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SOME PHASES OF TITLE EXAMINATION AND REAL ESTATE PRACTICE

CHARLES T. BOYD*

Real estate law still constitutes a large field of practice in North Carolina. As the State becomes more and more industrialized, and its general progress continues, the volume of real estate work grows. Lawyers are employed in a large percentage of loan and purchase transactions. The purpose of this article is to present and discuss a few of the matters which arise in the course of title examination and real estate practice, without undertaking to make even a cursory summary of the entire field. The subjects covered are as follows: (1) Statutory Cancellation of Mortgages and Deeds of Trust; (2) Mechanics', Laborers' and Materialmen's Liens; (3) Conveyances by Heir or Devisee within Two Years from Death of Decedent; (4) Violation of Trust Relationship in Foreclosure Sales; (5) Examination of Trustee's Adverse Conveyances; (6) Examination of Title to Easement Rights; (7) Building Restrictions; (8) Parol Trusts; (9) Lunacy; (10) Lis Pendens; (11) Matters Not of Record; (12) Tax Deeds; and (13) Closings.

STATUTORY CANCELLATION OF MORTGAGES AND DEEDS OF TRUST

Since a mortgage or deed of trust is an encumbrance upon title during the continuance of the debt, it should be removed upon the satisfaction of the debt. At common law the method of removal was by release deed, by which the title was reconveyed to the grantor or to the subsequent owner. Under modern business conditions this method of mortgage satisfaction is cumbersome, as it requires a deed of conveyance in each case. This situation gave rise to statutory cancellation which makes a deed unnecessary. The various methods of statutory cancellation in North Carolina are set out in Section 2594 of the North Carolina Code Annotated.

Subsection 1 of said section provides for marginal cancellation by the trustee or mortgagee or his or her legal representative or the duly authorized agent or attorney of such trustee, mortgagee, or legal representative. This is a personal cancellation entered upon the margin of the record by the person making the cancellation, in the presence of the Register of Deeds or his deputy, who witnesses the signature of the person making the cancellation and also affixes his name as witness.

It will be noted that this subsection provides for cancellation in person by the party in whom legal title to the land is vested. The cestui que trust under a deed of trust is not empowered under this subsection to make a personal cancellation on the margin, although this has been frequently done. Neither is the personal representative of the cestui que trust under a deed of trust permitted to make a personal cancellation under this subsection. A duly authorized agent or attorney of the trustee, mortgagee, or legal representative of the trustee or mortgagee may make a cancellation under this subsection.

There have been a great many irregular marginal cancellations by payees or assignees of the mortgage indebtedness. Such cancellations have been made under the impression that such cancellation is authorized by the statute. However, an examination of the wording of the section shows that it is not permitted and it has been necessary to correct many such cancellations by having the mortgagee or trustee enter marginal satisfaction, or by production of the notes and the mortgage deed or deed of trust. The point to be borne in mind is that statutory cancellations must be made strictly in accordance with the language of the statute.

Subsection 2 provides that upon the exhibition of any mortgage, deed of trust or other instrument intended to secure the payment of money, accompanied by the bonds or notes, to the Register of Deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee or assignee of the same, or by any chartered, active banking institution in the State of North Carolina, when so endorsed in the name of the bank by an officer thereof, the Register or his deputy shall cancel the mortgage or other instrument by entry of "Satisfaction" on the margin of the record. This subsection has no application to cancellation in person and provides a method for removing mortgage liens upon the presentation of the mortgage deed or deed of trust, together with all the notes secured thereby. If all the notes are not presented, the Register should not make the entry of satisfaction. Satisfaction may be entered if the papers are marked paid in full by the payee of the notes, the mortgagee, trustee or assignee. If the papers show on their face that they have been assigned, the Register would not be justified in cancelling if they are marked paid by the payee. Likewise, for the assignee or holder to mark the papers satisfied, the assignment must be found thereon, unless the notes or bonds are payable to bearer.

This subsection also provides for entry of satisfaction by the Register upon the papers being presented marked paid and satisfied by any chartered banking institution of the State of North Carolina. Many
mortgage papers are sent through banks for collection and this part of the subsection provides for a convenient method of cancellation. It was argued in *Richmond Guano Co. v. Walston*¹ that this subsection does not provide for the entry of satisfaction by the Register upon presentation of notes and deed of trust marked satisfied and paid, inasmuch as the language of the statute provided that “the register or his deputy shall cancel the mortgage or other instrument by entry of satisfaction.” The court, however, held that it was the intent of this subsection to embrace deeds of trust as well as mortgage deeds.

The last part of this subsection 2 provides for entry of satisfaction by the Register of a mortgage deed or deed of trust upon exhibition of the mortgage or deed of trust providing for payment of money which does not call for or recite any notes secured by it. Under the circumstances, the Register may enter satisfaction upon exhibition of such mortgage or deed of trust marked paid and satisfied.

Subsection 3 provides that upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagor, his agent or attorney, together with the notes or bonds secured thereby, to the Register of Deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes or bonds being at the time of said exhibition more than ten years old, counting from the date of maturity of the last note or bond, the Register or his deputy shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not. This subsection provides a method for cancellation where the mortgage papers are more than ten years old from the date of maturity of the last note presented by the grantor or mortgagor, his agent or attorney, the theory being that if the party who made the lien, or his agent, has the mortgage and notes in his possession, even though they are not marked paid, he is entitled to cancellation.

The second paragraph of subsection 3 was added by Chapter 47 of the Public Laws of 1935 and provides that upon presentation of any deed of trust given to secure the bearer or holder of any negotiable instrument transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof, to the Register of Deeds or his deputy of the county in which same is recorded, the said Register or his deputy shall cancel such deed of trust by entry of satisfaction upon the record and such entry of satisfaction shall be valid and binding upon all persons. There is a proviso which gives the owner of such evidences of indebtedness as may have been lost or stolen the right to have a

¹ 187 N. C. 667, 122 S. E. 663 (1924).
marginal entry made on the record in order to prevent such cancellation. The purpose of this paragraph is to facilitate the cancellation of deeds of trust securing a series of notes or bonds. Oftentimes, the notes fall into different hands and the purpose of the paragraph is to enable the bearer who is in possession of all the notes and the deed of trust to obtain immediate cancellation.

Subsection 4 of said section is as follows: "Every such entry thus made by the Register of Deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been fully executed and recorded." The effect of this section is to give to every cancellation made by the Register the same effect as a deed of release or reconveyance would have. In other words, the cancellation as provided for by statute, while in itself not a reconveyance of the legal title, has the same effect as a reconveyance of the legal title.

Subsection 5 is as follows: "The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby unless the holder of the indebtedness secured by said instrument or party secured by any provision thereof shall file an affidavit with the Register of Deeds in the county where such instrument is registered, in which shall be specifically stated the amount of the debt unpaid, which is secured by said instrument, or in what respect any other condition thereof shall not have been complied with, whereupon the Register of Deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded. Or in lieu of such affidavit the holder may enter on the margin of the record any payments that have been made on the indebtedness secured by such instrument, and shall in such entry state the amount still due thereunder. This entry must be signed by the holder and witnessed by the Register of Deeds. Provided, however, that this subsection shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other in-
instrument relating to the sale, purchase or lease of railroad equipment on rolling stock, or of personal property."

The effect of this subsection is to create a statute of limitations of fifteen years from the date of the maturity of the last note against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, unless the affidavit provided for has been filed or the original entry made. Oftentimes mortgages and deeds of trust, though paid, are not marked off the records and stand in the way of a clear title to the property. The notes and mortgage instruments may not be available in the hands of the grantor or mortgagor and cancellation cannot be had. This subsection was passed in 1923 to become effective January 1, 1924, and the Supreme Court soon held that it could not be construed retroactively so as to affect those who became creditors prior to its passage.\(^2\) During the fifteen-year period following the passage of the Act the subsection was of no practical value. However, the fifteen-year period from the effective date having expired on January 1, 1939, there may now be cases where mortgages and deeds of trust, given after the effective date, may be barred of enforcement by the terms of this statute.

There are numerous North Carolina cases involving the point of irregular cancellation. The question usually arises in a suit between the holder of the indebtedness secured by the mortgage alleged to have been irregularly cancelled and a subsequent purchaser or encumbrancer. The rule is that if the cancellation is in the exact manner prescribed by the statute, without variance, a subsequent bona fide purchaser or encumbrancer, for value, may rely thereon. However, if there is anything in the entry of satisfaction or in the circumstances surrounding the transaction which would put a third party on notice, the holder of the original indebtedness is protected. For instance, if the instrument is cancelled before the maturity of all the notes,\(^3\) or if the instrument is cancelled by someone other than the person permitted to cancel under the statute,\(^4\) or if the entry of satisfaction refers to one bond, when as a matter of fact there are several bonds secured by the mortgage or deed of trust,\(^5\) it is held that there is notice to the subsequent purchaser or encumbrancer, and the original holder of the indebtedness will be protected. A forged cancellation is void as against the mortgagee.\(^6\)


\(^3\) Wynn v. Grant, 166 N. C. 39, 81 S. E. 949 (1914).


\(^5\) Ibid.

REAL ESTATE PRACTICE

MECHANICS', LABORERS' AND MATERIALMEN'S LIENS

In real estate transactions involving new construction, the matter of mechanics', laborers' and materialmen's liens is an important one. There may or may not be a public record of liens claimed. The statutes provide lien security for laborers and materialmen in two classes of cases. The first is where the claimant has direct contractual relations with the owner of the property. The second is where the claimant has had no contractual dealings with the owner but has furnished labor or material to a contractor or sub-contractor. In handling a loan, purchase, lease or other transaction in connection with property which is newly repaired or constructed, search should be made of the records to see if any liens have been filed, and there should also be inquiry outside the public records to see if any claims remain unpaid. If so, it is advisable to take protection against such claims either through payment, waiver of lien, title insurance or indemnity bond. We treat firstly the case of a lien arising out of direct contractual relations with the owner and secondly the right of lien based on the furnishing of labor or materials to a contractor or sub-contractor.

Nature of the lien. "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated . . . shall be subject to a lien for the payment of all debts contracted for work done on the same or material furnished."

This is a statutory lien conferred by the laws of North Carolina upon mechanics, laborers and materialmen who furnish labor and material for the betterments upon the property of the owner with whom they have entered into a contractual relation. The statutes conferring and enforcing the liens are designed to protect those who but for the statute would have no security except the personal obligation of the person for whom the work is done or to whom the materials are furnished. The lien also attaches to the land upon which the building is situated. This lien is statutory, given to enforce the debt, and without a debt there can be no lien.

Lien upon property of a married woman. A lien may be filed against property which stands in the name of the husband alone or in the name of the wife alone, or in their joint names. Formerly, before a married woman had a right to contract in her own name with respect to her separate estate the lien could not be filed against her separate property.

The former status of a married woman's estate created a hardship

upon furnishers of labor and materials. Section 2434 of the Code has remedied this situation and allows the lien upon the property of a married woman when it appears that a building was completed or repaired on her land with her consent or procurement. In such case she shall be deemed to have contracted for such improvement.

**Filing of notice.** If the debt is against any interest in real estate regardless of the amount, notice of lien must be filed in the office of the Clerk of the Court in the county where the labor was performed or the material furnished. The notice of lien shall specify in detail the character and amount of materials furnished or labor performed, and the time thereof. Also an adequate description of the property upon which the lien is claimed must be given. Without such particulars a lien is irregular and void.

If the lien as filed is defective an amendment cannot be allowed by the court in the action to enforce the lien. The reason given is that the mechanics' lien is not a process on pleading but an instrument filed for record and therefore the court has no power to allow amendments thereof. In *Jefferson v. Bryant* the notice of lien did not set out the date of furnishing the labor and materials. In an action to enforce the lien in Superior Court an amendment was allowed supplying the needed information. On appeal it was held that the lien as filed was defective and that the Superior Court had no power to allow an amendment. If the law were otherwise, the claimant would be allowed to correct the errors in his notice at any time.

The notice of lien shall be filed at any time within six months after the completion of the labor or the furnishing of the materials. Upon being properly filed, within the given time, the lien relates back to the first furnishing of labor or materials. Thus it appears that a person furnishing labor or material has for filing his lien a period of time extending from the beginning of furnishing of labor and materials until the completion thereof, plus six months.

**Priority of liens.** As among liens themselves, where the lien is based on a debt between the owner and claimant, all claims filed and proved are paid and settled according to the priority of the notice of lien filed with the Clerk. This is true even though a claimant who files last began to furnish materials or labor at an earlier date than the claimant

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9 N. C. CODE ANN. (Michie, 1939) §2469.
10 Jefferson v. Bryant, 161 N. C. 404, 77 S. E. 341 (1913); Cook v. Cobb, 101 N. C. 68, 7 S. E. 700 (1888); Wray v. Harris, 77 N. C. 77 (1877).
12 161 N. C. 404, 77 S. E. 341 (1913).
13 N. C. CODE ANN. (Michie, 1939), §2470.
15 N. C. CODE ANN. (Michie, 1939) §2471.
who files first. But as between liens and other subsequently acquired interests, since each lien, when properly perfected, relates back to the time the claimant began to furnish, the lien, when so perfected, will take priority over all those who claim to have acquired an interest in the land after the date upon which the first labor or material was furnished. Therefore, the fact that a lien relates back may give it priority over mortgagees or others who have acquired interests in the property, but will not give it priority over another lien which has been filed earlier.

**Suit to enforce lien.** The action to enforce the lien must be commenced within six months from the date of filing the notice. But if the debt is not due within six months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due.

Failure to commence action within the time specified discharges the lien. But even after the lien is lost, the claimant may still have a civil action on the debt against the owner and the ordinary statute of limitations would apply as to the time in which said action might be brought.

**Execution.** Section 2477 of the Code provides that upon judgment rendered in favor of the claimant the execution for the collection and enforcement thereof shall be in the ordinary manner except that the execution shall direct the officer to sell all the right, title and interest which the owner had in the particular premises at the time of filing notice of the lien, before such execution is extended to the general property of the defendant. The judgment for the debt is, of course, a lien against all of the property of the defendant owner—the statute merely provides that the property subject to the lien must be sold first.

No execution for the enforcement of a lien issued by a Justice of the Peace shall be enforced against real estate or any interest therein. The Justice’s judgment may be docketed in the Superior Court for the purpose of selling such estate or any interest therein. The correct legal procedure seems to be that if a lien is claimed against real estate and the amount of the debt is less than $200.00, the lien is to be filed with the Clerk of the Court, judgment taken before a Justice of Peace, and the judgment docketed in the Superior Court in order that the execution may issue to satisfy the lien.

**Priority between mortgages and liens.** A mortgage or deed of trust recorded before the furnishing of labor and material takes priority over

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a lien subsequently perfected. This is true even where the lien is for construction purposes and the money paid out from time to time. The theory is that the person furnishing labor or materials has notice of the mortgage and therefore can only claim a lien upon the owner's equity. The rule applies the ordinary doctrine of taking with notice. However, as was noted above, a lien properly filed and enforced will take priority over a mortgage or deed of trust recorded after the date on which the claimant began to furnish labor or material, as the lien relates back to the beginning of performance.

**Homestead exemption.** Labor liens come ahead of the owner's homestead exemption. A materialman's lien does not come ahead of the homestead exemption except in a case where the entire building is put up by one man; in such an instance the contractor has a lien which will come ahead of the homestead exemption.

We come now to the rights of sub-contractors and those who have furnished labor or materials to sub-contractors or the general contractor.

**Lien of sub-contractors, etc.** Section 2437 of the Code creates a lien in favor of the sub-contractors and laborers who are employed to furnish or who do furnish labor or material for the construction of improvements on real estate. This is a lien created by statute for the purpose of protecting those who contribute to the betterments on the property of the owner without having contractual relations with the owner, the contract being generally with the original or general contractor. In the case where the owner makes a contract for the construction of a building with a general contractor and pays out the money to him, there exists a possibility that the contractor will fail to pay the persons who have furnished labor and materials and these latter people would be left without a remedy except a civil suit against the contractor. To remedy this situation the legislature has passed successive statutes designed to furnish protection to the sub-contractor, laborer and materialman to the extent of what is due the contractor by the owner.

**How lien acquired.** The lien is acquired by giving notice to and furnishing an itemized statement of the account to the owner before payment by the owner to the general contractor. Liens acquired in

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this manner are limited to the extent of the amount due the contractor, which amount shall not exceed the original contract price. This limit is placed upon the owner’s liability for the reason that it would work an undue hardship upon him to pay the contractor the full price and then have to pay for labor and materials perhaps to the full extent of all furnished if it should happen that the general contractor failed to pay any of his bills.

If the contractor is paid in advance so that no money is due him after work has begun, then no lien can be had against the property of the owner.

The notice furnished by the claimant to the owner must be an actual notice. It is not sufficient that the owner knew that labor and materials were being supplied and furnished for the betterment of his property.

The lien is acquired by giving notice to the owner and a claim of lien does not have to be filed with the Clerk of the Court. This is expressly provided in Section 2441 of the Code and in numerous decided cases.

Rights acquired by giving notice. By filing notice and the itemized statement claimant acquires a lien on the property of the owner and also the right to participate in the fund due by the owner to the general contractor. This fund is really a trust fund. The leading case on the rights acquired by a claimant when he files his notice is Foundry Co. v. Aluminum Co. The claimant acquires a lien on the property and also the right to participate in the trust fund. Section 2439 of the Code provides that the contractor must furnish to the owner a list of the people who are due money from him. It is the owner's duty to hold out this money in his settlement with the contractor. It is the owner's duty, after notice is given, to pay the claimant out of the money due the contractor. If the owner does pay, he is in no worse position than if he paid the contractor directly, for his liability is limited to the amount due the contractor. If, however, the owner fails to pay the claimant and either withholds the money or pays the contractor, a personal liability arises from the owner to the claimant and the claimant can sue the owner directly for the amount of his claim up to the amount due the contractor in a civil action. The contractor is a necessary party.

26 Norfolk Bldg. Supply Co. v. Elizabeth City Hospital Co., 176 N. C. 87, 97 S. E. 146 (1919).
28 Bond v. Pickett Cotton Mills, 166 N. C. 20, 81 S. E. 936 (1914).
29 172 N. C. 704, 90 S. E. 923 (1916).
along with the owner.\textsuperscript{30} So the claimant is entitled to have his money paid him out of the money due the contractor and if he is not paid in this manner, he can sue the owner for it.

\textit{Suit to enforce lien.} In order to avail himself of the security afforded by the lien the claimant must sue on his claim within six months after giving his notice to the owner.\textsuperscript{31} However, if he loses his right of lien upon the property acquired by giving notice, by failure to sue upon it in six months, he can still maintain his civil action against the owner.\textsuperscript{32}

Thus it appears that civil action against the owner for judgment need not be brought within six months from the date of filing the claim.\textsuperscript{33} It also seems unnecessary to file notice of lien with the owner within six months from the final furnishing of labor and materials; but rather, notice may be filed so long as there is any money due from the owner to the contractor. Section 2438 of the Code provides that notice may be given at any time before settlement with the contractor.

\textit{Payment of claims.} It is interesting to note that no claim can be acquired against the owner except through the lien gained by giving notice. In case of contractual relations between the owner and the claimant the right of lien depends upon the existence of a debt. In the contractor cases there is no debt between the owner and claimant, but by giving notice and thereby acquiring a lien the claimant obtains the right to maintain a civil action against the owner to the extent of the owner's indebtedness to the creditor just as though the debtor-creditor relation had existed. There is really a substitution of the sub-contractor, laborer and materialman to the rights of the general contractor against the owner.\textsuperscript{34}

If there are not sufficient funds in the hands of the owner due the contractor to pay all claims which are filed with him, it is the owner's duty to pay the claims pro rata. Where there is a contractual relation between the owner and the claimant, the claims are paid in the order in which they are filed in the office of the Clerk of the Court. Claimants share pro rata in the fund due the contractor and paid out by the owner, if the fund is so paid out; if it is not paid out and it is necessary for the claimant to sue the owner personally, he can have judgment only for his pro-rata share of the amount due the contractor; and if

\textsuperscript{31} Hildebrand v. Vanderbilt, 147 N. C. 639, 61 S. E. 620 (1908).
\textsuperscript{33} Campbell v. Hall, 187 N. C. 464, 121 S. E. 761 (1924).
\textsuperscript{34} Morganton Hardware Co. v. Morganton Graded Schools, 150 N. C. 680, 64 S. E. 764 (1909).
the claimant has perfected his lien by bringing suit upon it, his lien is effective in securing his claim only to the pro-rata extent.\textsuperscript{35}

If at the time notice is filed with the owner there is no money due by the owner to the contractor, and sums later become due the contractor by the owner, these sums are subject to a lien.\textsuperscript{36}

**Conveyance by Heir or Devisee Within Two Years from Death of Decedent**

A troublesome problem in connection with title examination and real estate practice is raised when the land is conveyed, or sought to be conveyed, by a devisee or heir within two years of the date of death of the decedent. With respect to resident decedents, Section 76 of the Code provides that all conveyances of real property of a decedent made by any devisee or heir at law within two years of the death of the decedent shall be void as to the creditors, executors, administrators and collectors of such decedent but such conveyances to bona fide purchasers for value and without notice, if made after two years from the death of the decedent, shall be valid even as against creditors.

The first problem raised under this statute is whether such a conveyance made within two years of the death of the decedent is absolutely void or conditionally void. The purpose of the statute is, of course, to protect creditors of the deceased. It has been uniformly held that such a conveyance, made within two years, is not absolutely void but is only conditionally void as against creditors in cases where the personal estate is not sufficient to pay the debts.\textsuperscript{37} Such a conveyance is therefore good, even if made within the two-year period, if all the debts have been paid. If one takes a conveyance from the heir or devisee after the expiration of the two-year period from the death of the decedent, but is not a bona fide purchaser for value and without notice, then the land is still subject to debts. It has been held that the fact that the estate has not been settled does not constitute notice of outstanding debts after the two-year period has run.\textsuperscript{38}

In many cases the estate is settled and the personal representative's final report or account is filed in the Clerk's office at the expiration of the one-year notice to creditors. Such reports oftentimes recite that all the debts have been paid. If actually the debts have not been paid


\textsuperscript{36}Norfolk Bldg. Supply Co. v. Elizabeth City Hospital Co., 176 N. C. 87, 97 S. E. 146 (1918); Borden Brick & Tile Co. v. Pulley, 168 N. C. 371, 84 S. E. 513 (1915).

\textsuperscript{37}First National Bank of Henderson v. Zollicoffer, 199 N. C. 620, 155 S. E. 449 (1930); Davis v. Perry, 96 N. C. 260, 1 S. E. 610 (1887).

in such a case and are not barred by the statute of limitations, a conveyance made between the time of filing such report and the expiration of the two-year period from the death of the decedent may be set aside, and the property subjected to the claim of the creditor.

The question has been frequently asked as to whether a conveyance made during the two-year period is good against creditors after the expiration of the two years. If the heir or devisee waits until the two years is out to make his deed, the grantee takes a good title provided he is a bona fide purchaser for value and without notice. Thus it would seem that a conveyance made within the two-year period should be valid after the expiration of two years. However, the statute reads differently, and it is believed that the passage of time does not place the property beyond the reach of creditors.

In *Murchison v. Whitted*, the land was sold within the two years and then resold by the grantee after that time to a bona fide purchaser for value and without notice. It was held that the last purchaser obtained good title, on the general principle of equity that the right of the creditors to set aside the conveyance, being equitable in nature, is cut off by a sale to an innocent purchaser for value. At the time of this decision, the statute provided that conveyances made within two years of qualification of the personal representative could be set aside at the instance of creditors, but the law was changed in 1935 and the amendment made the limitation begin to run from the death of the decedent rather than from the grant of letters.

An interesting question arises as to whether encumbered property in which there is no equity for the general creditors of the estate or for the heirs or devisees, in whom the legal title is vested, may be released during the two-year period to the lien creditor, who holds the encumbrance, by the deed of the heir or devisee, with the joinder of the personal representative, when the personal representative has been so authorized by the probate court. Oftentimes, it is desirable to release such property to the lien creditor by deed rather than have it foreclosed or otherwise subjected to the payment of the indebtedness secured by the lien. The purpose of the statute is to make real property available for the payment of debts when the personal estate is insufficient and to prevent the heir or devisee from putting it beyond the reach of the general creditors. Therefore, it would seem that if the personal representative files a petition setting out the facts and showing that there is no equity for the general creditors, an order might be entered authorizing the release and empowering the personal representative to join in a deed from the heirs or devisees to the lien creditor. This practice, with perhaps some variation in form, is followed in bankruptcy, re-

87 N. C. 465 (1882).

ceivership and other liquidations. However, this procedure is not authorized by any statute and might not be upheld. The validity of such action might be challenged in a case where the petition failed to set out the true facts and where there is actually some equity in the property for the general creditors. If actually there is no equity, then the general creditors would not be interested in undertaking to subject the property to their claims.

VIOLATION OF TRUST RELATIONSHIP IN FORECLOSURE SALES

There have been several North Carolina cases in recent years involving this subject. Members of the bar have always been acquainted with the general principle that where the relation of mortgagor and mortgagee exists, a conveyance of the equity of redemption by the mortgagor to the mortgagee may be subject to attack, and that the same situation obtains if the mortgagee buys the property at his own sale. In a number of cases the rule in the mortgagor-mortgagee situation has been applied by analogy to other trust relationships. The following are the most general of the trust relationships: (1) attorney and client; (2) principal and agent; (3) partners; (4) trustee and cestui que trust; (5) guardian and ward; (6) executor and administrator; (7) mortgagor and mortgagee; (8) parent and child.

Since a tenant in common who buys in the entire estate at an adverse sale is deemed to purchase for the benefit of the co-tenants, it was held in *Kelly v. Davis* that, where one of the tenants in common conveyed to the other by a warranty deed, and where both were liable on a mortgage debt on the property, the executor of the grantor, who bought at the foreclosure sale, took the property in trust for his co-tenant with a right of lien for one-half of the mortgage debt which he discharged.

In *Sutton v. Sutton* it was held that one tenant in common, under an obligation to discharge an encumbrance on the land, may not procure a foreclosure sale thereunder and acquire either directly or indirectly, the title to the entire interest in the land to the exclusion of his co-tenant.

In *Graham v. Floyd* it was held that where a guardian ad litem bid in the property and had the title taken in his wife's name, the transaction was voidable by the mortgagor.

"It has long been the law that an administrator cannot purchase property at his own sale, even in good faith, fairly and for a fair price;
certainly he cannot in any case make the purchase without the sanction or ratification in some sufficient way manifested by those interested. This rule is well settled and founded in reason, justice and sound policy.44

The most familiar case of the application of the rule that one in a position of trust cannot purchase at his own sale grows out of the relationship of mortgagor and mortgagee. It has long been the law that the mortgagee cannot buy at the sale without running the risk of having the purchase attacked. The law gives the mortgagor, as owner of the equity of redemption, the right to have the sale set aside.46 Similarly, an officer of a corporate mortgagee may not bid in property and later deed it to the mortgagee, since such transaction, in substance, is the same as if the mortgagee itself had purchased.47 However, where the mortgagee does purchase the property, the sale is not absolutely void but voidable, at the option of the mortgagor.48 Where the mortgagee buys at the sale and then conveys the property to an innocent purchaser, for value, the mortgagor may elect to disavow the foreclosure sale and recover damages from the mortgagee for the wrongful conversion of his equity.49

On the same principle of preserving the rights of the mortgagor, a conveyance by the mortgagee to the mortgagor, without sale, is likewise subject to attack.50

While purchase by the mortgagee at his own sale creates a cloud upon title, it is well settled in North Carolina that the cestui que trust has the right to buy at the trust sale unless fraud or collusion is alleged and proved.51

Likewise, the cestui que trust may take a conveyance of the equity

of redemption from the mortgagor. However, if the conveyance is induced by fraud or by unfair representations of the trustee, the sale is open to attack. Where the mortgagor conveyed to the cestui que trust but it appeared that the trustee, who was active in inducing the deed, was related to the cestui que trust, and was working for himself or himself and the cestui que trust, a judgment of non-suit in the mortgagor's action was reversed.\textsuperscript{52}

While the cestui que trust may take a deed for the equity of redemption, or buy at the sale, where there is no fraud or collusion, the rule is otherwise where the trustee or his agent makes the purchase. The trustee is required to be impartial in the transaction, without personal interest. Where an attorney for the trustee sold the property, bought it in, and took a deed from the trustee, it was held that the mortgagor might elect to treat the sale as a nullity.\textsuperscript{53}

In a slightly different case, the attorney for the trustee, who was an officer of the corporate creditor, sold the land and bid it in for the corporate creditor. It was held that the attorney was agent for the trustee, the seller, and also for the purchaser. The plaintiff's verdict for wrongful conversion of his equity was held to stand.\textsuperscript{54}

The most important case of this general type is that of \textit{Mills v. Mutual Building \\& Loan Assn.}\textsuperscript{55} Therein, the trustee was an executive officer of the defendant Building and Loan Association. He authorized the amount of the bid, sold the land as trustee, bid it in for the defendant Building and Loan Association, and then executed deed to said defendant which resold the land to an innocent purchaser. The case was a civil action for accounting and to recover damages for breach of trust in making a wrongful foreclosure. It was held that the relationship was actually that of mortgagor and mortgagee and that the plaintiff was entitled to take his case to the jury.

This decision received much attention among attorneys engaged in real estate practice; for there have undoubtedly been many instances of foreclosure sales where the trustee, although connected in some way with the lender, has bid in the property for the mortgage creditor. Many lawyers have innocently engaged in this practice, not realizing the legal implications. As a result of the decision the matter was taken to the 1941 Legislature and an act was passed which provides that "No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after the ratification of this section in which a foreclosure sale which occurred prior to January 1, 1941, under a deed

\textsuperscript{52} Hinton v. West, 207 N. C. 708, 178 S. E. 356 (1935).
\textsuperscript{53} Lockridge v. Smith, 206 N. C. 174, 173 S. E. 36 (1934).
\textsuperscript{54} Davis v. Doggett, 212 N. C. 589, 194 S. E. 288 (1937).
\textsuperscript{55} 216 N. C. 664, 6 S. E. (2d) 549 (1939).
of trust conveying real estate as security for a debt is attacked or otherwise questioned upon the ground that the trustee was an officer, director, attorney, agent or employee of the owner of the whole or any part of the debt secured thereby, or upon the ground that the trustee and the owner of the debt or any part thereof have common officers, directors, attorneys, agents or employees.”

EXAMINATION OF TRUSTEE’S ADVERSE CONVEYANCES

Many of today’s titles are dependent on trustees’ deeds under deeds of trust conveying one or more parcels of land to secure the payment of debt. Under the original deeds of trust, title is vested in the trustee. If the trustee should release a portion of the land to the mortgagor, or his grantee, or a subsequent grantee, and there should later be a foreclosure of the deed of trust, and the trustee erroneously includes the entire tract in the description of the property conveyed, quite clearly, the trustee’s deed would not pass title to the portion released. There may be a question as to the validity of such a release in which the holder of the indebtedness does not join, but for present purposes we assume a valid release either by the trustee alone or by the trustee with the joinder of the holder of the indebtedness.

Many attorneys fail to examine all the conveyances made by the trustee during the period from the creation and registration of the deed of trust to the time of the foreclosure. In most communities a few individuals are named trustee in large numbers of instruments and to examine their adverse conveyances adds materially to the work. However, a release by the trustee can generally be found only by examining the trustee’s cross-conveyances. It might possibly be found by checking the mortgagor’s conveyances during the period from the creation of the deed of trust to the foreclosure provided the practice is followed in the Register of Deeds office of cross-indexing such instruments under the name of the maker of the deed of trust, as is done in the case of trustees’ deeds. However, there is a difference in that a release deed runs in favor of the mortgagor, his grantee or a subsequent grantee, while a trustee’s deed in foreclosure is a conveyance against the mortgagor. Furthermore, lawyers do not examine the mortgagor’s conveyances during such period where the title is found to be good in the mortgagor at the time of the registration of the deed of trust. Since the holder of the indebtedness may not be known, the only sure way of finding such a release deed is by examining the conveyances of the trustee.

Easements over adjoining property may tend to increase the value of land. The value of many properties, especially in cities, depends upon the means of ingress and egress, and on other easements. In the case of homes, it is quite common to find joint driveways between two properties, with the land contributed by both owners, each having an easement over the portion of the land contributed by the other. Such a situation will eliminate the necessity of an additional driveway. In business districts the buildings usually occupy most of the space on the important streets and ingress and egress is afforded to the rear of the buildings by several alleys, which usually enter the block from streets on which the property is less valuable. Thus a number of buildings may be serviced by a few inside alleys. Party walls between business buildings tend to reduce construction costs, as such walls save the cost of erecting complete walls for every building. Utility easements, such as rights of way for telephone and telegraph lines, water lines and pipe lines, are both common and necessary. Thus the easement over a servient tenement may considerably enhance the value of the dominant tenement.

Where such an easement is appurtenant to the locus in quo, and an examination is made of the title to the property, it is essential to know that the title to the easement is good, as well as to know that the title to the locus in quo is good.

If, for instance, a joint alleyway is created between two properties and there is an outstanding mortgage on one of the properties at the time of the right of way agreement and the holder of the mortgage does not join in the agreement, and there is a subsequent foreclosure of the mortgage, the purchaser at the sale takes free and clear of the easement, and is not bound to give it validity unless he chooses. Likewise, in the case of the erection of a party wall, if there is an unsatisfied mortgage on one of the properties at the time of the agreement and the holder does not join in, and there is a later foreclosure, the purchaser is not bound by the agreement. Of course, in such cases, the new purchaser will generally want the easement to stand, as it is probably of as much benefit to his property as to the other property.

However, it is necessary to examine the title to the easement in order to be sure that the title to the appurtenance is good. Where business property is serviced by alleyways, and it is necessary to use these alleys in order to bring in goods for sale in retail stores, the value of the easements is very considerable. In such cases, it is sometimes necessary to examine a number of other titles in order to be able to establish good title to the easement.
Likewise, in drawing such easement and right of way agreements, in order to make them effective, care should be taken to make sure that all parties in interest in the servient tenement, including lienholders, sign the agreement. Otherwise, one of the situations pointed out above can very readily arise.

**Building Restrictions**

The building restriction is in general use today, especially in high-grade residential sections. The theory behind such restrictions is to so limit the use that may be made of property as to require compliance with certain standards, thereby maintaining the character of the neighborhood. These restrictions are generally set out in deeds executed by the owner or developer of the subdivision. Such restrictive covenants generally deal with the subjects of setback lines, both front and side, minimum building costs, racial occupancy, residential and commercial use, and other matters having to do with the improvement and use of land.

In the acquisition of property today it is just as important to know what use can be made of it as it is to know that the title is good. Limitations on use are generally found in the building restrictions, if any, and in municipal ordinances. Therefore, this subject should be carefully examined at the time of purchase or loan. Very few restrictions in general use today carry reversionary clauses and the violation of the restrictions does not forfeit the title. However, such violation may make it impossible to borrow money on the property unless the violation is trivial and does not impair the value.

Minor violations, such as failure to meet by a few inches the setback restrictions, are generally not considered serious. Violations of restrictions concerning minimum building costs are in the same category. However, the degree of violation may become important in any case and may affect the marketability of the title.

The restrictions sometimes contain provisions for curing violations by quitclaim deeds from the adjoining owners. In such a case it is necessary to proceed exactly in accordance with the wording of the curing provision. Where there is no provision for curing, it is necessary to either pass the violation or obtain quitclaim deeds from all those who can possibly have any interest in the matter. This is difficult to determine, as it is generally considered that when a subdivision is laid out under a general plan or scheme of development and uniform restrictions are inserted in all the deeds, that all owners in the subdivision may have an interest in the maintenance of the restrictions with reference to every lot. In some cases, it may be considered that only those in a particular block have any real interest and that their quitclaim
deeds will be sufficient. Where such deeds are obtained, lienholders must join in the execution of the deed.

Such restrictions are generally considered to be equitable, negative easements, and are so held to be in this State.\(^7\) Such easements are within the Statute of Frauds and may not be proven by parol;\(^8\) and since a writing is required, the provisions of the Connor Act are applicable with respect to notice.

Mutual restrictions are enforceable between owners of properties in the same subdivision only when there is a general plan or scheme of development with the intent that it shall affect the whole property.\(^9\) Whether there is such a common plan or scheme of development depends upon whether or not substantially the same restrictions are inserted in all the deeds, whether part of the lots are affected with restrictions while others are conveyed without restrictions, whether the right to change and alter the restrictions is reserved by the developer and the owner of each lot, and similar facts. This does not mean, however, that identical provisions must be inserted in all the deeds. Minimum cost restrictions may vary in the various blocks. It was held in *Pepper v. Development Co.*\(^6\) that where a development company sells adjoining lots with different restrictions as to cost, it is not liable to the owner of one lot for damages by reason of the fact that the deed to the adjoining lot provided for a smaller cost.

Where the character of a neighborhood changes substantially, so that it is no longer equitable to enforce restrictions, equity will intervene and grant relief. In such a case the restrictions will not be enforced.\(^61\) Perhaps the chief illustration of this case is where a residential neighborhood is invaded by business and has to give way to natural progress and development.

There are many interesting situations in the law of this subject with reference to definitions and the construction of various restrictional provisions. Many such restrictions limit the use of property to residential purposes and prohibit the erection of more than one residence or dwelling house on a given lot. In *Bailey v. Jackson*\(^62\) it was held that where the restrictions provided that not more than one residence could be built, an apartment house could not be constructed, as it contained more than one residence. The word "residence", however, is more restricted

\(^7\) Davis v. Robinson, 189 N. C. 589, 127 S. E. 697 (1925).
\(^8\) Ibid.
\(^6\) 211 N. C. 166, 189 S. E. 628 (1937).
\(^62\) 191 N. C. 61, 131 S. E. 567 (1926).
in meaning than the wording "dwelling house". It has been held that a provision containing the word "dwelling" or "dwelling house" includes an apartment house and therefore that an apartment can be built although the restriction prohibits the erection of more than one dwelling.\textsuperscript{63} The theory is that a dwelling house is a broader term than residence and may refer to a building in which more than one family resides.

It is well settled that where restrictions are applicable, and there is a threatened violation, the courts will enjoin the violation.\textsuperscript{64}

With respect to the results of mortgage foreclosure, restrictions occupy the same position as a conveyance of an interest in land or any other encumbrance. Thus where restrictions were imposed on land after the registration of a deed of trust, which was later foreclosed, the land was freed from the operation of the restrictions by reason of the foreclosure.\textsuperscript{65}

\textbf{Parol Trusts}

One of the difficult problems in title examination and real estate practice is that which is presented when a lawyer has information which leads him to believe that the land is really owned by someone other than the holder of the record title. Sometimes this fact is definitely stated to be the case. It oftentimes arises when the true owner is in financial difficulties or has judgments docketed against him. He then resorts to the device of acquiring or keeping property in the name of some other person. Will a deed or monetary lien from the holder of the record title be good?

The subject of parol trusts in North Carolina is discussed in an article in the \textit{North Carolina Law Review} by Lord and Van Hecke.\textsuperscript{66} There is no statute in North Carolina specifically requiring the creation or proof of trusts in land to be in writing. The seventh section of the English Statute of Frauds\textsuperscript{67} which provides that declarations or creations of uses or trusts in lands must be manifested and proved by a memorandum signed by the party declaring the trust, has never been adopted in North Carolina, although it has been adopted in many states. Section 988 of the North Carolina Code, requiring all contracts to sell or convey lands, tenements or hereditaments, or any interest therein, and all leases and contracts for leases exceeding three years in duration to be in writing, applies to legal interests in land, and not to equitable interests.

\textsuperscript{65}St. Louis Union Trust Co. v. Foster, 211 N. C. 331, 190 S. E. 522 (1937).
\textsuperscript{66}Lord and Van Hecke, \textit{Parol Trusts in North Carolina} (1930) 8 N. C. L. Rev. 152.
\textsuperscript{67}29 Car. II, c. 3, §7 (1676).
It has also been held that the Connor Act applies only to written instruments capable of registration and not to parol trusts.68

The question next arises as to what parol trusts are cognizable under the law of the State of North Carolina. As pointed out in the Law Review article above cited, the only parol trust recognized by the courts of this State is one created prior to or contemporaneously with a conveyance by A to B for the benefit of C. That is, if A conveys to B and it is understood at the time of the conveyance that B is to hold in trust for C, then a parol trust arises. This is a trust created by oral agreement. Other trusts are created by law, as resulting trusts and constructive trusts. The resulting trusts are more numerous and generally obtain where the purchase price of land is paid by one and the title is taken in the name of another. In such case there is a resulting trust in favor of the one who paid the money. A good summary of the law of resulting trusts is to be found in Tire Co. v. Lester.69 It was there held that one who furnishes the purchase money at the time of purchase has a trust whether expressed or not. A resulting trust is not within the Statute of Frauds, but can only be proved by clear, strong and convincing evidence.

In Pritchard v. Williams70 it was held that a parol trust is valid against the holder of the legal title unless the latter is a bona fide purchaser for value and without notice of the equity. Former Chief Justice Clark dissented on the ground that the Connor Act was intended to strike down equities arising by parol or by implication of law, thus making the recording acts applicable to equitable as well as legal interests. In Roberts v. Massey71 it was held that the Connor Act does not apply to equities which rest in parol and are, therefore, incapable of registration. In Spence v. Pottery Co.72 a title had been taken in the name of the husband, although the wife furnished part of the purchase money. She sued to have the title established as an entirety when it was about to be sold to satisfy judgments against her husband. It was held that she was entitled to show a resulting trust, which is not within the Connor Act, even though this result had the effect of eliminating the judgment creditors who were deemed to take no higher interest than their judgment debtor.

From the foregoing it appears that oral trusts, equitable in their nature, are not prohibited in North Carolina by the Statute of Frauds,

69 190 N. C. 411, 130 S. E. 45 (1925).
70 175 N. C. 319, 95 S. E. 570 (1918).
71 185 N. C. 164, 116 S. E. 407 (1923).
72 185 N. C. 218, 117 S. E. 32 (1923).
the seventh section of the English Statute not having been adopted in this State. North Carolina recognizes oral trusts created prior to or simultaneously with a conveyance and also recognizes certain trusts created by implication of law, as resulting and constructive trusts. Since these equities do not constitute legal interests in land, but equitable interests, they are held not to come within the statute requiring a writing. The Connor Act is then held to apply only to contracts and conveyances required to be in writing and since these equities are not in writing they do not come within the terms of the Connor Act. Therefore, they are effective against the holder of the legal title unless that holder is a bona fide purchaser for value, without notice, in which case the equity is cut off upon general equitable principles.

Thus if it is admitted that the legal title is in one person and that another really owns the land, a purchase or loan transaction cannot safely be had with the holder of the legal title without barring the holder of the equitable interest. This may be done by having the equitable holder quitclaim all his interest to the holder of the legal title or by having him otherwise surrender his equity. This article does not purport to discuss the question of whether or not an attorney's notice of an outstanding equitable interest would be held to bind his client, but it is much safer to proceed on the theory that it would. Of course, if there is no knowledge of the equity, and if the transaction is for value, the equity is cut off.

Lunacy

Conveyances by persons non compositus mentis may be set aside. This is elementary law. In order to give notice of the names of persons who have been judicially declared to be of unsound mind, a lunacy docket is kept in the office of the Clerk of the Superior Court. This docket shows the names of all such persons and the date of adjudication. It is believed that this book is not generally examined by lawyers in making title searches. However, since the lunacy docket is a public record, failure to examine it would probably be held to constitute negligence.

In the making of a conveyance, the inchoate right of dower of an insane wife may be conveyed by the husband provided he follows the provisions of the statutes. Section 1004 of the Code provides that "Every man whose wife is a lunatic or insane and whose homestead has been allotted, may bargain, sell, release, mortgage, transfer and convey any of his real estate by deed, mortgage deed, deed of trust or lease, except his homestead, without the signature or private examination of his wife: Provided, that the clerk of the superior court of the county in which the wife was adjudged a lunatic or declared insane, or the superintendent of an insane institution of the state, or any other state,
shall certify under his hand and seal that she has been adjudged a lunatic or declared insane, and that her sanity has not been declared restored as is provided by law, and this certificate must be attached to the husband's deed, mortgage deed, deed of trust, or lease. This section does not apply to the homestead of the husband.

The above section was re-enacted in 1923\(^7\) and is now Section 4103(a) of the Code.\(^5\) In a summary of 1923 statutory changes in the *North Carolina Law Review*\(^6\) it is stated that Chapter 65 of the Public Laws of 1923 re-enacts Section 1004 of the Code which is not referred to in the Act.

However, there is a question as to whether or not the 1923 enactment does not eliminate the former requirement that the homestead be allotted before a husband may, by following the statute, convey his wife's dower. It will be noted that at the very beginning of Section 1004 it is provided that every man whose wife is a lunatic or insane and whose homestead has been allotted, may bargain, sell, etc., any of his real estate. At the end of the section it is expressly provided that the section does not apply to the homestead. The intent of the section seems to be that if a homestead has been allotted to a man with an insane wife he may dispose of the rest of his property and convey his wife's dower. But he cannot so convey her dower until the homestead has been laid off. In Section 4103(a) the right to convey the dower is not conditional upon the homestead having been allotted but there is a provision that the section shall not apply to the homestead of the husband which has been actually allotted. Thus, under the later statute, supposedly a re-enactment of the older statute, the only requirement, so far as homestead is concerned, is that the section is not applicable to a homestead that has been actually allotted. If this be a correct interpretation, then the statute is applicable to a conveyance by a husband of any of his lands prior to an allotment. Thus there would be a conflict between the two statutes. The 1923 enactment, Chapter 65 of the Public Laws of 1923, provides in the second section that all laws and clauses of laws in conflict with the Act are repealed to the extent of such conflict.

Both sections are carried up in the Code and the apparent conflict may give rise to a serious question as to the validity of a conveyance made in accordance with the statute where no homestead has been allotted. Neither statute is applicable to any homestead that has been laid off.

\(^7\) N. C. Code Ann. (Michie, 1939) §1004.
\(^8\) N. C. P. L. 1923, c. 65, §1.
\(^6\) *Statutory Changes, Conveyances* (1923) 1 N. C. L. Rev. 271.
Lis Pendetns

At common law the docketing of a lis pendens meant that any person who took or acquired an interest in land with notice of the pendency of any action affecting the title to said land took with notice and was bound by the judgment. The matter of lis pendens is now regulated by statute in this State, and Section 500 of the Code provides that the plaintiff, at or after the time of filing his complaint in which the title to realty is sought to be affected, or when or after attachment is issued, or the defendant, when he sets up an affirmative cause of action, or after filing answer, it is intended to affect realty, may file with the Clerk a notice of lis pendens.

Where the action is brought in the county where the land is situated and the pleadings contain the names of the parties, the object of the action and the description of the property to be affected in that county, it is not necessary to file a formal notice, as the complaint takes the place of the notice.77

In order to place third parties on notice of the lis pendens, the same must be cross-indexed, whether notice be given formally by notice of the lis pendens or informally by asking that the complaint be regarded as a notice.78 This notice must be filed in a book kept in the Clerk's office called "Record of Lis Pendens". The index must contain the names of the parties, where the notice is filed, the object of the action, the date of indexing and a description of the land sought to be affected. In many Clerks' offices in the State, notice of lis pendens is indexed in the judgment indices and is also indexed in the lis pendens book.

The notice of lis pendens is void unless it is followed by the first publication of notice of the summons or by an order therefor, or by personal service on the defendant within sixty days after the cross-indexing.79

The notice of lis pendens may be cancelled by order of court or voluntarily by endorsement on the margin of the record by the plaintiff, his agent or attorney.80

Matters Not of Record

In the examination of titles, it is generally understood that the examination covers the public records. Usually, attorneys' certificates of title are limited to the public records. However, there are a number of items in connection with closing the ordinary purchase and sale or

loan transaction which are not of record. These points should be inquired into.

Labor and material liens. The matter of mechanics' liens is discussed more fully elsewhere in this article. Where new improvements have been placed upon the property and the statutory period for filing liens has not expired, or full settlement has not been made between the owner and the contractor, if there was a contractor, it may be that there are outstanding claims for labor and materials furnished. The purchaser or lender, in order to be protected, must know whether there are any such claims outstanding. This is a matter outside the record. Protection should be furnished by waiver of lien, title insurance or indemnity bond.

Unrecorded leases. Under the law of this State leases for periods of time up to three years do not have to be in writing. Therefore, such leases cannot be recorded and do not become a matter of public record. Furthermore, written leases for three years or less do not have to be recorded in order to be good against creditors or purchasers for value. Therefore, a tenant in possession under a verbal lease for three years or less or under an unrecorded written lease for the same term may remain in possession, despite a change of ownership, provided he complies with the terms of the tenancy. Therefore, in the case of transfer of property the new owner should become familiar with any tenancy arrangements which may not be disclosed by the public records.

Water rents. Municipal water rents are usually secured by statutory liens against the property, even though the water bill may have been incurred by a tenant. Water records are not generally considered as public records although the status of the account can be ascertained by proper inquiry. The amount involved is usually small, as water charges are generally not high and in most cases some deposit is required. This is another instance of a matter beyond the public records which may affect title to the extent of unpaid water charges.

Zoning laws. The subject of municipal zoning law has become an important one in recent years. As cities become more populous, regulation of the use of property increases. Nearly all incorporated towns and cities now have certain requirements with respect to the types of building and construction which may be erected. Cities are now laid off into residential zones and business zones. Residential zones are subdivided into apartment and single-family occupancy sections. Property may be used for certain types of businesses subject only to municipal approval. The location of buildings is likewise governed and regulated, with minimum setback restrictions. This subject consti-

tutes a gradually expanding field. The uses that may be made of property may be just as important to a purchaser as the fact of marketable title. In order to know the applicable rules, it is necessary to examine the zoning ordinances.

Survey. One of the most important matters in connection with real estate practice is that of adequate survey. Many deeds are old and the chain of title has been continued by using descriptions from prior deeds, without a modern survey of the property. Such survey is necessary to make sure that the improvements are located on the locus in quo and that there is no conflict of lines with adjoining owners. Only by an exact survey can the size and shape of the property be adequately determined. Conflict is often found between the record title and the physical status of the property as revealed by competent surveying and engineering. Oftentimes, the corners are not in and have to be put in by the surveyor.

Corporate lenders generally require a survey in connection with their loans. Individual purchasers and lenders oftentimes complete their transactions without a survey, but it is submitted that this is shortsighted policy, as the ordinary financial transaction certainly justifies the small cost involved in obtaining an adequate blueprint of the property. The title insurance companies make an exception in their policies of all matters which would be disclosed by an accurate survey of the premises unless such survey is furnished.

TAX TITLES

A tax title differs from a title derived through ordinary sources in that it is not dependent upon previous links in the chain of title. On the contrary, it is a new title, and has the effect of breaking up all previous sources of title. A tax deed executed at the conclusion of the legal procedure required for perfecting it will eliminate the rights of all previous parties in interest, including mortgagees and holders of easements. It bars the right of homestead and the inchoate right of dower. Its only connection with previous title is found in the statutory requirements with respect to the persons who are necessary parties in the tax foreclosure proceeding which results in the tax title. Since a tax title operates on the property and destroys all previous interests in the land, it is obvious that the statutory procedure for the foreclosure of a tax lien and the making of a tax deed must be precisely followed.

The courts have always required that the procedure for divesting an owner of title to his property on account of delinquent taxes must be followed strictly in accordance with the law. As a general rule, tax titles have been stricken down for defects which would not ordinarily cause a reversal of judgment. The courts have always been diligent in their effort to protect persons in their ownership of land. Therefore,
tax titles are generally looked upon with a great deal of distrust and suspicion, and purchasers have been reluctant to accept tax titles. This attitude is so general that the title insurance companies ordinarily will not insure any title dependent solely upon the foreclosure of a tax lien. This is a point of tremendous importance from the standpoint of marketability. New owners generally require financing in connection with the improvement of their property and since many lenders now require title insurance, a purchaser takes a risk of not being able to obtain his financing if he buys a tax deed. In recent years the counties and municipalities in North Carolina have acquired very large numbers of properties for delinquent taxes. Since many of these properties cannot be resold where the title is dependent solely upon the tax foreclosure proceedings, these cities and counties in many cases make an effort to obtain deeds from the owners, and in other cases buy up outstanding mortgages in order that the titles may be so perfected that they are not dependent upon the tax deeds.

Although the title may not be insurable, it is indisputable that good title can be acquired through the present tax foreclosure system in effect in this State. A few cases will show some of the points that have arisen in connection with this procedure.

In *Orange County v. Jenkins*\(^{83}\) it was held that the statutory notice of foreclosure of tax certificates is constitutional and valid.

In *Johnston County v. Smith*\(^{84}\) there was a proceeding to enforce the County's lien for unpaid taxes and the Clerk ordered a resale "according to the statute". The applicable statute provided that such sale could be had only on certain days during the term of the Superior Court, and the resale was had on another day. It was held that the resale was void but that another sale might be ordered. Likewise, in *Caswell County v. Scott*\(^{85}\) it was held that a tax sale held on an improper day was void.

In *Harnett County v. Rearden*\(^{86}\) the tax sale was set aside for irregularity. In *Buncombe County v. Penland*\(^{87}\) the sale was set aside because the property was not properly listed and because of improper publication.

In *Wake County v. Faison*\(^{88}\) the land was listed in the name of a person other than the true owner and was sold for taxes. It was held that the purchaser's title at foreclosure sale was not good.

The present tax foreclosure law provides for a proceeding in the nature of an action to foreclose a mortgage. Therefore, all persons in

\(^{83}\) 200 N. C. 202, 156 S. E. 774 (1931).
\(^{84}\) 203 N. C. 235, 165 S. E. 707 (1932).
\(^{85}\) 215 N. C. 185, 1 S. E. (2d) 364 (1939).
\(^{86}\) 203 N. C. 267, 165 S. E. 701 (1932).
\(^{87}\) 206 N. C. 299, 173 S. E. 609 (1934).
\(^{88}\) 204 N. C. 55, 167 S. E. 391 (1933).
interest are required to be made parties. Such persons, in number, are mainly the owners and mortgagees. In *Madison County v. Coxe* the trustee and mortgage creditor were not given notice and the sale was set aside. In *Steed v. Hildebrand* a mortgagee made his appearance within six months from service by publication and tendered the taxes due. It was held that such mortgagee was not barred and was entitled to redeem. In *Buncombe County v. Arbogast* the mortgagee was not made a party and the sale was set aside for irregularity. Likewise in *Orange County v. Atkinson* it was held that the mortgagee must be made a party. Substantially the same situation obtained in *Johnston County v. Stewart*, with the same result.

For the tax foreclosure proceeding to be valid, the property must be sufficiently described in the listing. In *Johnston County v. Stewart* the land was listed as "4 lots lying and being in Banner Township, Johnston County." This was held to be an insufficient listing. In *Craven County v. Parker* a listing of "250 acres Washington Road, No. 1 Township", was held sufficient.

The present system of foreclosing tax liens is the only one available to private purchasers of the tax certificate. The law provides that such method of foreclosure is the only remedy open to certificate holders other than taxing units. A county or municipality may enforce its lien by this method or by the alternative method set out in Section 7990 of the Code.

The cases construing said Section 7990 have generally held that when an action is brought by a taxing unit, pursuant to the section, that the statute of limitations is not applicable, on the theory that the statute cannot run against the sovereign. *City of Raleigh v. Jordan* was an action by a municipality under C. S. 7990 to foreclose a tax lien for the years 1925 and 1926. The court held that the action was barred by the provisions of Chapter 181, Section 7, of the Public Laws of 1933. The basis of the decision was the apparent intent of the legislature to bar the enforcement of all liens for unpaid taxes for 1926 and prior years, regardless of the statute under which the action might be brought. Under this holding, the foreclosure of all tax liens for 1926 and prior years is barred even though the action be one by a county or municipality under Section 7990.

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80 N. C. 58, 167 S. E. 486 (1933).
81 N. C. 208, 171 S. E. 58 (1933).
82 N. C. 745, 172 S. E. 364 (1934).
83 N. C. 593, 178 S. E. 91 (1935).
84 N. C. 334, 7 S. E. (2d) 708 (1940).
85 Ibid.
86 N. C. 561, 140 S. E. 155 (1927).
87 N. C. CODE ANN. (Michie, 1939) §7971 (228); Logan v. Griffith, 205 N. C. 580, 172 S. E. 348 (1934).
88 N. C. 55, 9 S. E. (2d) 507 (1940).
CLOSINGS

The lawyer's part in a real estate transaction, whether it be a purchase or a loan, generally comes to an end with the closing. This involves the preparation of the papers and the title certificate. The transactions are generally consummated in the lawyer's office and he should see to the competency of the parties to enter into the transaction. The signatures should be carefully checked, using the legal signatures of the parties, and the acknowledgments should be in order. The persons acknowledging the execution of the instrument should personally appear before the Notary so that the acknowledgment will speak the truth. There has been a tendency to laxness on the part of Notaries with respect to execution of acknowledgments. Where there is a recital of the privy examination of the wife, such privy examination should be actually taken, as required by the statute. This is an important point.

Where required, documentary stamps should be affixed to the instruments. The parties will generally conclude the financial settlement, but very often this is under the supervision of the attorney. In purchase and sale transactions, current taxes and rents are generally apportioned. The tax lien now dates from January 1st of each year. The seller usually pays the taxes from January 1st until the time of the transaction and the purchaser pays for the remainder of the year. Fire insurance may be taken over by the purchaser or he may obtain new insurance.

In the case of improved property it is important that proper endorsements be placed upon the fire insurance policies. The ownership should be in accordance with the record ownership. Where the transaction is one of purchase, an endorsement should be added showing the new owners. Where the transaction is a loan, a mortgagee clause should be attached making the loss payable firstly to the mortgagee. In such case it is advisable to use the standard clause without full contribution, as this will protect the creditor, without pro-rata, in the event other insurance is acquired and with respect to which no mortgage clause is attached.

After all other details are attended to, the papers are recorded. Just prior to probate and registration, a last-minute search should be made of the records in order to make sure that no new liens or objections to title have come into the records since the date of the title examination. This is a very important point and should never be overlooked.

Where the transaction is a sale, with a purchase money mortgage, both instruments should be recorded at the same time. Since indexing is an integral part of registration, the transaction should be followed up to the extent of making sure that there has been proper permanent indexing.