter how short (fraction of an hour), it should be called to the attention of the abstracter. These omissions usually occur from mistakes common to all people and the abstracter is always willing to correct any errors called to his attention.

Since the preparation of an abstract requires special knowledge and ability, the abstracter is liable for want of due care and skill,\(^6\) and an omission from the abstract of title of any showing of a previous encumbrance gives rise to a cause of action against the abstracter.\(^7\) The courts have held that the abstracter is responsible, and some states have required that a public bond be posted for the benefit of those who depend upon his work as security for mistakes and errors.\(^8\) The

\(^5\) 1 C.J.S., Abstracts of Title § 4 (1936).

\(^6\) An abstracter occupies a position of trust towards his employer similar to an attorney-client relationship. Vallette v. Tedens, 122 Ill. 607, 14 N.E. 52 (1887).

Failure to examine the original records is a want of ordinary care. The abstracter relied on the margin notation that a mortgage was satisfied, when the original document disclosed that the mortgage was only “partially satisfied,” the abstracter was held liable. Wacek v. Frink, 51 Minn. 282, 53 N.W. 633 (1892).

\(^7\) However, there must be a direct causation and a showing that the injury complained of was the direct result of the defect in the abstract. Denton v. Nashville Title Co., 112 Tenn. 320, 79 S.W. 799 (1904) (Omission of a judgment). Economy Bldg. & Loan Ass'n v. West Jersey Title & Guarantee Co., 64 N.J.L. 27, 44 Atl. 854 (1899) (Omission of a mortgage).

\(^8\) Such a bond is collateral security for the enforcement of the cause of action but does not change it from a contract to a tort action and the contract Statute of
statutes of these states usually make the abstracter and his sureties responsible not only to the person for whom the abstract was made, but to all persons who purchased the land or extend credit thereon in reliance upon the abstract.\textsuperscript{9} In states where there are no statutes upon the subject, the liability of an abstracter for loss due to his error is determined and limited by the terms of his contract for employment.\textsuperscript{10} In most cases there is a lack of contract between the abstracter and the purchaser because the vendor furnishes the abstract, and the result in these states is that there is seldom any legal responsibility of the abstracter to the party injured by his mistake or omission.\textsuperscript{11}

There has been a tendency lately to ignore this question of privity of contract, thereby making the abstracter liable for any loss by reason of his error, neglect or carelessness, and this liability shall be to the one who sustains the loss by


\textsuperscript{9} A typical statute provides: “The bond shall be conditioned for the payment by the abstracter of any and all damages that may be sustained by or that shall accrue to any person by reason or on account of any error, deficiency, or mistake in any abstract or certificate of title, or continuation thereof, made and issued by the abstracter.” N.D. Rev. Code § 43-0111 (1943).

\textsuperscript{10} Patton, Titles § 27 (1938).

\textsuperscript{11} Savings Bank v. Ward, 100 U.S. 195 (1879) (Omission of prior recorded deed); Shine v. Nash Abstract & Investment Co., 217 Ala. 498, 117 So. 47 (1928); Equitable Bldg. & Loan Ass’n v. Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 901 (1907). In a case where recovery was allowed because privity of contract did exist, the court said that provisions of a certificate stating that the abstract company would incur no liability by reason of its construction of records was inapplicable where an outstanding recorded deed was omitted from the record. Guaranty Abstract Co. v. Denman, 209 S.W.2d 213 (Tex. Civ. App. 1948).

"In view of the custom prevailing in this state by virtue of which the vendor of land procures the abstract and tenders it to the prospective purchaser, we are urged to hold that an abstracter is liable to any other person who may suffer damage by reason of reliance upon the negligent work of the abstracter. We are not aware that the custom prevailing in this state is different from the custom prevailing elsewhere, and we are not disposed to depart from the well established rule that he who claims damages by reason of the negligence of an abstracter must trace his right thereto to some contractual relations existing between him and the abstracter." Peterson v. Gales, 191 Wis. 137, 210 N.W. 407, 409 (1926).
reason of depending upon his work. In a good many cases the abstracters themselves have recognized their moral responsibility, and their certificates have been changed to cover "any person relying upon the abstract." A small minority of courts have allowed recovery on the tort theory, holding that the giving of the certificate and not the certificate itself constituted negligence for which the abstracter is liable. The importance in this theory lies in the fact that in the usual case the defect or error is not discovered until a subsequent transfer of the property, which often is after the Statute of Limitations has run on the contract. In a negligence or fraud case the Statute of Limitations begins running at the time of the discovery of the fraud and not the contract date.

II. Primary Defects in Title

Reference to the diagram at the beginning of this article will indicate that attorneys engaged in practice have to deal with liens and encumbrances in a decided majority of closing transactions. Since these matters occur most frequently, the balance of this article will consider these various primary defects in title. In practice, the lien most frequently encountered is the lien resulting from an outstanding mortgage.

12 Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1065 (1934); Brown v. Sims, 22 Ind. App. 317, 53 N.E. 779 (1899) (Omission of a pending suit); Western Loan & Savings Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774 (1904); Economy Building & Loan Ass'n v. West Jersey Title & Guarantee Co., 64 N.J.L. 27, 44 Atl. 854 (Sup. Ct. 1899) (Omission of a mortgage); Anderson v. Sprintersbach, 69 Wash. 393, 125 Pac. 166 (1912).

In the above cases the courts have held that the abstracter is liable to third persons relying on the abstract, usually on the basis that the abstract company had knowledge that there would be such reliance. On the same theory they have denied liability to an assignee of a mortgagee. Talpey v. Wright, 61 Ark. 275, 32 S.W. 1072 (1895).

The abstracter omitted a judgment because at the time the abstract was made there was an appeal pending. The lien of the judgment was not destroyed but only suspended, and the abstracter had to pay the amount of the judgment. Denton v. Nashville Title Co., 112 Tenn. 320, 79 S.W. 799 (1904).

13 Where the abstracter omitted a void tax deed, but the owner subsequently had to pay for a quitclaim deed from the holder of the tax deed, it was held that the abstract company was liable even though the tax deed was void. Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912).
There are, however, other liens resulting from deeds of trust, judgments, and taxes, together with a group of miscellaneous liens and encumbrances resulting from probate proceedings, levies and attachments, mechanics' liens, charges against the land created by recitations in deeds, court costs, attorney's fees, and others, which, whenever they appear, must be cared for before the transaction is closed.

Whenever an attorney makes a mistake in the description in a mortgage or deed, the mistake is easily corrected by a supplementary mortgage or a correction deed. But when an outstanding mortgage or judgment is missed, or when the attorney decides that a certain mortgage has merged in the title (when in fact, there was no merger) and the situation is subsequently discovered, then the attorney may find it necessary to defend his action by resorting to the courts. Generally, it takes no great deal of skill to discover outstanding mortgages, or improper releases of these mortgages. But in situations where present outstanding mortgages have passed into the hands of trustees or receivers, of executors and administrators, the problem of proper releases occurs again and again, and a certain amount of experience is required before the attorney is able to safeguard himself properly.

A. Mortgages

By the strict doctrine of common law, unmodified by the intervention of equity for the protection of the debtor, a mortgage was regarded as passing the whole legal title to the estate pledged to the mortgagee, who became the owner of it, although his title was liable to be defeated on a condition subsequent. Also, at common law, a mortgage took effect at the time of its execution and delivery, but the recording acts now provide that mortgages shall take effect from the time of recording. An unrecorded mortgage is good between the parties but as to third persons having acquired a legal interest
in or lien upon the property they take effect from the time they are delivered to the recorder.

The English courts of equity began at an early date to look with great disfavor upon the strict common law doctrine of absolute forfeiture of the estate upon nonpayment of the mortgage debt. Accordingly, they established the rule that in equity the debtor should still have a right to redeem after the breach of the condition at law. This right to save the estate in equity after the forfeiture at law was called the "equity of redemption." The same designation came to be applied to the interest or estate retained by the debtor after conveyance of the legal title to the mortgagee by the mortgage deed. When a second mortgage is given, such equity is the only estate in which the second mortgagee acquires an interest. In equity a mortgage of land is regarded as a mere lien or security for a debt. Until foreclosure the mortgagor continued to be the real owner of the fee.

In a majority of states, partly by force of statutes and partly by the decisions of the courts, the common law doctrine of mortgages has been abrogated. In a majority of states a mortgage is nothing more than a lien or security for a debt, passes no title or estate to the mortgagee and gives him no right or claim to the possession of the property. A trust deed in the nature of a mortgage is a conveyance of the property intended to be pledged, in fee simple, to one or more trustees, who are to hold the same for the lawful owner

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15 When the granting clause in a mortgage makes the conveyance subject to a prior unrecorded mortgage, the grantee acquires only an equity of redemption, and his estate can only be enlarged by the payment or discharge of the prior mortgage. Riegel v. Belt, 119 Ohio St. 369, 164 N.E. 347 (1928).
18 59 C.J.S., Mortgages § 1 (1949).
of the note, bond or other obligation secured, permitting the grantor to retain the possession and enjoy the rents and profits of the estate until default shall be made in the payment of the obligation secured. Such deeds contain a power giving the trustee or trustees, upon such default, the right to make a sale of the premises and satisfy the holder of the debt out of the net proceeds, returning the surplus, if any, to the grantor. Such an instrument, although executed to trustees instead of directly to the creditor and although in form a conveyance in trust, is essentially a mortgage, and will be construed and enforced as such.\textsuperscript{19}

From the foregoing it will be seen that the execution and delivery of a mortgage or trust deed does not transfer to the mortgagee or trustee the right to possession of the mortgaged premises nor the right to collect the rents therefrom which is an incident of such right of possession. In the absence of an agreement to the contrary, the mortgagor is entitled to retain possession and to retain income until the mortgage is foreclosed and the redemption period has expired.\textsuperscript{20}

\textit{Assignments.} — Mortgages may be assigned, and the transfer places one party in the place of the other in such a way that all benefits and liabilities of the mortgagee pass to the assignee. Assignments should be recorded in order to give constructive notice of the contents of the assignment. Any assignment of the mortgage security apart from the debt is a nullity,\textsuperscript{21} and this appears to be true without reference to

\textsuperscript{19} Guaranty Title & Trust Co. v. Thompson, 93 Fla. 983, 113 So. 117 (1927); Pledge of real property in whatever form, for payment of debt, constitutes a mortgage. Sanderson v. Engel, 182 Minn. 256, 234 N.W. 450 (1931); statutory interpretation in LeBrun v. Prosise, 197 Md. 466, 79 A.2d 543 (1951). See collected cases in Decennial Digests, Mortgages Key 1.

\textsuperscript{20} 59 C.J.S., Mortgages § 300 (1949).

\textsuperscript{21} If there is no debt there is no mortgage. Dewberry v. Bank of Standing Rock, 227 Ala. 484, 150 So. 463 (1933); Western Loan & Bldg. Co. v. Scheib, 218 Cal. 386, 23 P.2d 745 (1933). Mortgage held not assignable where there was never any debt due from mortgagor to mortgagee, and mortgage constituted mere paper transaction, and was so understood by parties thereto. General Ice Cream Corp. v. Stern, 291 Mass. 86, 195 N.E. 890 (1935). Mortgage is mere security, and has no efficacy if unaccompanied by debt or obligation. Shriver v. Sims, 127 Neb. 374, 255 N.W. 60 (1934).
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whether the mortgagee has the legal title. The right to proceed against the land as security can exist only in favor of the holder of the debt secured. Thus assignment of the debt secured by a mortgage carries with it the security.

Generally, the obligation and the debt are transferred together, and if not, the holder of the mortgage security holds the title in trust for the owner of the obligation. Therefore, the attorney may assume that the mortgage and the debt were assigned to the same person, and he is entitled to rely on the record and would be protected in calling for a release from the assignee unless he had outside knowledge of facts that would lead him to believe otherwise. In any such case, the attorney should protect himself by calling in the cancelled note and mortgage. In states where the legal title is vested in the mortgagee, the title may remain in him even though he has assigned the debt, but in the view of a court of equity, the title is held for the benefit of the holders of the debt, and the security in its beneficial, as distinct from its purely legal aspect, belongs to the holder of the debt. In states where the mortgagee has a lien, as opposed to the title, any conveyance of the land only, is invalid.

Where an abstract contains an entry of a mortgage in favor of one party and the mortgage is subsequently released by another party, the release is not satisfactory, and the attorney should call for evidence of the assignment. If there was no

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22 Assignment of second note is sufficient to transfer trust deed or mortgage without a further written assignment. Lewis v. Booth, 3 Cal.2d 345, 44 P.2d 560 (1935); Long v. Taggart, 214 Iowa 941, 243 N.W. 200 (1932); Collins v. W. C. Briggs, Inc., 98 Fla. 422, 123 So. 833 (1929).

23 Legal owner of secured note failing to properly note fact of purchase, held, nevertheless entitled to benefit of mortgage lien as against assignee of mortgage without endorsement or delivery of note. Rockford Trust Co. v. Purtell, 183 Ark. 918, 39 S.W.2d 733 (1931).

assignment, it will be necessary to call for a release from the original mortgagee. If the attorney has information relating to an unrecorded assignment, directions should be given for the recording of the assignment and its release by the assignee. In accordance with the facts in the particular case the assignments and the release should be cared for, both in fact and according to the record, to the satisfaction of the attorney, and if there is any question about these matters, the cancelled instruments should be called in for examination by the attorney.  

*Parties Releasing.* — In several states releases made on the margin of the record are acceptable, but certain states have by statute declared that a release of a mortgage should be made "by separate instrument." Although there are cases

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26 *Wis. Stat.* § 235.55 (1951). Entry of satisfaction of mortgage on margin of record thereof raised only prima facie presumption of payment as between parties thereto. *Wilson v. Federal Land Bank*, 230 Ala. 75, 159 So. 493 (1935). Where the statute provided certain methods by which a mortgage lien on real estate may be released; *i.e.*, (1) by an entry on the margin of the record signed by the mortgagee, (2) discharged on record by proper officers on the presentation of a certificate signed by the mortgagor, (3) a court decree, held that quitclaim deed from the mortgagee to mortgagor did not discharge mortgage and the debt was not extinguished. "And while appellants were put upon inquiry, it was not enough for them to examine the record and see that no assignment of the first mortgage appeared thereon, but they should have required a satisfaction of the mortgage, evidenced in one of the ways prescribed by the statute; otherwise they proceeded at their peril in dealing with the mortgaged property on the assumption that the title to the first mortgage was still in the original mortgagee." *Merchants Trust Co. v. Davis*, 49 Idaho 494, 290 Pac. 383, 386 (1930). In accord, *Miller v. Paul*, 237 Ill. App. 166 (1925).
to the effect that a release by one of two mortgagees is acceptable, it would appear that the better rule is that the release is effective only against those signing. Releases executed under power of attorney should be predicated upon a power executed with the same formalities as a deed, and the power of attorney should be recorded. Releases by corporate mortgagees do not require any action on the part of the board of directors.

Proper precautions should be taken to see that the release of any mortgage by executors and administrators, by receivers of insolvent banks, or by guardians or minors or incompetents, was properly authorized. Thus, where a mortgage is released by the receiver of a bank, the abstract should show the appointment and qualification of the receiver, and any such party must have been acting as receiver at the time of the release. And where there is an outstanding mortgage in favor of a party who subsequently dies, the mortgage should be released by the personal representative, and the appointment and qualification of the personal representative should be shown on the abstract. If the estate is closed, then sufficient proceedings from the estate of the decedent should be shown on the abstract to enable the attorney to determine "who were the proper and sole legatees, devisees, or heirs-at-law" of the decedent, and the release should then be executed by the proper parties.\textsuperscript{27} It is to be noted that a guardian, administrator or executor may execute a release of a mortgage without an order of court.\textsuperscript{28}

\textit{The Reviving Junior Mortgage.} — The matter of the revival of junior mortgages is one of the most complicated that

\textsuperscript{27} If, upon the settlement of an estate, the residue consists in part of a note and mortgage, it may be assigned in that form to the persons entitled thereto. The order of assignment has the effect of an order of distribution to transfer the title to the persons named. Ford v. Smith, 60 Wis. 222, 18 N.W. 925 (1884).

\textsuperscript{28} A mortgagee's administrator may, for a consideration, discharge the mortgage and if the heirs consent to the allowance of the administrator's account which includes the consideration, they cannot later come in and have the release set aside. Merriman v. Westlawn Cemetery Ass'n, 304 Mich. 12, 7 N.W.2d 126 (1942).
will come to the attention of any attorney examining title. The purpose of an action to foreclose a mortgage or deed of trust is to extinguish the right of redemption. We know that junior encumbrances including mortgages, judgments and other liens may be cut off by foreclosure if the parties holding the junior encumbrances are properly made parties to the proceedings. Therefore when two or more mortgages on property are owned by different persons and the first mortgagor forecloses, properly joining the junior encumbrancers as parties defendant, then purchase by a stranger at a valid sheriff’s sale will effectively cut off the junior mortgagees and instructions may be given to disregard them.

Different rules apply where title is reconveyed to the mortgagor after foreclosure of the first mortgage and after junior encumbrances have presumably been cut off. The facts are as follows: A.B. and C.D. give a first mortgage to the M.N. Company and subsequent thereto the same parties give a second mortgage to the O.P. Company. Later the M.N. Company forecloses its mortgage properly joining the O.P. Company as a party defendant. After foreclosure the M.N. Company, having acquired title by sheriff’s deed subsequently sells the property to A.B. and C.D. the original mortgagors, and the question to be considered is whether the reacquired title of A.B. and C.D. inures to the benefit of a second mortgagor, the O.P. Company, by reason of the covenant of warranty in the mortgage.

The judicial decisions covering the point are about evenly divided. The question ultimately depends on the reaction of the courts to the following propositions: first, in a foreclosure sale, is the interest of all parties to the action sold, or does such sale effectively convey only the interest of the mortgagor; second, what is the effect of the covenant of warranty in the mortgage? One line of decisions deals only with the

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29 Where mortgagee foreclosed and became purchaser at foreclosure sale, but failed to join holder of an interest in the premises as a party defendant, any sub-
covenant of warranty in the second mortgage, and from such a discussion they reason that the junior encumbrances re-attach; the other line reaches the opposite conclusion by saying that the interests of all parties to the foreclosure suit were acquired at the foreclosure sale and that the junior encumbrances do not reattach.

In a leading case in Massachusetts A gave first and second mortgages to B and C. B foreclosed his mortgage and the land was subsequently conveyed to the mortgagor. Suit was brought by an assignee of C and since the second mortgage contained a general warranty of title, the court, by the late Mr. Justice Holmes, held that the second mortgage reattached as a lien when the mortgagor came back into the title. No question of fraud or collusion was raised in the case. The headnote succinctly states the rule of the case: Where a mortgagor gives a second mortgage with covenant of warranty as against the first mortgage, and the first mortgage is foreclosed, and the title obtained by the foreclosure is afterwards conveyed to the mortgagor, the title thereby acquired inures to the benefit of the second mortgagee.

However, in another Massachusetts case the court held that the second mortgage will not be revived if the covenant of warranty therein specifically excepts the first mortgage. The same doctrine has been followed in Missouri and Wis-

sequent conveyance of interest in the property resting on purchase at such foreclosure sale was equally ineffectual as to omitted party and as affecting his right of redemption. OKLA. STAT. tit. 42 § 18 (1951). State ex rel. Com’rs of Land Office v. Loose, 204 Okla. 88, 227 P.2d 402 (1951). A bona fide purchaser for value from a purchaser at a mortgage foreclosure sale takes free from the equities of the mortgagor and a second mortgagee. First Nat. Bank v. Brown, 207 Wis. 272, 240 N.W. 381 (1932).


32 In the Missouri case Greene purchased property “subject to” a first and prior deed of trust executed by the former owner, held: that the second deed of trust did not revive. The court gave as a reason, the fact that the second deed of trust was made subject to the first, and that the holder of the second deed of trust knew the foreclosure was taking place and did not protect his lien by paying off the first trust deed or by redeeming from the foreclosure. Greene v. Spitzer, 343 Mo. 751, 123 S.W.2d 57 (1938).
The Wisconsin court held that where purchasers at a mortgage foreclosure sale had purchased for their own benefit and there was no collusion between them and the mortgagor, the lien of the mortgagee under another mortgage which had been cut off by the foreclosure sale and which expressly excepted the foreclosed mortgage in the clause containing covenants of seizin and warranty, was not revived by the mortgagor's purchase from those who had purchased at the foreclosure sale. However, the Court went further and stated that:

Unless it expressly or circumstantially appears that the bidding in of the property at the foreclosure sale was, in effect a redemption, by the landowner as distinguished from a purchase by the bidder, the lien of a mortgage cut off by the foreclosure judgment is not revived by subsequent acquisition of title by the landowner.

An attorney examining title is in no position to determine whether the foreclosure sale was, in effect, a redemption by the mortgagor as distinguished from a sale to the bidder; the facts relating to these matters vary with each case and allow the courts to decide such cases either way. The examining attorney thus has no alternative, and must call for a release of the second mortgage.

There are cases in Alabama, California, Massachusetts, Minnesota and Tennessee which hold that any covenant of warranty in a junior mortgage that does not expressly except the first mortgage will result in revival as against the original mortgagor who reacquires the title. As opposed to this doctrine there are cases holding that a foreclosed mortgage can-

33 Federal Farm Mortgage Corp. v. Larson, 227 Wis. 221, 278 N.W. 421 (1938).
33a Id., 278 N.W. at 424.
not be revived in Pennsylvania, Louisiana and Florida. The Supreme Court of Louisiana\textsuperscript{35} held that junior mortgages are not revived when the original mortgagor reacquires the property stating:

We do not understand the contention to be made that the mortgage revived automatically as the necessary legal effect of the Russels having reacquired the property. They had not committed any fraud, or done any act which might preclude them from reacquiring the property without this mortgage reviving. They stood as free as anybody else to acquire the property from the homestead association; and, of course, to acquire it just as this association held it; \textit{i.e.,} free of this mortgage.

The headnote in the Pennsylvania case\textsuperscript{36} states their rules very clearly:

Where a vendor or mortgagor either sells or mortgages land which he does not own, and afterwards obtains the title thereto, he will not be permitted to set up this after-acquired title to defeat his previous grant or mortgage, for this would be to permit him to perpetrate a fraud on his grantee or creditor. But this rule has no application where the lien of a mortgage is discharged by a sale under a prior mortgage, and the purchaser conveys the title to the mortgaged property back to the mortgagor, who in the meantime has been discharged in bankruptcy. In such case the lien is not revived, but is lost.

The court said that to hold that the purchase worked a revival of the extinguished debt and mortgage was a clear mistake without the shadow of authority for its support.

The Florida cases hold that in the absence of fraud or collusion, junior mortgages cut off by foreclosure will not reattach.\textsuperscript{37} However, an attorney examining the record has no


\textsuperscript{37} Where prior mortgage assumed by mortgagors as part of purchase price when they purchased property and which they agreed to pay was foreclosed and mortgagors subsequently repurchased property from purchaser at foreclosure sale, title under such repurchase did not inure to benefit of subsequent mortgagee. Waldock v. Iba, 114 Fla. 786, 153 So. 915 (1934), \textit{affirming}, 114 Fla. 786, 150 So. 231 (1933), \textit{rehearing granted}, 114 Fla. 786, 150 So. 803 (1933), following Murray v. Newsom, 111 Fla. 193, 149 So. 387 (1933). Where junior mortgage was extinguished in fore-
opportunity to judge the motives of the parties, and the absence of fraudulent intent cannot very well be assumed in any case. The facts relating to collusion opens a field of speculation which allows courts to decide these cases either way. Therefore, in all such cases the attorney should call for a release of the second mortgage unless there has been such a lapse of time between the acquisition of title through foreclosure by the mortgagee and the subsequent conveyance of that title to the original owners that the matter may be considered as an ordinary business risk by the examining attorney. Even in this latter situation, the decisions of the court in the particular jurisdiction must be against revival.

We thus have two conflicting theories relating to legal rights. One theory says that the interests of all parties to the foreclosure suit are acquired at the foreclosure sale; that the lien of the first mortgage must be free and must carry with it a clear right to convey to anyone, even to the former owner of the property. The other line of decisions protects the rights of creditors by discussing the covenant of warranty in the second mortgage and from such a discussion they reason that the junior encumbrances reattach. The first theory imposes on the second mortgagee an imputation of contributory negligence unless he protects his interests by buying in at the sale or by redeeming from the sale. It would seem that if the court has jurisdiction to decree a sale, then that sale must be conclusive and the title of the purchaser must be absolute. In addition, such title should include the rights of all parties joined in the action.

If the second mortgagee has had his day in court and has protected his rights, he has probably been given a deficiency judgment and this judgment would attach to the foreclosed land if reacquired by the mortgagor. The courts which hold

closure of another mortgage, mortgagor's reacquiring title from purchaser at mortgagor's foreclosure sale did not inure to benefit of holder of junior mortgage. Murray v. Newsom, 111 Fla. 193, 149 So. 387 (1933).
that second mortgages revive are protecting the rights of creditors and whether anyone who lends money with the knowledge that he is getting a second or third mortgage is deserving of the protection of the courts is a matter that may well be questioned.

The magic of our "covenants of warranty" should not be extended to help persons who make bad investments. There is no doubt that the courts which hold that liens are revived discourage adequate bidding at the foreclosure sale, and this is understandable, since the revival theory is a trap for the unwary purchaser. As the matter now stands, in any situation where there is a possibility of revival, an examining attorney should require that the danger of attack, or of an adverse decision, be avoided. This may be done by insisting on a release of the second mortgage or deed of trust or by having the attorney obtain a court decree cutting off the possible claim of the holder of the second mortgage or deed of trust. A third alternative is to require an owner's policy of title insurance and to insist that the title policy be issued free and clear of any objection relating to the possible revival of the junior mortgages.

Rules on Merger. — In law, merger always takes place when a greater and a lesser estate coincide meeting in one and the same person, in one and the same right, without any intermediate estate. The lesser estate is annihilated and merged with the greater. However a court of equity is not bound by the rules of law and may sometimes hold a charge extinguished when it would subsist at law, and sometimes preserve it when at law it would be merged. This depends upon the intention, actual or presumed, of the person in whom the interests are united.38

This intention is a question of fact to be tried and determined in the same manner as are other issues. It comes to repel the prima facie presumption of a merger which arises from the union of legal and equitable estates in the same person at the same time. The intention is generally determined by the interest of the owner, and if the owner has an interest in keeping the titles distinct or if there is an intervening right between the lien and the title, there will be no merger. One of the latest cases on this question of merger in Wisconsin states that a subsequent purchaser cannot rely on a merger from the appearance of the record; there must in fact be a merger of the estates in the same person. The same rule is upheld by other courts.

Where an attorney is examining a title, questions relating to merger arise in the following manner:

1. An abstract reveals that A gives first and second mortgages to B and subsequently B forecloses the first mort-

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39 Generally, party alleging that transfer of mortgagor's interest in mortgaged property to mortgagee did not result in merger of lien into ownership has burden of proving such fact. Kansas Seventh Day Adventist Conference Ass'n v. Williams, 156 Kan. 555, 134 P.2d 626 (1943).
40 Ponstein v. Van Dyk, 282 Mich. 350, 276 N.W. 475 (1937); Delaware Nat. Bank v. Wiss, 158 Misc. 576, 284 N.Y. Supp. 615 (County Ct. 1936). Accord, Clark v. Rowell, 163 Misc. 777, 298 N.Y. Supp. 232 (County Ct. 1937); In re Sheines' Estate, 198 Misc. 59, 96 N.Y.S.2d 105 (Sur. Ct. 1950). Where the mortgagee acquires a fee or equity of redemption from the mortgagor or a subsequent owner, the lesser title is swallowed up by the larger if the property at time of the conveyance is equal in value to the mortgage debt, except that in equity this rule does not obtain where the parties intended to keep the mortgagee alive. Armstrong v. Germain, 98 N.Y.S.2d 946 (County Ct. 1949); Cleary v. Batz, 225 Wis. 82, 273 N.W. 463 (1937). See collected cases in Decennial Digests, Mortgages, Key 295(2).
41 There cannot be a merger of a mortgage lien and the fee title unless the two estates actually vest in the same person; hence, a subsequent purchaser cannot rely upon a merger from the appearance of the record — there must in fact be a merger of the estates in the same person. Thauer v. Smith, 213 Wis. 91, 250 N.W. 842 (1933).
42 Manktelow v. Nevlerzer, 200 Misc. 536, 107 N.Y.S.2d 688 (County Ct. 1951); Rich v. Bebe Realty Associates, 122 N.J. Eq. 67, 192 Atl. 378 (Ch. 1937); Saline County v. Thorp, 337 Mo. 1140, 88 S.W.2d 183 (1935). Acceptance by first mortgagee of quit-claim deed to mortgaged premises without actual knowledge of existence of second mortgage, where first mortgage and note were not canceled or surrendered, held not to extinguish first mortgage so as to subordinate it to second mortgage. Beal v. Alschuler, 277 Mich. 66, 268 N.W. 813 (1936). Conveyance of mortgaged land by mortgagor's grantee thereof to mortgagee did not bar foreclosure of mortgage against mortgagor, even if conveyance effected merger of equitable and legal titles to land. Beamer v. Shrader, 47 So.2d 10 (Fla. 1950).
gage and buys in at the sheriff's sale. The attorney cannot assume that the second mortgage was merged in the title and a call should be made for the release of the second mortgage.

2. A gives a first mortgage to B and a second mortgage to C. Subsequently B assigns the first mortgage to C and then A, the original borrower, gives a warranty deed to C in lieu of foreclosure. In spite of the fact that the mortgages have presumably merged in the title, both mortgages should be released.

3. The same rules should be enforced against an estate. If A gives first and second mortgages to B and B forecloses the first mortgage and thereafter dies, a release of the second mortgage should be executed by the personal representative of B.

According to the above rules no merger results (unless there is an expression of intention to that effect) in any situation where it will be contrary to the legitimate interest of the owner of the rights involved. Since merger is so generally a matter of intention, a purchaser should require that encumbrances be discharged of record unless the showing of satisfaction by merger is clear and certain. As a matter of good practice a call should be made for the release of all merged mortgages. A purchaser cannot rely upon a merger from the appearance of the record. They must go beyond such appearance and ascertain whether there has been a merger in fact, and they act at their own peril if they do not require their grantor to procure the mortgage and note supposed to be merged and discharge the mortgage of record, or show that it constitutes a part of the title to the estate.

43 To permit the prospective purchaser to conclusively decide for himself whether a merger of the two interests resulted from the execution and delivery of a deed from the original mortgagor to the apparent record holder of the mortgage is going farther than was intended by the recording act. He should not deal with the fee title on the assumption that the mortgage is discharged unless it is discharged of record in the manner provided by the statutes, or by a judgment of a court. Thauer v. Smith, 213 Wis. 91, 250 N.W. 842 (1933).
B. TRUST DEEDS

A trust deed is a conveyance of property to a person or corporation as trustee for the purpose of securing a debt or other obligation with a power of sale in the trustees, upon default, to apply the proceeds from the sale in payment of the debt. A deed of trust conveys the legal title to the trustee, and it remains in him until the debt is paid or until a sale is made upon default. The trustee, therefore, may foreclose under the power of sale contained in the trust deed, and there is no statutory or other right of redemption after sale unless the foreclosure is by court action. If there is any question as to whether an instrument is a mortgage or a trust deed, the instrument will be considered a mortgage.\(^4^4\)

While the trust deed conveys to the trustee the entire legal title for the purpose of the trust, yet under the rule that a trustee takes only such estate as is necessary to the execution of the trust, the title of the trustee lies dormant until the necessity for foreclosure arises and prior to that time he has none of the legal incidents of ownership, and the trustor or his successors can convey mortgage or otherwise deal with the property subject, however, to the trust deed.\(^4^5\)

Whenever there is a large trust deed securing a bond issue providing for foreclosure by sale by the trustee or by a court action, then this “trust deed or mortgage” is ordinarily treat-

\(^{4^4}\) Banta v. Wise, 135 Cal. 277, 67 Pac. 129 (1901); LaArcada Co. v. Bank of America, 120 Cal. App. 397, 7 P.2d 1115 (1932); Martin v. Rockford Trust Co., 281 Ill. App. 441 (1935); Cameron v. Campbell, 176 Tenn. 589, 144 S.W.2d 775 (1940).

\(^{4^5}\) One who gives a deed of trust still has right to bring a quiet title action. Charles A. Warren Co. v. San Francisco Saving Union, 153 Cal. 771, 96 Pac. 807 (1908). A “deed of trust” differs from a “mortgage” in that title passes from trustor to trustee under a deed of trust, while, in case of mortgage, a mortgagor retains title; the statute of limitations never runs against power of sale in a deed of trust, while it does run against a mortgage; and mortgagor has statutory right of redemption after foreclosure, while no such right exists under a deed of trust. Py v. Pleitner, 70 Cal. App.2d 576, 161 P.2d 393 (1945). A mortgage or trust deed in nature of mortgage vests legal title to mortgaged land in mortgagee as against mortgagor, but only for protection of mortgagee’s interests. Miller v. Frederick’s Brewing Co., 405 Ill. 591, 92 N.E.2d 108 (1950). See collected cases in Decennial Digests, Mortgages Keys 137-38.
ed as a mortgage in which case the statutory right of redemption exists. In any action affecting a trust deed, both the trustee and beneficiary of record should be made parties. Trust deed covering a minor's or incompetent's interest can be executed only upon proper order of court.

**Releasing Before Maturity.** — An attorney must exercise greater care in passing on the release of trust deeds than is ordinarily required in passing on the release of mortgages. The power of the trustee is to some extent limited. Since he holds title and exercises his authority for the benefit of the legal holders of the indebtedness, and because the evidences of the indebtedness are usually negotiable, the incident of the lien will follow the note or bond to the last endorsee, and it is therefore necessary that the terms for the release of the trust deed be followed strictly. For this reason it is often required that the cancelled notes or bonds be sent in; surrender constituting a satisfactory showing that they were paid.

A deed of trust is, in effect, a mortgage with a power of sale. The trustee holds title for the benefit of a third party, and since the beneficiaries have certain rights which must be protected, a release by the trustee before maturity of the debt is not acceptable. Usually a deed of trust securing a large issue of bonds will have a provision to the effect that the trustee may release prior to maturity upon giving a certain prescribed notice to the bondholders. But deeds of trust for a

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46 In equity, release unauthorized by terms of trust or by cestui que trust will have no effect on trust deed as between original parties or as to subsequent purchasers with notice. Phelps v. American Mortgage Co., 6 Cal.2d 604, 59 P.2d 95 (1936). Parties who secured release of trust deed were bound to know that trustee had no authority to deal with trust estate or bind holders of bonds secured by deed of trust except as expressly conferred by the deed of trust or necessarily incident thereto. Prudence Co. v. Garvin, 130 Fla. 680, 179 So. 127 (1936). Only the true holder of a note secured by a deed of trust can satisfy the record. Mo. Rev. Stat. § 3465 (1949). Simmon v. Marion, 227 S.W.2d 127 (Mo. App. 1950). See collected cases in Decennial Digests, Mortgages Key 309(2).

47 Where purchaser had notice from abstract that trustee releasing trust deed held title for third party and that notes were not due and contained no prepayment privilege, release was invalid as between holder of notes and purchaser. Kennell v. Herbert, 342 Ill. 464, 174 N.E. 558 (1930), reversing, 253 Ill. App. 252 (1929).
small amount which secure a single note or bond often do not have such a provision, and it is in these cases that releases by the trustee alone, before maturity, are not acceptable. A release made by a trustee before the maturity of the indebtedness is not satisfactory unless the provisions of the deed of trust expressly provide therefor, and a new release should be procured from the trustee with the beneficiaries joining, and a call should be made to have the cancelled notes sent in.\textsuperscript{48}

\textit{Large Bond Issues}. — Whenever a corporation executes an instrument securing a bond issue, the instrument is usually in the form of a trust deed and made to a trustee. The trustee may be either an individual or a corporation, and the trust deed usually provides that on the resignation of the trustee, the trust shall vest in the survivor or survivors. The trustee derives his powers from the trust agreement, and payment to the trustee will constitute payment to the bondholders only when made at the time and in the method prescribed by the terms of the deed.\textsuperscript{49} Generally, an application for a loan is made, and the lending corporation is informed that the money to retire the outstanding bonds is needed at a certain time. Directions must then be given for calling the bonds in accordance with the terms of the trust deed, but a partial release is not to be accepted unless the trust agreement gives this specific power. A large trust deed securing an issue of bonds usually contains a provision authorizing prepayment, based on notice to the bondholders calling the bonds in for payment, and such a release is proper.

Any action by the trustee not authorized by the trust agreement, is generally regarded as a deliberate assumption of


\textsuperscript{49} Under trust deed authorizing trustee to receive from mortgagor all money paid on bonds and to apply payments according to terms of bonds, and that upon payment by mortgagor trustee should on demand release trust deed and mortgagor should be considered fully released, money paid by mortgagor to trustee was received by trustee as agent of bondholder, and mortgagor was not responsible thereafter for proper application of amount paid. \textit{In re Church's Will}, 221 Wis. 472, 266 N.W. 210 (1936).
and where the powers are set out there is no excuse for the exercise of discretion. The trustee should be requested to call for all bonds in accordance with the terms of the trust agreement, and a sufficient sum of money should be deposited with the fiscal or transfer agent to redeem all bonds. The attorney should see that the terms of call and release of the bonds are complied with and that the money for the release of the bonds is on deposit at the proper time and with the proper agent and that the required notice has been given. If the terms of the agreement are followed then it makes no difference whether or not all of the bonds were turned in. All interest payments will cease on the date of redemption provided that proper notice has been given, and the attorney and trustee will be protected. If there is any doubt as to the construction of the terms of the trust deed, the trustee should be instructed to apply to the court for protective advice.

Trust deeds covering a large issue of bonds are long and involved instruments running from fifty to several hundred pages. The entire instrument should be studied, but particular attention must be given to the articles of the indenture entitled "provisions relating to redemption of bonds" and " defeasance."

C. JUDGMENT LIENS

In most states statutes provide that judgment will be a lien upon all non-exempt property of the judgment debtor for a specified period of years. Since these liens are wholly statu-

50 When the trust instrument specifically and clearly defines the powers of the trustee, there can exist no possible field for the exercise of discretion on the part of the trustee, touching the powers he is permitted to exercise. Such powers, being specifically defined, are necessarily fixed and inflexible. Conover v. Guarantee Trust Co., 88 N.J. Eq. 450, 102 Atl. 844 (Ch. 1918), aff'd, 89 N.J. Eq. 584, 106 Atl. 890 (Ct. Err. & App. 1919).

51 Where collecting trustee for holders of bonds secured by mortgage received and retained portion of proceeds of mortgaged property without informing bondholders or making distribution to them and without mortgagor demanding surrender of bonds, subsequent purchaser of mortgaged property subject to outstanding indebtedness held not entitled to have amount of such proceeds credited on mortgaged indebtedness, as against claims of innocent bondholders. First Trust Co. v. Danielson, 132 Neb. 141, 270 N.W. 680 (1937).
tory, the conditions and limitations imposed by the statutes are controlling and the lien commences either from the date of rendition or from the date of docketing, depending upon the wording of the particular statute. Except in a very few states a judgment attaches as a lien without the use of any process, but in Illinois and Michigan the judgment is ineffective unless followed by levy and execution. The statutes of the various states authorize the transcribing of a judgment from one county to another for the purpose of binding the lands of the judgment debtor in the latter county.

When a judgment has once attached to land it remains until legally removed, and any purchaser who has actual or constructive notice of the judgment will take the property subject to the lien. Also, a judgment against a debtor during his life will continue against the lands in the hands of heirs or devisees and should be noted as outstanding in the title report.

Judgments which have been extinguished by lapse of time may be disregarded and no mention need be made of them unless the running of the statute has been suspended by an absence in the military service of the United States.

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52 The various state statutes and decisions showing when the judgment attaches are set out in Patton, Titles § 315, n. 127 (1938).
54 Unless an outstanding judgment lien is released, the title will be unmarketable and any purchaser will be justified in refusing the title. Harding v. Olson, 177 Ill. 298, 52 N.E. 482 (1898).
55 When a creditor has a judgment lien against interest of one joint tenant he can immediately execute and sell interest of judgment debtor and thus sever the joint tenancy, or he can keep his lien alive and wait until joint tenancy is terminated by death of one of joint tenants, and if judgment debtor survives, judgment lien immediately attaches to entire property, but, if judgment debtor is first to die, the lien is lost. Zeigler v. Bonnell, 52 Cal. App.2d 217, 126 P.2d 118 (1942). A judgment which is a lien against real estate owned by a decedent at the time of his death continues to bind said real estate without an action to revive. Simmons v. Simmons, 150 Pa. Super. 393, 28 A.2d 445 (1942), aff'd, 346 Pa. 52, 29 A.2d 677 (1943).
56 The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or
ment searches should cover a period commencing ten years prior to the date of certification of any abstract to which they are attached or of which they form a part (except as the duration period is different in a particular state), and should relate to the name of every record owner of any interest in the property since that date.\(^{57}\)

**Execution in Illinois.** — In Illinois a judgment lien continues for one year, but if an execution is issued within the first year, the judgment will remain a lien for seven years.\(^{58}\) When execution is not issued on a judgment within one year from the time the same becomes a lien, it shall thereafter cease to be a lien, but execution may issue upon such judgment at any time within said seven years, and shall become a lien on such real estate from the time it shall be delivered to the sheriff or other proper officer to be executed.\(^{59}\)

The cases indicate that if one year has elapsed from the date of the judgment without issuance of the execution, or if seven years have elapsed where an execution is issued within one year, then the judgment is barred unless an execution is outstanding at the expiration of the seven-year period. Such an execution expires 90 days from its date; and thereafter the judgment ceases to be a lien.

The execution will be effective from the time that it is placed in the hands of the sheriff, and ordinarily the abstract-
er would have no record notice of this act. Therefore, all judgments in the State of Illinois that are not more than one year old should be released. However, if the judgment is more than one year old and there has been no appeal or stay, then it appears to the writer that the transaction may be completed if no execution is issued and in the hands of the sheriff, since in the latter case the judgment becomes a lien only from the time of the execution. 60

*Homestead Exemption.* — The law of judgments results from and depends upon the right to apply real estate of the judgment debtor to the satisfaction of the debt. In states where the homestead is exempt from execution by statute, the property, as long as it retains its homestead character, may be transferred clear from all judgment liens without furnishing any opportunity for such liens to attach. 61 As a judgment is not a lien on a homestead it follows that if property by abandonment or otherwise loses its homestead character, prior judgments will attach to the property. 62 If a judgment once attaches to property, which is not the homestead of the judgment debtor, but thereafter becomes the homestead of the judgment debtor, it will be encumbered by the judgment lien upon which execution may issue. 63 Where the defendant was a resident of Minnesota when the judgment was entered and docketed, and at that time owned certain property located in

60 In re Schuneman, 290 Fed. 200 (7th Cir. 1923).

61 Upon the death of owner using and occupying property as homestead, leaving a surviving wife, his heirs or devisees took his homestead free from all debts except for the purchase price, taxes and improvements, and death of surviving wife or others who had right to occupy homestead did not give general creditors any right to subject homestead to payment of debts. Robinson v. Snyder Nat. Bank, 175 S.W.2d 482 (Tex. Civ. App. 1943). See collected cases in Decennial Digests, Homestead Key 144.

62 Where declaration of homestead was filed first, and judgments were filed second, and mortgage was executed third, under Washington law the judgment creditors did not hold or have a lien on homestead property at time of execution of mortgage. Wash. Rev. Code § 6.12.100 (1951). In re Shelton, 102 F. Supp. 629 (W.D. Wash. 1952).

63 A duly recorded judgment lien against the owner of land which is exempt as homestead will nevertheless attach to the land when it ceases to be a homestead, if it is then still owned by the judgment debtor. Walton v. Stinson, 140 S.W.2d 497 (Tex. Civ. App. 1940).
Wisconsin, which he occupied as his homestead subsequent to the date of the rendition of the judgment, but not prior thereto, the court held that the property was not exempt since the judgment lien having once attached to the property, thereafter always remains.\(^{64}\)

**Release by Proper Parties.** — Whenever a judgment is released by a stranger who states that he is an assignee of the judgment creditor, the abstract should be amended to show the assignment.\(^{65}\) If a judgment is outstanding in favor of an estate, the release should be executed by the personal representative\(^{66}\) if he is still qualified (evidence of his appointment and qualification should be shown) or the judgment should be released by the person or persons to whom it was distributed in the estate, and evidence should be furnished from the probate proceedings showing that the proper parties executed the release.\(^{67}\) In situations where judgments are released by receivers of insolvent banks, the abstract should be amended to show the appointment and qualification of the receiver and that he was so acting at the time of the release.

**Judgments Against Beneficial Interests.** — It is a general principle that the lien of a judgment is limited to the actual interest the debtor has in the property and does not extend to his apparent interest. The lien of a judgment does not attach

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\(^{64}\) Upman v. Second Ward Bank, 15 Wis. 449 (1870).

\(^{65}\) Where amount of judgment and costs are paid by one who is a stranger to the action, judgment is extinguished or not according to intention of party paying. Hughes v. McElwee, 117 W.Va. 410, 185 S.E. 688 (1936).

\(^{66}\) Administratrix, upon her appointment as such, was vested with legal capacity to sue for wrongful death of her decedent and payment to her as administratrix in satisfaction of judgment would discharge and be a complete protection to judgment-debtor, regardless of whether administratrix was in fact the lawful widow of decedent or obtained appointment as administratrix by false representation as to such relationship. Metropolitan Distributors v. Hyndsman, 201 Misc. 1045, 108 N.Y.S.2d 544 (Sup. Ct. 1951), aff'd, 279 App. Div. 786, 109 N.Y.S.2d 925 (Sup. Ct. 1952).

\(^{67}\) Defendant, against whom judgment was rendered for damage to realty which plaintiff claimed as widow of record owner, was entitled to require of personal representative of estate of record owner or distributees of the realty in the estate a release or other evidence that widow was entitled to entire judgment. Ludlow v. Colorado Animal By-Products Co., 104 Utah 221, 137 P.2d 347 (1943). See collected cases in Decennial Digests, Judgment Key 874(1).
to the mere legal title of land existing to the judgment debtor when the equitable and beneficial title is in another.\textsuperscript{68} The lien of a judgment attaches to the precise interest of the judgment debtor of the land. In some states it is confined to the legal interest of the debtor; but whether it extends to the legal and equitable interest or is restricted to the legal interest only, it is the actual and not the apparent interest of the defendant that is affected, and his apparent interest can neither extend nor restrict the operation of the lien so that it shall encumber any greater or less interest than the debtor in fact possesses.\textsuperscript{69}

The interest of a vendor in lands contracted to be sold is bound by the lien of a judgment recovered against him while the contract is unexecuted to the extent to which it is unexecuted. The lien of a judgment against a vendor may be enforced against a vendee with notice as to all sums remaining unpaid by the vendee under the contract, but the judgment creditor must take proper care to notify a vendee in possession of his judgment, and must take the proper steps to subject the amount due from the vendee in possession to the payment of his judgment. Hence it is apparent that the legal estate may

\textsuperscript{68} Judgment creditor of husband could not satisfy judgment out of property standing in husband's name but which was subject to trust in favor of wife. Maurica v. Haugen, 387 Ill. 186, 56 N.E.2d 367 (1944). A judgment taken upon individual debt against holder of a mere legal title held in trust for another has no lien upon land so held. Jackson v. Thompson, 214 N.C. 539, 200 S.E. 16 (1938). Where judgment debtor held merely naked legal title to land under unrecorded deed and equitable and beneficial title thereto was in judgment debtor's wife, lien of judgment would not attach to land. N.D. Rev. Code §§ 28-2013, 47-1941 (1943). Redman v. Biewer, 78 N.D. 120, 48 N.W.2d 372 (1951). A judgment creditor of a trust company could not secure a lien on realty held by the trust company as trustee for others, since a judgment is a lien against only that realty in which the judgment debtor has a beneficial interest. Davis v. Commonwealth Trust Co., 335 Pa. 387, 7 A.2d 3 (1939). See collected cases in Decennial Digests, Judgment Key 780(5).

\textsuperscript{69} A judgment lien does not attach to the mere record title of land standing in the name of the judgment debtor, but is limited to the actual interest that the judgment debtor had in the land at the time the judgment lien attached. Harry v. Hertzler, 185 Okla. 151, 90 P.2d 656 (1939). Under statute providing that every judgment for money shall be lien on all realty to which defendant in judgment is or becomes possessed or entitled at or after date of judgment, apparent interest of debtor can neither extend nor restrict operation of lien so that it shall encumber any greater or less interest that debtor in fact possesses. Guaranty Co. of Maryland v. Hubbard, 117 W.Va. 563, 187 S.E. 313 (1936); Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657 (1937).
be bound by a judgment against one, such as a vendor, and the equitable estate by a judgment against another, such as a vendee, and that the interest of either may be transferred to a purchaser at a sheriff's sale.\footnote{70}{A judgment lien accruing against a vendor after making a contract of sale, but before making delivery of deed, extends to all of vendor's interest remaining in land, \textit{Chain O'Mines v. Williamson}, 101 Colo. 231, 72 P.2d 265 (1937). Where judgment debtors had entered into a valid contract for sale of real property prior to entry of judgment, lien of such judgment was enforceable by judgment creditor against vendees with notice as to all sums remaining unpaid by vendees upon the contract, and debtors could not destroy the lien by assigning or quitclaiming their interest in the contract and real property to a third party after entry of the judgment. \textit{Heath v. Dodson}, 7 Wash.2d 667, 110 P.2d 845 (1941). See collected cases in Decennial Digests, Judgment Key 780(3).}

From the foregoing, it would appear that judgment docketed on property previously sold under a land contract would become a lien on the property sold to the extent of the vendor's interest. If the purchase money has been paid and the sale consummated, except for the execution of the deed, the lien of the judgment rendered against the vendor does not attach to the land for he has no beneficial interest therein, but merely a bare legal title. The conclusion would seem to be that a judgment extends to whatever title a judgment debtor owns, whether a fee or less than a fee and whether legal or equitable. Therefore, the certificate of the abstracter should cover land contract vendors and land contract vendees, together with the names of all parties holding equitable interests in the property.

\textit{Release by Attorneys.} — As a general rule, any attorney who is retained by a client is authorized to do anything that may be necessary from the time he begins the proceedings until he has obtained a judgment. However, his authority extends beyond this and also includes the power to collect the money found due to his client and to satisfy the judgment.\footnote{71}{An attorney may receive moneys due his client on a judgment and may satisfy the judgment. \textit{State v. Hialeah}, 130 Fla. 375, 177 So. 712 (1937). See collected cases in Decennial Digests, Attorney & Client Key 100.} The attorney, however, may not compromise the claim and is not permitted to receive less than the full amount called for...
by the judgment. In addition, if the attorney satisfies the judgment for less than the original amount, the parties would not be protected in relying on such a satisfaction. An attorney who has recovered judgment has the authority to bind his client by receiving payment of the judgment and satisfying it, unless the defendant has notice or knowledge of the lack of such authority.

A judgment lien may be released by the judgment creditor on the docket or by an instrument of release duly acknowledged and filed for record. Often in our major cities the satisfaction of a judgment is entered upon the docket by the attorney who appeared for the plaintiff in obtaining the judgment. If the attorney was not the attorney in the original action, then the release by the attorney must be under a separate power of the attorney. If no power of attorney is shown in the abstract, the abstracter should be requested to amend the entry setting out the judgment by naming such attorney, and if it subsequently appears that the attorney releasing the judgment was not the attorney in the original action, a new release should be executed by the judgment creditor. It is to be noted that the statutes sometimes limit the time during which the attorney in the original action can release the judgment and any release by an attorney made more than five years after the date of the judgment should be checked with the statutes of the particular state.

If the attorney's client dies after the judgment has been entered, the relationship of attorney and client terminates,

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72 In statute providing that an attorney has power to receive money claimed by client and upon payment thereof and not otherwise to discharge the claim or acknowledge satisfaction of judgment, the word "payment" means, not payment in part, but payment in full. Glenwood Lumber & Coal Co. v. Hammers, 226 Iowa 788, 285 N.W. 277 (1939); Farmer v. Schneider, 269 App. Div. 1043, 58 N.Y.S.2d 587 (Sup. Ct. 1945); Business Service Collection Bureau v. Yegen, 67 N.D. 51, 269 N.W. 46 (1936).

73 7 C.J.S., Attorney and Client § 99 (1937). After notice of substitution of attorneys has been given, a payment to plaintiff's first attorney, who recovered the judgment, cannot operate as a valid payment on the judgment. Nuessler v. Bergman, 141 Wash. 297, 251 Pac. 578 (1926).
and the attorney has no further power to release the judgment. As a matter of law, a satisfaction given by the attorney after the death of the client is of no force and effect. In the usual case, the attorney alone may completely satisfy the judgment if the client is still living and sane and is the owner of the judgment, provided, however, that the attorney still represents the client and full payment in money has been made. If the judgment creditor has assigned a judgment, the attorney has no further power to release it, and the relationship of attorney and client is no longer effective. In any such case, the privity between the judgment creditor and the attorney who represented him is destroyed.

Identity of Debtors. — There is a presumption that names spelled differently refer to the same persons when they sound alike, but there is too much doubt and uncertainty in the decisions for any attorney to pass on matters of this sort without a reference to the decisions in the particular jurisdiction. There are decisions to the effect that the names of Hendrix and Hendricks,\(^7\) Bernhard and Bernhand,\(^7\) Leboeuf and Leboub,\(^7\) refer to the same persons while the names of Gensero and Geneva\(^7\) do not refer to the same persons. The attorney, in passing discrepancies in a name of this sort, should confine himself to instances which are so clearly within the rule that there is very little likelihood that a court or a subsequent attorney will take a different view of the matter. In any situation where there is a wrong middle name, or where initials only are used, in naming the judgment debtor, it appears that the safest course is to call for a release of the judgment or to give the parties the option of furnishing an affidavit executed by the judgment creditor, if in fact the party is not the judgment debtor. If the abstract reveals a judgment

\(^7\) Hendrix v. State, 21 Ala. App. 517, 110 So. 167 (1926), cert. denied, 215 Ala. 114, 110 So. 168 (1926). See collected cases in Decennial Digests, Names Key 16(2).
\(^7\) Bernhand v. Ennis, 140 Atl. 151 (Super. Ct. 1927).
\(^7\) LeBoeuf v. Papp, 243 Mich. 318, 220 N.W. 792 (1928).
\(^7\) Geneva v. Thompson, 200 Iowa 1173, 206 N.W. 132 (1925).
against B. McKenzie and the attorney represents a party who is lending money on property owned by Ben McKenzie, a request should be made for the release of the judgment. If the judgment is against C. C. Richardson but the grantor is Carrie Richardson, it may be assumed that the judgment debtor is not the same person as the owner, and if an affidavit to that effect is furnished by the judgment creditor such evidence may be accepted and the judgment may be disregarded. A judgment against J. W. Humphrey was sufficient to place the parties on inquiry as to whether the debtor was the same person as the record titleholder, John W. Humphrey.\textsuperscript{78} As stated above, there is too much doubt and confusion in the cases to take a chance in these matters.\textsuperscript{79} Whenever names are as close as the ones referred to herein, they are sufficiently similar to afford constructive notice and the judgment should either be satisfied or an affidavit should be furnished by the judgment creditor that they are not in fact the same parties.

\textit{Federal Tax Lien Judgments}. — State exemption laws are of no avail to the tax-debtor when the Federal Government seeks to enforce its tax liens. Many of the mid-western and western states have laws exempting homesteads from debt enforcement processes, but several courts have held that the federal tax lien attaches to the taxpayer's homestead as well as to other state exempted property. The courts reason that, in view of the paramount importance of tax revenues to the central government, no state should have the power to place the property of its citizens beyond the reach of the federal tax collector.\textsuperscript{80}

\textsuperscript{78} Penney v. Russell & Co., 52 Minn. 433, 54 N.W. 484 (1893). \textit{Patton, Titles § 316} (1938).

\textsuperscript{79} Breyer v. Gale, 53 N.D. 439, 207 N.W. 46 (1925); Coral Gables v. Kerl, 334 Pa. 441, 6 A.2d 275 (1939).

\textsuperscript{80} United States v. Heffron, 158 F.2d 657 (9th Cir. 1947); Shambaugh v. Scofield, 132 F.2d 345 (5th Cir. 1943). The taxes due to the Federal government are not a specific charge against homestead, but are a lien against whole of decedent's estate. Federal tax lien attaches as of date assessment list is received in office of Collector of Internal Revenue. \textit{Int. Rev. Code §§ 3670-3672. In re Capitol Cleaners & Dyers, 233 F.2d 377} (Utah 1951).
Under the provisions of the Internal Revenue Code, the lien continues "until the liability . . . is satisfied or becomes unenforceable by reason of lapse of time." The pertinent sections of the Code provide that a tax which has been assessed may be "collected by distraint or by a proceeding in court," but only if (1) begun within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. Hence, it can be seen that in order to preserve the life of the lien, the Government within six years following the assessment of the tax must take some action, which may consist of obtaining a waiver from the taxpayer, instituting distraint proceedings, or bringing a suit in court to collect the tax.

An attorney examining title is in no position to judge whether or not a federal tax lien has been barred in six years since the Government may have obtained a waiver from the taxpayer extending the time of expiration beyond that period. In any such case, the examining attorney should insist that the lien be satisfied or that the property be released from the federal tax lien.

Turning now to the manner in which a tax lien must be recorded to insure its priority over purchasers, pledgees, judgment creditors and mortgagees, we find that there are two controlling statutory provisions: First: If the property sub-
ject to the lien is situated in a state or territory which has by law authorized the filing of notices of federal tax liens in a designated office, the lien must be filed in that office. Second: If the particular state or territory has not by law authorized the filing of the lien in a designated office, notice of the lien must be filed in the office of the clerk of the United States district court for the district in which the property subject to the lien is situated, and the lien will attach to any property of the debtor in any county included within the federal district.85

United States District Court Judgments. — In addition to federal tax liens the attorney examining title to real property must also be concerned with judgments docketed in the federal courts in favor of the United States86 or in favor of individuals or corporations. Such judgments are governed by Section 1962 of the United States Code.

The federal statutes provide that judgments and decrees rendered in a district court in the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions as if such judgments had been rendered by a court of general jurisdiction of such state. Further, whenever the laws of any state require a judgment to be recorded and docketed or indexed in a particular manner before the lien shall attach, these rules must be followed or conformed to, before the lien shall attach in the courts of the state. The federal statutes also provide that judgments and decrees in a United States district court within any state shall cease to be a lien on real estate, in the same manner and at like periods as judgments

85 Int. Rev. Code § 3672.
and decrees of the courts of such state cease by law to be a lien thereon.\textsuperscript{87}

The majority of states have conformity statutes providing that a judgment or decree in a district court of the United States within the state shall be from the time of docketing thereof in said court a lien upon the real property of the judgment debtor located in the county in which it is so docketed the same as a judgment of a state court. The state statutes provide further that when the judgment is so transcribed and docketed, it will attach in the same manner and with like effect, as in the case of judgments and decrees of the state courts.\textsuperscript{88} The search for judgments in federal courts need extend to the federal district court only; none will be found in the Supreme Court or in the circuit court of appeals, since these courts enforce their mandates through the district courts.\textsuperscript{89}

**D. Taxes**

The legislative power to classify property for taxation is very broad, and generally speaking all real property not

\textsuperscript{87} B. A. Lott, Inc. v. Padgett, 153 Fla. 304, 14 So.2d 667 (1943). Under federal and Illinois statutes, the same rights are accorded to a judgment entered in a United States court sitting in Illinois as are associated to a judgment entered in an Illinois state court, the lien as to each being created, extended and extinguished in precisely the same manner. Reconstruction Finance Corp. v. Maley, 125 F.2d 131 (7th Cir. 1942).

\textsuperscript{88} The following states have proper conformity statutes as contemplated by the Act of August 1, 1888, Rev. Stat. § 967, 28 U.S.C. § 1962 (Supp. 1952): Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Certain other states either do not have conformity statutes, or have statutes relating to liens of judgments of the Federal Courts which do not provide sufficient conformity and in these states the lien of the federal judgment will attach to any land of the judgment debtor included within the territorial jurisdiction of the federal court. Congress did not intend to change the rule that federal court judgments were liens on lands throughout the territorial jurisdiction of the respective federal courts, except in those states which pass laws making the conditions of creation, scope, and territorial application of liens of federal court judgments the same as state court judgments. Rhea v. Smith, 274 U.S. 434 (1927).

\textsuperscript{89} PATTON, TITLES § 356 (1938).
specifically exempted is subject to tax. Exemptions are strictly construed, and the taxpayer has the burden of proving that he qualifies for exemption. Property belonging to state or local governments generally is exempted by state constitution or statute. It is the policy of law not to tax public charities because they perform social and welfare services that otherwise might have to be performed by the state.

Jurisdiction, Assessment, and Attachment of Lien. — Jurisdiction to tax is determined by the situs of the property, and land can be taxed only by the state in which it is located. Likewise, a municipality or other taxing district cannot tax land that lies outside its boundaries.

The state can make the ownership of property subject to taxation relate to any day or period of the year. Also, a state legislature has almost unlimited authority to fix the amount or rate of tax. Statutes customarily require that the assessment be completed by a certain day or within a specified period. Most states require that property be assessed at its


91 Bronx Garment Center v. New York City, Dept. of Finance, 199 Misc. 513, 106 N.Y.S.2d 720 (Sup. Ct. 1951), aff'd, 280 App. Div. 890, 115 N.Y.S.2d 524 (1st Dep't 1952). No tax can be laid, except by authority of the Legislature and it may grant exemptions, either in express terms or by omitting certain property from the catalogue of taxable estate. City of Keene v. Town of Roxbury, 97 N.H. 82, 81 A.2d 439 (1951). Right of legislature to exempt property of subordinate branches of government from taxation is necessary adjunct of right to tax. Eugene v. Keeney, 134 Ore. 393, 293 Pac. 924 (1930).

92 In re Downer's Estate, 101 Vt. 167, 142 Atl. 78 (1928).


94 Township or borough school district cannot tax that part of tract of land which lies outside its boundaries, unless dividing line is also a county line, and the mansion house on the tract lies within the district attempting to tax. Arthur v. School District, 164 Pa. 410, 30 Atl. 299 (1894).

95 Assessment of entire land in name of plaintiff, conveying part thereof to another subsequent to date when assessor was required to examine titles, held valid. Avery v. Mayo, 161 La. 699, 109 So. 393 (1926). Record owner of premises held property assessed for taxes, though owner had conveyed premises by an unrecorded deed. Saftel v. Newton Sav. Bank, 254 Mass. 516, 150 N.E. 433 (1926).
full value, but assessors frequently value property at a fraction of its true value.\(^96\) Even in states where the laws provide that the property be valued at a specific fraction of its true value, assessors frequently value property at percentages lower than those specified.

The statutes as a rule fix the time when the tax lien attaches. A provision which creates a tax lien before determination of the amount of tax is valid.\(^97\) If there is no statutory provision, the lien has been held to attach (1) when the amount of tax becomes fixed and liability for payment accrues;\(^98\) (2) from levy date;\(^99\) or (3) from completion of assessment.\(^100\)

Many statutes give tax liens priority over other liens attaching to taxpayers' property.\(^101\) The question of priority is one of legislative intent, so that the answer as to whether the legislature made the tax lien paramount depends upon construction of the particular statute.\(^102\) In any event, a statutory

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\(^96\) "Assess" when used in connection with taxation of property, means to make a valuation and appraisal of property, usually in connection with listing of property liable to taxation, and implies the exercise of discretion on the part of officials charged with duty of assessing, including the listing of inventory of property involved, determination of extent of physical property, and placing of a value thereon. Montana-Dakota Power Co. v. Weeks, 8 F. Supp. 935 (D.N.D. 1934).

\(^97\) United States v. Alabama, 313 U.S. 274 (1941).


\(^99\) Tax lien of state does not become fixed encumbrance until amount of tax is determined by annual assessment of land and annual levy of tax. McAnally v. Little River Drainage Dist., 325 Mo. 348, 28 S.W.2d 650 (1930); Henderson Bldg. & Loan Iss'n v. Burwell, 206 N.C. 358, 174 S.E. 125 (1934).

\(^100\) Eaton v. Chesebrough, 82 Mich. 214, 46 N.W. 365 (1890).

\(^101\) A tax lien is paramount to all rights, titles, claims, or interests whenever or however acquired. Jader v. Costello, 405 Ill. 181, 89 N.E.2d 814 (1950). Taxes upon real property are a perpetual, paramount lien thereon against all persons except the United States and the State of North Dakota. N.D. Rev. Code § 57-0240 (1943). Conlin v. Metzger, 77 N.D. 620, 44 N.W.2d 617 (1950). See collected cases in Decennial Digest, Taxation Key 509.

declaration of priority must not impair existing contracts or vested rights.\textsuperscript{103}

A transfer of property subject to a tax lien ordinarily will not divest the lien, even to a purchaser for value without notice.\textsuperscript{104} Thus, an assignment for benefit of creditors\textsuperscript{105} or a transfer of property to a trustee in bankruptcy\textsuperscript{106} will not wipe out the tax lien. Unless the statute provides otherwise, a tax lien attaches to property until the tax is paid.\textsuperscript{107} Generally however, duration of the lien is fixed by statute.\textsuperscript{108}

\textsuperscript{103} A tax lien, in absence of statute, ranks according to order of attachment to land in same manner as other liens. However, the legislature has power to determine whether or not a tax lien shall be superior to other liens, providing determination does not impair existing contracts or vested rights. Steinfeld v. State, 37 Ariz. 389, 294 Pac. 834 (1930). Legislature has power to make taxes a lien on all property of owner of taxed property prior to other liens. To constitute a tax against all property of owner at date of levy superior to liens already existing, legislative intent must appear either expressly or by necessary implication. Union Cent. Life Ins. Co. v. Black, 67 Utah 268, 247 Pac. 486 (1926).

\textsuperscript{104} Pittsburgh C. C. & St. L. Ry. v. Harden, 137 Ind. 486, 37 N.E. 324 (1894). No one can be innocent purchaser of land as against lien held by state for taxes due. Texas Bank & Trust Co. v. Bankers' Life Co., 43 S.W.2d 631 (Tex. Civ. App. 1931). The lien of city of third class for taxes on property within city limits on January 1, is inchoate and becomes fixed in amount by relation back to such date after assessment and levy is completed. Long v. City of Independence, 360 Mo. 620, 229 S.W.2d 686 (1950). Where order of board of county commissioners correction assessment of ad valorem taxes on realty was invalid, taxes paid by subsequent purchaser constituted a lien on property which was an incumbrance running with land and its discharge was legal duty of vendors by terms of their conveyance to purchaser's vendor whereby they warranted premises unincumbered of and free from all taxes. Shires v. Reynolds, 203 Okla. 573, 224 P.2d 580 (1950). See collected cases in Decennial Digests, Taxation Key 511.


\textsuperscript{106} Stokes v. State, 46 Ga. 412 (1872).

\textsuperscript{107} Packard Contracting Co. v. Robers, 70 Ariz. 411, 222 P.2d 791 (1950). An original sale of lands for a delinquent tax is carried through all the proceedings so that the lien thereof is preserved separately no matter how many subsequent tax sales have been had. Conlin v. Metzger, 77 N.D. 620, 44 N.W.2d 617 (1950). Lien impressed by law upon real estate for taxes due thereon continue until discharged by payment of taxes or by redemption of tax sale certificate issued for nonpayment of taxes, or as otherwise provided by law. Henderson v. Leatherman, 120 Fla. 496, 163 So. 310 (1935); Eschbach v. Pitts, 6 Md. 71 (1854). Lien of taxes regularly levied on land is ordinarily perpetual. Flansburg v. Shumway, 117 Neb. 125, 219 N.W. 956 (1928). When a tract of land is assessed as an entirety in name of one or more of the owners, a tenant in common may not pay his proportionate share and thus discharge the lien of the state on his undivided interest, and lien of state on entire tract continues until all taxes assessed are paid. Haden v. Eaves, 55 N.M. 40, 226 P.2d 457 (1950). See collected cases in Decennial Digests, Taxation Key 513.
Special Assessments. — Special assessments rest upon the taxing power but differ from general taxes in that they do not affect all lands within a subdivision generally but relate to special properties that receive benefits from a specific improvement. The property affected and the existence of a lien depend upon the enactment of the legislature. Usually all assessments become a lien after they are certified to the auditor and put on the tax duplicate.

Drainage assessments on farm property, and special assessments for paving, street lighting, and sewerage on city lots are liens on the particular parcels involved. These special assessments usually extend over a period from five to ten years from the time they are assessed. Arrangements for the payment or nonpayment of all unmatured instalments are

108 Duration of lien is dependent upon legislature. Burnet v. Dean, 60 N.J. Eq. 9, 46 Atl. 532 (Ch. 1900).
109 "Taxes" include special or local assessments on specific property benefited by improvements, and drainage taxes come within that definition. Waits v. Black Bayou Drainage Dist., 186 Miss. 270, 185 So. 577 (1939).
110 Department of Public Sanitation v. Solan, 229 Ind. 228, 97 N.E.2d 495 (1951); In re Shurtz's Will, 242 Iowa 448, 46 N.W.2d 559 (1951). While, in general sense, word "taxes" includes "special assessment," yet clear distinction exists between the two; "special assessment" being peculiar class of taxes which are levied on property benefited according to some equitable rule, while "taxes," as generally understood, is money necessary to defray expenses of government. Harlan County v. Thompson, 125 Neb. 65, 248 N.W. 801 (1933). Assessment for drainage work could not be made against land which was not benefited. Stoltz v. Water Power and Control Commission, 258 App. Div. 440, 17 N.Y.S.2d 361 (1940), appeal denied, 259 App. Div. 777, 18 N.Y.S.2d 750 (3rd Dep't 1940); Rupp v. Tulsa, 202 Okla. 442, 214 P.2d 913 (1950). See collected cases in Decennial Digests, Municipal Corps. Key 405.
111 Under statutes relating to drainage districts, land within a district cannot be assessed for any greater amount than is necessary to pay costs of the improvement. Iowa Code §§ 7479, 7484, 7505-7509 (1939). Ames v. Board of Supervisors, 234 Iowa 617, 12 N.W.2d 567 (1944). Land that is benefited by proposed drainage ditch may be assessed for payment for construction of the ditch regardless of whether it abuts the line of the ditch. Comp. St. 1929, § 31-109. Loup River Public Power Dist. v. Platte County, 141 Neb. 29, 2 N.W.2d 609 (1942). Under Oklahoma law, unless an easement gives the exclusive right to possession and control thereof, it is not subject to special benefit drainage district assessments. Sinclair Refining Co. v. Burroughs, 133 F.2d 536 (10th Cir. Okla. 1943). See collected cases in Decennial Digests, Drains Key 69.
112 State lands may be assessed for drainage and the lien for drainage taxes may be made of equal dignity with the lien for state and county taxes. Fla. Stat. c. 298 § 1530(1) et seq. (1951). State v. Everglades Drainage Dist., 155 Fla. 403, 20 So.2d 397 (1945).
usually made between the parties at the time the property is conveyed or whenever a mortgage is placed upon the property. In the majority of mortgage cases the general custom is to insist on payment of all delinquent instalments and to waive present payment of unmatured instalments. This rule may be varied by agreement between the parties, but all delinquent special assessments should be paid before the property is mortgaged.

**Separate Assessment of Parcels.** — If A is the owner of lots 3 and 4 and the lots are being assessed together for purposes of taxation and A subsequently sells lot 4 to B, it will be necessary to call for separate assessment for tax purposes on the next tax roll. This would also be true in the case of a sale of farm property where a quarter section is being divided in half. If the attorney does not call for separation, then either of the parties may subsequently pay the other's taxes and it may later be necessary to start an action for recovery. Therefore, if the final continuation in an abstract covers more land than is to be included in a certain mortgage or conveyance, a statement by the abstracter to the effect "that this property is assessed separately" is insufficient and the attorney should direct that the premises to be mortgaged or sold be separately assessed on the next tax roll.

In the usual case, if a person makes a mistake and pays taxes on property which he does not own the courts hold that the payment was "voluntary" and cannot be regained. However, this rule has been varied in Wisconsin and a person paying taxes on a parcel that he does not own is entitled to reimbursement. As an inference from the rules set forth in

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113 Landowner and predecessors in interest who paid taxes erroneously assessed against them on strip of land in honest but mistaken belief that they owned strip, which of record belonged to adjoining land owner without whose request or knowledge taxes were paid, held "volunteers", and not entitled to reimbursement for all such taxes from adjoining land owner. McMillan v. O'Brien, 219 Cal. 775, 29 P.2d 183 (1934).

114 Central Wisconsin Trust Co. v. Swenson, 222 Wis. 331, 267 N.W. 307 (1936).
this decision, it is not only necessary to know that the taxes are paid, but the taxes must have been paid by the owner of the property. Since taxes are often paid by agents, real estate firms, trustees and other parties acting for the owners, this has caused some difficulty, but it would appear that the matter can be ignored by attorneys, except in situations where the examination covers valuable commercial properties or other properties which may be valuable by reason of location or for aesthetic reasons.

**Delinquent Taxes.** — Some states collect taxes by selling certificates of delinquency covering overdue taxes to any applicant willing to pay their principal value, plus interest.\(^{116}\) Certificates can also be issued to the county on property for which no prior certificate has been issued.\(^{117}\) The certificate does not give holder title to property or any interest in land; it merely gives him a lien on the property for the amount paid, plus interest.\(^{117}\) To preserve his rights, the holder must pay taxes subsequently accruing, until foreclosure of the certificate.\(^{118}\) Statutes provide for foreclosure of delinquency certificates by a proceeding against the property\(^{119}\) and these requirements must be followed closely.\(^{120}\) As a condition precedent, a statute can require holder of a delinquency certificate to pay all taxes due and unpaid before applying for foreclosure.\(^{121}\)

**Parties Allowed to Purchase.** — Generally, only strangers to the title may purchase tax certificates, and it is customary

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115 State *ex rel.* American Savings Union v. Whittlesey, 17 Wash. 447, 50 Pac. 119 (1897).
116 Gordon v. Adams, 125 Ore. 662, 268 Pac. 60 (1928).
117 Delinquency certificate, evidencing general tax liens, vests in holder no more than lien on property securing amount paid and interest. Kienbaum v. New Republic Co., 139 Wash. 298, 246 Pac. 925 (1926).
118 Whatcom County v. Black, 90 Wash. 280, 155 Pac. 1071 (1916).
119 The foreclosure of a delinquency certificate is a proceeding in rem, and is operative to convey all the title that either the owner or the state possessed at the time of sale. Connor v. Spokane County, 96 Wash. 8, 164 Pac. 517 (1917).
120 Rae v. Morgan, 125 Ore 644, 266 Pac. 1069, 267 Pac. 1072 (1928).
121 Trumbull v. Bruce, 64 Wash. 644, 117 Pac. 472 (1911). Tax certificate obtained in 1932 was void when purchaser paid only taxes for 1928, and taxes for other years were then due. Warrior v. Stith, 174 Okla. 150, 50 P.2d 179 (1935).
to require that the officer conducting the sale give the purchaser a tax sale certificate. This certificate constitutes written evidence of the purchaser's lien on the property until expiration of the redemption period.\textsuperscript{122} The holder is entitled to a tax deed passing title after the redemption period has expired.\textsuperscript{123} The tax certificate also constitutes constructive notice of the sale to a later buyer of the property.

Ordinarily, a person obliged to pay the taxes on a parcel of realty cannot purchase the parcel at a tax sale.\textsuperscript{124} If he does, it is deemed to be merely a means of paying the taxes, and does not in any way strengthen his title to the property.

\textit{Parties Allowed to Redeem. —} The statutes commonly give a delinquent taxpayer the right to redeem his land sold at a tax sale. Generally, any person may redeem who has an interest in the property that would be affected by the vesting of title in the tax sale purchaser.\textsuperscript{125} The redemption privilege

\textsuperscript{122} Tax certificate imports a paramount right to the land, subject only to the right to redeem, and constitute a cloud on the title. Curtis Land & Loan Co. v Interior Land Co., 137 Wis. 341, 118 N.W. 853 (1908).

\textsuperscript{123} Where only life tenant was made party to judicial proceeding to foreclose tax sale certificate, and remaindermen were not before court, a sale of land pursuant to such proceeding did not pass the interest of the remaindermen as well as of the life estate to the purchaser, and sale and commissioner's deed conveyed to purchaser only the life estate. N.C. Gen. Stat. § 105-410 (1950). Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950). Tax title is a new independent title, and it has nothing to do with previous chain of title nor does it in any way connect itself with it, for it is a breaking up of all previous titles. Adams v. Nibbor Realty Co., 93 N.E.2d 727 (Ohio App. 1950). Tax sale certificates do not entitle owner to possession of land covered thereby. They are only evidence entitling owner to deed on happening of certain conditions. Hastings v. Montgomery, 142 Okla. 47, 285 Pac. 89 (1930). Until purchaser of realty at tax sale made application to county treasurer for tax deed, owner of realty had right of redemption, and purchaser had only a lien for all mounts paid plus legal rate of interest. Okla. Stat. tit. 68, § 433e (1951). Kenworthy v. Murphy, 204 Okla. 233, 228 P.2d 382 (1951). See collected cases in Decennial Digests, Taxation Key 730.

\textsuperscript{124} Larson v. Whitmer, 124 Mont. 399, 224 P.2d 983 (1950). One who, by virtue of an existing legal or contractual relation with another is under an obligation to such a person to pay the taxes on lands, but who omits to pay such taxes, cannot be allowed to strengthen his title to such land by buying in tax title when property is sold as a consequence of his omission to pay taxes on it, and his purchase at sale will operate merely as a payment of taxes and title will be same as it was before sale except that lien for taxes is discharged. Morris v. Lambert, 218 S.C. 384, 62 S.E.2d 841 (1950). See collected cases in Decennial Digests, Taxation Key 674.

\textsuperscript{125} Mortgagee held entitled to redeem portion of lands covered by mortgage, though lands sought to be redeemed had not been assessed separately. State v. Hays,
ordinarily must be exercised within the time limit fixed by the statute. However, redemption usually may be had after the redemption period expires, provided equitable grounds exist therefor. Statutes customarily provide for notice to the owner, and strict compliance with the statutory terms is necessary.\textsuperscript{126}

The amount required to redeem is controlled by statute, but usually includes: (1) the amount paid by purchaser at the sale,\textsuperscript{127} (2) subsequent taxes paid by purchaser,\textsuperscript{128} and (3) interest,\textsuperscript{129} penalties\textsuperscript{130} and expenses\textsuperscript{131} prescribed by statute.


\textsuperscript{127} Elder v. Board of County Com'rs, 33 Colo. 475, 81 Pac. 244 (1905).

\textsuperscript{128} Harmon v. Steed, 49 Fed. 779 (C.C.D. W.Va. 1892). States vary on whether or not the amount required to redeem must include subsequent taxes paid by the purchaser; owner on redemption of land must pay all taxes for years intervening between tax sale and exercise of right of redemption. St. Bernard Syndicate v. Grace, 169 La. 666, 125 So. 848 (1929).

\textsuperscript{129} Threadgill v. Home Loan Co., 219 Ala. 411, 122 So. 401 (1929). Interest rate to which holder of tax certificate is entitled is determined by statute in force when sale was made. Kirkman v. Stoker, 201 N.C. 9, 158 S.E. 551 (1931).


\textsuperscript{131} Harris v. McMurray, 92 N.J. Eq. 1, 116 Atl. 702 (Ch. 1920). Landowners' tender of taxes, interest and costs to tax sale purchaser before tax title was recorded, operated to set aside tax sale. Henderson v. Lambert, 11 La. App. 9, 122 So. 295 (1929).
How Redemption is Made. — Generally, no particular formalities are prescribed for effecting the redemption; 132 payment or a tender of payment to the proper party is sufficient. 133 Some statutes require that redemption payment be deposited with an official instead of being paid to tax sale purchaser. 134 In such cases the official, upon receipt of payment from a party entitled to redeem, is required to issue a certificate of redemption, which states the essential facts of the transaction. 135 In addition to being a receipt for payment, the certificate of redemption in effect annuls the tax sale 136 as redemption annuls the sale of the property 137 and divests the tax lien upon which the sale was predicated. 138 On the other hand, a failure to redeem divests owner of his title to the property. 139

Summary on Delinquent Taxes. — When taxes are delinquent, the statutes provide for a sale of the tax certificate covering such delinquent taxes. This certificate of delinquency in the hands of a stranger constitutes a lien on the land and must be redeemed. If the tax certificate has been assigned, redemption should be made from the last assignee and such

134 Hodsdon v. Weinstein, 251 Mass. 440, 146 N.E. 675 (1925). County treasurer accepting payment to redeem land from tax sale to individual purchaser acts as trustee for holder of tax sale certificate. Money paid to county treasurer to redeem land from tax sale to individual purchaser belongs to purchaser, not to treasurer nor to county. Keenan v. McClure, 127 Neb. 466, 255 N.W. 784 (1934).
135 State v. Cranney, 30 Wash. 594, 71 Pac. 50 (1902).
136 Payment of taxes by owner within six months after adjudication of property to state for unpaid taxes amounted to a redemption, though no redemption certificate was issued by the sheriff. Little v. Smith, 44 So.2d 377 (La. App. 1950); Drew v. Bowman County, 60 N.D. 410, 235 N.W. 138 (1931). See collected cases in Decennial Digests, Taxation Key 713.
137 "The redemption creates no rights in the land. It merely annuls the tax sale and leaves the title as if the sale had not been made." Sunderman Inv. Co. v. Craighead, 143 Minn. 286, 173 N.W. 653 (1919).
redemption should thereafter be shown on the abstract. The issuance of tax certificates is of course controlled by statute, and very often when a party buys up one certificate, the lien resulting therefrom is usually protected by paying taxes which subsequently accrue. The redemption of these certificates, by payment, will always forestall a foreclosure of the tax certificates. Taxes are often forfeited to the county or state for non-payment, but municipalities, counties and states may purchase only if permitted by statute. Generally the sale of the certificate is first offered to private bidders, and if there are no bids, the tax certificates are bought in by the municipality, county or state. Redemption of tax certificates may be made by anyone having an interest in the lands, but generally the taxes are paid or redeemed by the owner or by a mortgagee to protect his mortgage interest. The holder of a tax certificate has an equitable title, and the purchaser has a lien until the time of redemption has expired. This lien will entitle the owner to a tax deed after expiration of the period of redemption.

Federal Estate and State Inheritance Taxes. — All death taxes are levied either on the privilege granted the deceased of transmitting his property to his heirs, or on the privilege granted the heirs of receiving that property. The estate tax is levied upon the right to transmit property at death. The federal tax is an estate tax, imposed upon and measured by the estate that the deceased leaves, and levied against the estate as a unit without regard to the shares received by different beneficiaries or heirs. It is a transfer tax levied on the privilege of transferring property to one's heirs at death and not on the property itself, though it is measured in any given instance by the value of the property so transferred. The state tax is an inheritance tax levied on the right of heirs to receive property from a deceased person and is imposed upon and measured by the share each heir receives. Since it is levied on
the right to succeed to a deceased person's property, it is sometimes called a "succession tax." 140

Statutes commonly require the filing of an inventory in an estate, and the value of the estate for tax purposes is usually determined by a formal appraisement, 141 although under certain statutes the judge may determine the value and amount of the tax without appointing appraisers. A notice of the time and place of appraisement is given to all parties interested in the estate. The statutes further provide for investigation by a state official or by a state board and the furnishing of a certificate showing either that the tax has been determined and paid or that no tax was due. Joint interests in property including joint tenancies, tenancies in common, tenancies by the entirety and community property interests, are subject to federal tax, 142 and are subject to state inheritance taxes when made so by statute.

Transfers Made in Contemplation of Death.—The federal estate tax law provides that there must be included in the gross estate of a deceased person the value of all property, or any interest therein, which that person has previously transferred "at any time . . . by trust or otherwise, in contemplation . . . of death." In re Rosing's Estate, 337 Mo. 544, 85 S.W.2d 495 (1935). Basis of both estate and transfer or succession taxes is privilege accorded by state for devolution of property from one person to another on death. In re Weiden's Estate, 144 Misc. 854, 259 N.Y. Supp. 573 (Surr. Ct. 1932); In re Downer's Estate, 101 Vt. 167, 142 Atl. 78 (1928); In re Merrill's Will, 212 Wis. 15, 248 N.W. 909 (1933). See collected cases in Decennial Digests, Taxation Key 856.

140 "Inheritance Tax" is not a tax on property but an excise, and may be a tax on transmission of property by a deceased person and chargeable upon the whole estate, in which case it is called "probate duty or estate tax," or it may be on privilege of taking property by will or inheritance or by succession in any other form on death of owner, in which case it is imposed on legacy or share received and is called "legacy or succession tax." In re Rosing's Estate, 337 Mo. 544, 85 S.W.2d 495 (1935). Basis of both estate and transfer or succession taxes is privilege accorded by state for devolution of property from one person to another on death. In re Weiden's Estate, 144 Misc. 854, 259 N.Y. Supp. 573 (Surr. Ct. 1932); In re Downer's Estate, 101 Vt. 167, 142 Atl. 78 (1928); In re Merrill's Will, 212 Wis. 15, 248 N.W. 909 (1933). See collected cases in Decennial Digests, Taxation Key 856.


142 INT. REV. CODE § 811(e). See state statutes.
tion of death.” Even where the deceased has made an outright and complete gift of property during his lifetime the value of that property will be taxable in his estate at his death if the gift was “in contemplation of death.”\(^{143}\) It is extremely difficult to determine when transfers are so made,\(^{144}\) and the attorney examining title can only watch for any great difference between the date of the deed and the date of recording, such discrepancy indicating that the deed was withheld from record during the lifetime of the grantor.

The lien for estate taxes arises at the moment of the decedent’s death and is not required to be recorded as a condition precedent to its validity against judgment creditors, mortgagees, pledgees, and the like. Thus, so far as estate taxes are concerned, we have a lien which comes into existence prior to the assessment or demand for payment of the underlying tax and as to which no recordation is required for its validity. It is actually an unrecorded tax lien and such a lien presents an obvious threat to certainty in title transactions.

For example, property transferred by the decedent during his lifetime, which is included in the gross estate for federal estate tax purposes by reason of the fact that the gift was made in contemplation of death or to take effect in possession and enjoyment at or after death, is subject to the lien of the federal estate tax. The Code further provides, however, that whenever any part of such property is sold by any person in possession to a bona fide purchaser for an adequate and full consideration, the federal lien is then lifted from the property itself; but a like lien attaches to other property of the person selling the property.\(^{145}\)

\(^{143}\) Id., § 811(c). See state statutes.

\(^{144}\) See the leading case of United States v. Wells, 283 U.S. 102, 119 (1931), in which the court says: “It is sufficient if contemplation of death be the inducing cause of the transfer whether or not death is believed to be near.” It was held that an inter vivos gift was not taxable if the motive was to accomplish some purpose desirable to the donor if he continued to live.

\(^{145}\) Int. Rev. Code § 827(h)
Federal estate taxes are barred by statute after ten years and several states have statutes barring inheritance taxes in periods varying from seven to ten years, but this matter of state taxes should always be checked with the statutes. In certain states inheritance taxes are "a lien upon the property transferred until paid" and in those states there should be a specific showing by receipt or otherwise that the tax has been determined and paid or that no tax was due. It appears that there should be a bar in all states and generally a ten-year period for collection of inheritance taxes should be sufficient, but some of the states have not seen fit to pass such legislation.

Gift Tax Lien. — Section 1009 of the Internal Revenue Code creates a lien for gift taxes comparable to the above discussed lien for estate taxes. The gift tax lien exists for a period of ten years from the time the gifts are made, and the lien attaches to the property comprising the gift in the hands of the donee. As in the case of the estate tax lien, the lien is lifted from the property if the donee sells it for an adequate and full consideration, but the lien then attaches to all other property of the donee.

The rate (effective October 21, 1942) is three-fourths of the federal estate tax rate. The exemptions are: (1) $3000.00 of gifts in each year to each donee; (2) gifts for charitable, religious and educational purposes; and (3) $30,000.00 of gifts to all donees in all years combined.

The donor is required to file a return with the Collector of Internal Revenue in his district on or before March 15th following the close of the calendar year. At that time, also, the

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146 Id., § 827(a). "Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent..."  
149 Int. Rev. Code §§ 1006(b), 1008-1009. Under statutes providing that gift tax shall be paid by donor on or before fifteenth day of March following close of calendar year, and that if tax is not paid when due, donee under trust agreement became directly liable for tax when donor failed to pay it, and trustee was not en-
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tax is payable by the donor. If the commissioner is satisfied
that the tax liability has been fully discharged or provided
for, he may under regulations prescribed by him, with the
approval of the Secretary of the Treasury issue his certificate
releasing any of the property from the lien imposed.

E. MECHANICS' LIENS

A mechanic's lien is a lien or claim upon real estate to
secure payment for work or labor performed on, or materials
furnished for, buildings or other improvements, and the labor
or material must have been furnished at the request or with
the consent, express or implied, of the owner of the real
estate. Mechanics' liens are valid prior liens over all other
claims, such as mortgages, and judgments given or taken after
the visible commencement of work, and the term covers all
claims for labor, whether skilled or unskilled, and for all
building materials furnished. The lien only attaches to the
very property upon which the work was done, and has no
effect on other pieces of real estate of the owner. The
majority of states have laws providing that the work to which
the owner is entitled under a contract must be entirely performed before the contractor can file a lien, but where owners' payments are made in instalments, some codes permit the filing of a lien when the owner defaults in the payment of an instalment. Liens usually take precedence according to the time of their filing in the county clerk's office. In some states subcontractors who have not had direct dealings with the owners may nevertheless file liens against the property for the work performed by them.

In any situation where a building is being constructed or repairs are being made and the construction or repairs are begun before the date of the mortgage, the contractor, subcontractor, or material company can file a mechanic's lien which will be prior to the mortgage, even though it is filed after the date of the mortgage. Persons performing work or furnishing materials for the improvement of property are by statute entitled to a lien thereon, without filing any notice or taking other proceedings in connection therewith.\textsuperscript{153}

\textit{Inspection.} — The purchaser is required to take notice of possible liens for labor or material for which in most states no record need be made and no notice need be given other than that afforded by the improvements themselves for a period of 30 to 90 days from the time the last item is furnished.\textsuperscript{154} An attorney is therefore in no position to state at the time of

\textsuperscript{153} A mechanic's lien relates back to the time the material was furnished and used in the building, and until that time it is inchoate only. American Surety Co. of New York v. Franciscus, 127 F.2d 810 (8th Cir. 1942). A mechanic's lien relates back to date of visible commencement of work. Brown v. Brown & Co., 25 Tenn. App. 509, 169 S.W.2d 431 (1941).

\textsuperscript{154} Newt Olson Lumber Co. v. Cue, 104 Cal. App.2d 477, 232 P.2d 64 (1951); Sterling Electric Co. v. Kent, 233 Minn. 31, 45 N.W.2d 709 (1951); Peccole v. Luce & Goodfellow Inc., 66 Nev. 360, 212 P.2d 718 (1949). The statutes in Wisconsin distinguish between a principal contractor and a subcontractor, the former having six months after the date of the last charge for labor or materials and the latter having 60 days. Wis. Stat. §§ 289.01, 289.08 (1951). See collected cases in Decennial Digest, Mechanic's Liens Key 132(1).
closing a purchase or a loan that the property is not subject to a mechanic’s lien for which a statement may thereafter be filed, unless he or his client has made sufficient investigation of the premises to determine that no improvements are in progress at the time and that none have been made within the preceding number of days allowed by the statutes. If a lien statement is filed within the required time, the act keeps the lien alive for another limited time, usually one to two years, within which time it is necessary to assert the lien by a bill of complaint; otherwise the lien or the right to enforce it expires on the last date of the period.¹⁵⁵ These liens may be discharged by any of the usual methods, and in case of payment a provision is usually made for an express release by the claimant on the face of the lien record or by a recorded written instrument.

*Priority Over Mechanics’ Liens: Construction Loans.* — Since a mechanic’s lien relates back to the date of the first visible commencement of work, it is advisable to have a picture of the property taken by a reputable surveyor prior to the commencement of construction. The surveyor will photograph the property if requested, and will certify that as of a certain date, no visible work had been started. Since a mechanic’s lien is also superior to a mortgage, a mortgagee should insure his priority by obtaining such a photograph and by recording the mortgage prior to the time construction is started. Since the effective date of any mechanic’s lien will relate back to the time when labor or material was first furnished, it follows that the mortgage will be on record prior to that time and will be a first lien. This is borne out by the decisions. A mortgage executed in good faith to secure advances to pay for labor performed upon a building and materials furnished therefor, and which advances were made, although

¹⁵⁵ A mechanic’s lien statement is not effectual to perfect a lien if it shows affirmatively upon its face that it was filed too late, even though the fact may have been otherwise. Olson v. Heath Lumber Mfg. Co., 37 Minn. 298, 33 N.W. 791 (1887).
after the commencement of the building, will take precedence over liens for labor and material.\textsuperscript{156}

\section*{F. OTHER LIENS AND ENCUMBRANCES}

Whenever there are recitals in deeds, mortgages or other instruments in the chain of title creating liens against the property, the purchaser is charged with notice of the lien created thereby and will take the property subject thereto. The attorney should therefore determine whether or not the particular lien is barred by limitation, and, if not, the lien should be discharged by proper quitclaim deed or in some other manner satisfactory to the parties. The liens most frequently encountered in practice are those created by recitals in deeds (support of grantor;\textsuperscript{157} particular charges in favor of named persons), charges created by will, charges created by court decree, and recitals in deeds that the property is subject to mortgages or trust deeds.

\textsuperscript{156} Wisconsin Planing-Mill Co. v. Schuda, 72 Wis. 277, 39 N.W. 558 (1888). This case was approved and followed in Interior Woodwork Co. v. Larson, 207 Wis. 1, 238 N.W. 822 (1931). A materialman need not have actual notice of mortgage, recorded before first material was furnished mortgagor to give mortgage priority over materialman's lien. Queal Lumber Co. v. McNeal, 226 Iowa 631, 284 N.W. 479 (1939). A mortgage in hands of assignee takes precedence over mechanic's lien which attached prior to assignment but subsequent to execution of mortgage. Finishson v. Waller, 64 Idaho 618, 134 P.2d 1069 (1943). Liens of mortgages, deeds of trust, judgments, and other encumbrances including attachments, created subsequent to time when labor lien attaches or subsequent to time to which labor lien relates, are subordinate to liens of claimants for work or labor performed. White v. Constitution Min. & Mill. Co., 56 Idaho 403, 55 P.2d 152 (1936). See collected cases in Decennial Digests, Mechanic's Liens Key 197.

\textsuperscript{157} The provisions of a deed requiring grantee, in addition to supporting grantors, to pay grantor's debts, doctor bills, funeral expenses, cost of erecting monument, taxes, assessments, interest and requiring grantee to operate farm conveyed and to use proceeds for such purpose created a lien on the land paramount to creditor's rights. Federal Land Bank v. Luckenbill, 213 Ind. 616, 13 N.E.2d 531 (1938). A provision, in a deed executed by a mother to her son, that the son should furnish the mother with a home on the premises so long as she might desire it constituted a "covenant running with the land" and was binding on grantee and all subsequent holders of title including one acquiring title by foreclosure of mortgage executed by the son. Glendening v. Federal Land Bank, 112 Ind. App. 162, 44 N.E.2d 251 (1942). Under deed from father to son reciting a consideration of parental love and affection and requiring son "to further pay" to father one-third of rent received from land conveyed should father demand it, as long as he lived,
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It is frequently advisable to suggest that a survey be made in order to show the exact boundaries of the property, whether the buildings are located within the lot lines, and whether there are any encroachments. In addition, the purchaser should be satisfied that there is no use of the property, by persons other than the owner, of driveways or passageways so as to establish an easement over it. Any substantial encroachment constitutes an encumbrance which would permit the purchaser to reject title.

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the reservation of one-third of the rentals was valid as a “condition running with the land” and hence purchase of such land from the son by purchasers who had notice from recorded deed that full consideration for land had not been paid, were subject to the lien of the grantor on the land to secure payments of the rents. Haven v. Wallace, 290 Ky. 314, 160 S.W.2d 619 (1941).

158 Though contract granting right of way was not recorded, possession of portion thereof by railroad put purchaser on inquiry as to extent. Dunford v. Dardanelle & R. R., 171 Ark. 1036, 287 S.W. 170 (1926). Passageway located one-half on property to be conveyed, and subject to use of others, held "defective title." Hershorn v. Rubenstein, 259 Mass. 288, 156 N.E. 251 (1927).

159 Where tenant's possession extends beyond premises covered by recorded lease, an intending purchaser has duty to inquire as to tenant's rights not included in the lease. Three Sixty Five Club v. Shostak, 104 Cal. App.2d 735, 232 P.2d 546 (1951). Actual possession of land is notice to the world of a claim thereto, and one who, knowing land to be held by one person, buys it from another, will be charged with notice of an unrecorded deed held by party in possession. Taylor v. Perdue, 206 Ga. 763, 58 S.E.2d 902 (1950). If a person purchases an estate from owner, knowing it to be in possession of tenants, he is bound to inquire into their estates, and is affected with notice of all facts in relation thereto. Nikas v. United Const. Co., 34 Tenn. App. 435, 239 S.W.2d 41 (1950). See collected cases in Decennial Digests, Vendor and Purchaser Key 232(2).

160 Keilly v. Severson, 149 Wis. 251, 254, 135 N.W. 875 (1912).

161 One purchasing mortgaged land, without knowledge of mortgage, after being told by one mortgagee that he had lease thereon, was entitled to ascribe mortgagee's possession thereof to lease, and under no duty to inquire further as to additional or other agreement between vendor and mortgagees; latter's possession being consistent with title they claimed. Dilts v. Mecham, 48 Wyo. 342, 45 P.2d 920 (1935).

162 Possession of realty by grantors in warranty deed, containing no reservations of title or interest held not to impart notice to purchaser from grantee of grantor's secret equities. Creighton v. Dorsey, 140 Kan. 688, 38 P.2d 90 (1934). Joint occupancy of premises as family home did not impart notice of wife's claim of any interest other than homestead right. Storz v. Clarke, 117 Neb. 488, 221 N.W. 101 (1928).