Defects in Titles to Real Estate and the Remedies

Claude J. Hendricks
DEFECTS IN TITLES TO REAL ESTATE AND THE REMEDIES

CLAUDE J. HENDRICKS

IN THE necessary limits of a discussion such as this, only a few of the high spots can be touched, and those only in a very brief and sketchy manner, although the importance of the subject warrants a most painstaking study of the questions which arise daily in the examination of titles. With the lapse of time and with all of the improvements and the greater knowledge and education of the persons who draft conveyances and make abstracts and examine the same, the problems instead of becoming more simple are becoming more complex.

The objections now made to titles as disclosed in abstracts were almost unheard of twenty-five or thirty years ago. Scarcely a day passes that some unheard of and previously unimagined objection to an abstract or a title is not voiced by some examiner, so that the examiner is constantly faced with a heavy responsibility in approving a title because some subsequent examiner may advise a client that the title is unsatisfactory. The examiner never knows when a title which he has approved, and which has appeared to him to be a perfectly good title will be assailed, not by a person who has some interest in the property, but by some over-zealous or over-timid examiner.

In modern business, real estate has become a comparatively liquid form of property, and, by the same token, its transfer should have become more simplified and expedited. A person can nowadays purchase almost any other type of property, regardless of the value, with less fear and uncertainty than real estate, and without any of the de-
lays attendant upon transfer of its title. Antiquated and outworn methods of conveyancing and of examination of titles are still in use and these serve to impede the transfer of real estate rather than to facilitate it. Yet real estate is something that cannot be stolen and moved to other localities or hidden or be disguised in any manner. The use to which it is put or the manner in which it is occupied is something that is open and obvious to any and every person who may be interested in it. It is one of the principal sources of the income of government by reason of levying of taxes on it; it is listed in the tax rolls, and if the taxes are not promptly paid, it is sold to satisfy the lien. The assessors are required to assess it from actual view, or from the best information that the assessor can practicably obtain, and as accurately as possible to list it for assessment in the name of the proper owner. There is no type of property less susceptible of improper and fraudulent transfer or fraudulent obtaining of money, and this is true regardless of the safeguards thrown about its transfer for the protection of owners and purchasers or mortgagees.

In cities, whether large or small, or villages, and in a large portion of the State of Wisconsin, real estate has become so valuable and so improved and cultivated that its ownership and boundaries are well known to the people of the locality where it is situated, and from this in conjunction with the modern requirements of recording conveyances and liens, its ownership is apparent, and in a large majority of cases its real ownership can be ascertained by almost casual inquiry and by the most unskilled.

The examiner of the abstract and, through it, of the title should not forget that he is examining a title rather than an abstract; that his client wants to know about the title to the real estate rather than the abstract; that he is employed by his client and is paid for telling the client whether the title is one that the client can safely purchase without the probability, rather than the possibility, that the title may be attacked, and that probability one reasonably certain and in the not distant future. There is no title which may not be attacked by some one making a perfectly fictitious claim and bringing suit to recover real estate, and without any reference to the state of the record title.

In this discussion, no attention will be paid to the unusual or exceptional defects which may appear, but to those which appear in practically every abstract. Any consideration of such unusual and exceptional defects would be of very little value for present purposes. As the source of the examiner's information is the abstract which he is examining, and is the basis of his opinion as to the validity of the title, no consideration will be given to what might be discovered outside of the record title as disclosed in the abstract and the necessary implications and deductions to be made from the matters shown in the abstract.
DEFECTS IN TITLES

Most of the difficulties connected with the examination of the record title shown in an abstract arise out of the narrow and technical definition of marketable title adopted by the courts, which have clung to the rules established in early cases when conveyancing was highly technical and titles uncertain. There has been very little effort on the part of courts to modernize and liberalize their definitions and practice to meet modern business conditions and apply them to very different conditions. Many of the cases, and particularly those which have dealt with objections to the title which cause examiners the most difficulty, were cases where a vendor was attempting to force a title upon an unwilling purchaser who seized upon technical objections to escape from his contract obligation, and were not cases where someone having a valid claim to land was attempting to recover it from someone attempting to justify his title upon the record.

In considering objections to the record title, a distinction must necessarily be drawn between those which are of long standing, and which can possibly be claimed to have been cured by lapse of time, and which by reason of such lapse of time are difficult to meet with proof of any sort, and those which are of such recent date that they can either be cured by investigation of readily accessible sources, or if not explainable, warrant the rejection of the title because of the possibilities of trouble which they suggest. Practically every abstract will show instruments which have not been witnessed or sealed or have not been properly acknowledged, or have been executed by a corporation by one officer only, or without corporate seal, which may safely be disregarded because of statutory provisions curing such defects. Similarly, many criticisms of court proceedings shown in an abstract may be disregarded.

1 Section 235.20 of the Wisconsin Statutes (1935) validates instruments unacknowledged, or defectively acknowledged, or not properly witnessed or not sealed, or executed without corporate authority, or which are otherwise defectively executed, after twenty years' record. Section 328.25 provides that every instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until denied by the oath or affidavit of such person, or by a pleading duly verified, except where the person shall have died previous to the requirements of such proof. Section 235.21 validates defectively signed corporate releases of mortgages on real estate made more than ten years before the taking effect of said section.

2 Section 316.33 of the Wisconsin Statutes (1935) provides that when any sale has been made under order of the county court by an executor or administrator, the title of a purchaser in good faith shall not be invalidated by any omission or error in the appointment of the executor or administrator, or by any defect or irregularity in the proceedings except in the manner and for the causes that the same could be invalidated in case such sale had been made pursuant to the order of judgment of a court of general jurisdiction. Section 316.45 limits actions to recover land sold by an executor or administrator to five years next after the sale, and actions to recover land sold by a guardian to five years next after the termination of the guardianship, excepting that persons under legal disability to sue at the time when the cause of action accrues may commence their action within five years next after removal of
In view of all of these statutory enactments, all of which are clearly within the power of the legislature to pass, a great mass of irregularities appearing in probate proceedings, execution sales, partitions and foreclosure actions, particularly if old, may be disregarded. And the abstract need only show the necessary facts giving the court jurisdiction to render the judgment, and the notice and confirmation of the sale, if required, and all other matters may be omitted from the abstract, and it need not set forth in detail the allegations of complaints, answers, affidavits and other similar matters.

In considering the sufficiency of a record title, and the kind of a title that a purchaser under a contract is entitled to, much confusion has arisen by reason of the failure to distinguish between good title, marketable title, perfect title and record title. In many cases the terms have been used interchangeably, even in the same opinion. The courts in many cases have attempted in the application of the law to the particular case to distinguish between such titles, holding that whether the purchaser was entitled to ask for a marketable, a good, a perfect, or a record title depended upon the terms used in the contract of purchase.

However, in this discussion, it will be assumed that the title must be a marketable one, determinable from the abstract. The Wisconsin court has defined a marketable title as follows: “As a general rule, a title which is open to judicial doubt is not marketable; but what may
DEFECTS IN TITLES

be regarded as such doubt is not easily defined, depending much upon
the discretion of the court. But in no case will a purchaser be com-
pelled to accept and pay for a title which he can only acquire in posses-
sion by litigation and judicial decision, nor where it is evident that his
possession must be defended in like manner. He is not bound to buy
a lawsuit. Waterman, Spec. Perf. secs. 411 et seq. Specific performance
will not be decreed at the suit of a vendor whenever the doubt con-
cerning his title is one which can only be settled by further litigation,
or when the court can see that the purchaser will, with reasonable
probability, be exposed to bona fide adverse claims on the part of third
persons. * * * But facts must be known at the time which fairly raise
a reasonable doubt and render the title doubtful, and not merely a pos-
sibility or conjecture that such a state of facts may be developed at
some future time. In Cattell v. Correll, 4 Younge & C. 237, Alderson,
B., said in regard to a doubt from a fear of future litigation: There
‘must be a reasonable and decent probability of litigation. The doubt
must be reasonable, and, so far as it depends upon contingent events
and uncertain facts, their occurrence and existence must be fairly prob-
able.’ ’’ The court held in that case that a title based on a tax deed fair
upon its face was prima facie marketable, and was sufficient under a
contract requiring an abstract showing a perfect title in the vendor.4

Our court has held that under a contract to convey a clear and
indefeasible title, a purchaser could insist upon a marketable title, and
that a title depending upon the statute of limitations was a marketable
one, and said: “After twenty years of peaceable and uninterrupted
adverse possession a grant will be presumed.”5 In another case the court

9 Gates v. Parmley, supra, note 3.
42 Minn. 443, 44 N.W. 527, 18 Am. St. Rep. 521 (1890) from which the court in
Nelson v. Jacobs, supra, quotes as follows (pp. 559-560): “To make a title
to real estate unmarketable, so that specific performance of a contract to con-
vey will not be enforced against the vendee, there must be a reasonable
doubt as to its validity. If the doubt raises a question of law, it must be a fairly
debatable one,—one upon which the judicial mind would hesitate before decid-
ing it. If the doubt depend on a matter of fact, and there is no doubt as to
how the fact is, and if it may be readily and easily shown at any time, it does
not make the title unmarketable.’ In that case Chief Justice Gilfillan, speaking
for the whole court, among other things, said: ‘Courts will not compel a
vendee to take an unmarketable title when he has stipulated for a good one;
and a title is deemed unmarketable, within this rule, where, although it may
be good, there is a reasonable doubt as to its validity. The term reasonable
doubt is always used in this connection, because, as a doubt might be sug-
gested or question raised as to most titles, it would go far to do away with
the remedy by specific performance if a mere doubt raised, without regard
to its character, were permitted to defeat the action. A doubt as to the title
may be raised upon a question of law, or upon a question of fact, or upon
both law and fact. It is impossible to state any precise and definite rule by
which to determine when a doubt raised upon a question of law is to be
deemed reasonable. Without going so far as some of the English cases, we can
at least say that the doubt suggested must raise a question of law that is fairly
has held that under a contract to convey a good record title, adverse possession of over twenty years did not constitute a title of record.\(^6\)

In the case of Harrass v. Edwards,\(^7\) it appeared that the record did not show that a recent deed was so executed as to entitle it to record, and the court said: “The plaintiff, as a purchaser, could not be required to accept a defective or unmarketable title. He had an undoubted right to a good title; and, while a title may be good, yet, if there is reasonable doubt of its validity, the purchaser is not obliged to take it \(* \ast \ast \ast \); and so it follows that a title may be valid, and yet not marketable \(* \ast \ast \ast \). A material defect in the title to land is such a defect as will cause a reasonable doubt and just apprehension in the mind of a reasonably prudent and intelligent person, acting upon competent legal advice, and prompt him to refuse to take the deed at a fair value. \(* \ast \ast \ast \) If a doubt exists, so as to make it probable that the purchaser’s right may be a matter of legal investigation, or if the title depends upon facts to remove it which can only be established by parol evidence should the title be attacked, he will not, in general, be compelled to complete the purchase. He will not be compelled to buy a lawsuit. \(* \ast \ast \ast \) The plaintiff was not bound to take the risk of being able to show that the deed in question had in fact been so executed as to pass the legal title as between the other nineteen grantors and the grantee.”\(^8\)

There are three types of defects in a record title which appear in practically every abstract examined, that is, variances in names between grantee and grantor, unreleased or defectively released mortgages, and deeds in which no wife joins, and it does not appear whether the grantor was married or single at the time, and while the examiner is perfectly satisfied in his own mind that such of these as are of long standing may be safely disregarded, he hesitates to pass them because of the fear that some subsequent examiner will reject the title.

As to unreleased mortgages or defectively released mortgages, the doubt arises because of the uncertainty as to whether or not payments may have been made which have kept the mortgage or debt alive. He is afraid that some payments may have been made upon the mortgage debt which have prevented the running of the statute of limitations,

---


\(^7\) 94 Wis. 459, 69 N.W. 69 (1896). Cf. Cutter v. Green, 185 Wis. 163, 201 N.W. 373 (1924) and Douglass v. Ransom, 205 Wis. 439, 237 N.W. 260 (1931).

notwithstanding the fact that a long chain of conveyances appear, in
which no mention whatever is made of the mortgage, and no assump-
tion thereof appears by purchasers through a long period of time.

It would seem to be a fair assumption that where the continuation
of the abstract shows that it was continued at or shortly prior to the
time of a conveyance in which no mention is made of the mortgage,
that the purchaser was satisfied from such investigation as he made
that the mortgage no longer constituted a lien upon the property; oth-
wise some mention would have been made of it in the abstract, or he
would have procured a release of it. Apparently, no consideration is
given to the fact which frequently appears that the mortgage covered a
large tract of land, which has afterwards become platted or cut up into
numerous small parcels, and that the land in question is such a small
part of the total area covered by the mortgage that the lien thereof
upon a particular parcel in question would be infinitesimal; that pur-
chasers of other parcels affected by the same mortgage have been satis-
fied that the lien no longer in fact exists; that the original mortgagor
has parted with all interest in the land and can have no further inter-
rest in keeping the debt alive; that in a conveyance by the original mort-
gagor, if the mortgage still existed, he would presumably have pro-
tected himself by requiring the purchaser to assume all or a propor-
tionate part of the mortgage; that he has given a warranty deed; that
his grantee and those under whom he claims and whose statements can
be obtained, state that no claim whatever has been made by any one
pretending to claim any rights under the mortgage, and that they have
not paid any interest to any one.

The examiner ignores rules of law which have been established by
various courts: that payment of interest on a mortgage by a mortgagor
after sale of part of the premises does not extend the lien as to prem-
ises sold;\(^9\) that the purchaser of land is protected by the statute of lim-
itations even though the mortgagor as between himself and the mort-
gagee has waived its protection;\(^10\) that the mortgagor cannot by pay-
ment revive a mortgage against purchasers or encumbrancers acquir-
ing title after the bar is complete;\(^11\) that limitations run in favor of
grantees of part of the land mortgaged who have not assumed any part
thereof, though purchasers of other parts have kept the mortgage alive.\(^12\)

---

\(^10\) *Wood v. Goodfellow*, 43 Cal. 185 (1872).
1912 B, 505 (1910).
\(^12\) *Ely v. Wilson*, 61 N.J. Eq. 94, 47 Atl. 806 (1900); *Barger v. Gery*, 64 N.J. Eq.
263, 53 Atl. 483 (1902); *Mack v. Anderson*, 165 N.Y. 529, 59 N.E. 289 (1901)
in which the court stated that the mortgagor could have kept the mortgage
alive by payments even after he had conveyed the premises, and cited *Hughes
v. Edwards*, 9 Wheat. 489, 6 L.Ed. 142 (1824) a case which was based, appar-
Some of the cases holding that payment by the mortgagor tolls the statute depend upon the language of the statute relative to payment, and in considering such cases Section 330.46 of the Wisconsin Statutes (1935) should be kept in mind. It provides that nothing contained in Sections 330.42 to 330.45 (which relate to acknowledgments or new promises, actions against parties jointly liable and as to parties who need not be joined) shall alter, take away or lessen the effect of a payment of any principal or interest made by any person, that no endorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made or purport to be made, shall be deemed sufficient proof of the payment so as to take the case out of the operation of the provisions of the statute of limitations. And Section 330.47 provides that if there are two or more joint contractors or joint executors or administrators of any contractor, no one of them shall lose the benefit of the provisions of the statute of limitations, so as to be chargeable by reason only of any payment made by any other or others of them.

It would seem that in the absence of something in the abstract showing the continued existence of the mortgage, the old unreleased mortgages or mortgages defectively released more than twenty years previous, where there have been numerous intervening conveyances without assumption clauses and where it does not appear that the mortgages covered other land, might be safely disregarded, were it not for Douglass v. Ransom,8 in which the court said: "It has been held that an unsatisfied mortgage although the lapse of time is such as to make it probable that the statute of limitations has run against foreclosure of it, renders a title unmarketable because the running of the statute may have been tolled by agreement or by payments,"4 and cites two cases, one in Nebraska,15 which does not show how old the mortgage was, and one in Minnesota,16 where the mortgage was sixteen years old, and then says: "This appears to us a reasonable rule and we adopt it";17 but the court makes no reference to cases holding otherwise, or in any manner qualifying the rule, or making any attempt to distinguish them from the case at bar, nor does the court refer to the statute of limitations in Wisconsin or the statutes relating to the effect of partial payments.

ently, upon the theory that so long as a mortgagor retains the equity of redemption or any part of it in the premises sold, his payment extends the mortgage as against a purchaser who has notice of the existence of the mortgage; see also Dubois v. First National Bank, 43 Colo. 400, 96 Pac. 169 (1908).  
13 205 Wis. 439, 237 N.W. 260 (1931).  
14 Douglass v. Ransom, supra, note 13, p. 447.  
16 Austin v. Barnum, 52 Minn. 136, 53 N.W. 1132 (1892).  
17 Douglass v. Ransom, 205 Wis. 439, 447, 237 N.W. 260 (1931).
As to deeds executed by a man with whom no wife joins and when he is not described as single and in which the abstract does not disclose whether he was a non-resident of Wisconsin or not, either by recital in the body of the deed or by showing that the acknowledgment was taken outside of the State of Wisconsin, or subsequent conveyances wherein he is described as single, there again the lapse of a long period of time should be very persuasive that there is no outstanding claim of dower, although such period must necessarily be longer than that affecting some other types of rights, for the reason that the widow would have no right to bring suit to recover dower until after the husband's death, and the statute would not begin to run against her until such date.

The examiner should take into consideration the fact that the grantee from a husband was doubtless acquainted with him, made due inquiry as to his marriage state, paid a consideration for the property, took a warranty deed from him; that the grantor would probably not have attempted to convey without his wife joining if he had a wife; that there have been numerous intervening conveyances; that through a long period of time no claim for dower rights has been made; that if a wife existed at the date of the deed she would doubtless know of her husband's conveyance of the land or his ownership of it; that to be entitled to dower she must have survived her husband and must not have accepted any testamentary provision made by him for her; that the property at the time of the conveyance was of small value; and that if at the time of the conveyance the property was a small unimproved tract of land, or of little value, the value of the widow's dower, if afterwards claimed, would be of little value in view of the provisions of Section 233.08 of the Wisconsin Statutes (1935), which prescribe: "That when a widow shall be entitled to a dower out of any lands which shall have been alienated by the husband in his lifetime, and such lands have been enhanced in value after alienation, such lands shall be estimated in setting out the widow's dower according to their value at the time they were so alienated." The examiner should also take into consideration the fact that the cases are extremely few where after a long period of time a widow has attempted to claim dower in a husband's land on account of an ancient deed in which she did not join.

In present conveyances the situation is altogether different because a widow's right of dower has now been changed to one-third in fee of the lands of which the husband was seized during marriage, instead of the life use of one-third as was provided by the former law. This, however, applies only to widows of persons dying after August 31, 1921.

There is nothing in an abstract of title, however, that causes more headaches to the examiner than variances in names, and particularly
since the case of Douglass v. Ransom. And there is probably no more concrete way of discussing the effect of variances in names than by taking this particular case, which is singularly barren of citations, particularly Wisconsin cases, that sustain the conclusions arrived at by the court on variances in names and unreleased or defectively released mortgages. Such facts as are herein stated are taken from the record on appeal.

The land in question was a lot in the City of Waukesha, which was part of a larger tract of land that passed for a considerable period of time through the same chain of title, many of the objections affecting the whole of the larger tract. The trial court in its findings said that there were substantial and valid objections to the title, and such as to warrant a reasonably prudent and careful man in insisting that they be removed, either by an action to quiet title, petition and order, or by affidavit. The first was a contract dated September 14, 1841, recorded October 25, 1847, to convey on payment of $4,000 in four equal payments of $1,000 each on September 14, 1842, 1843, 1844, and 1845, which had never been released and no conveyance had been made thereunder by the seller to the purchaser. This contract affected the entire east half of the quarter section, and its existence has been apparently disregarded by the examiners of the title to all of the rest of the land embraced in the half quarter section. The fact that the payments had matured and that no suit had been brought would seem to answer the objection.

The second was a mortgage assigned in 1850 to the Milwaukee and Waukesha Railroad Company, and subsequently assigned by the Milwaukee and Mississippi Railroad Company and later released. The above assignments appear on the mortgage itself and the mortgage was re-recorded to show such assignments. While the abstract did not show it the fact was that by the Session Laws of 1856 the name had been changed between the two assignments.

Another finding was that a mortgage to Joseph and Lyndsey Ward was released by Lyndsey Ward alone, no release appearing from the said Joseph Ward or assignment by him. The above mortgage affected the whole of the quarter section. The abstract showed that the mortgage was for $4,000, dated September 28, 1841. It does not show more than one note or one debt and was released on the margin of the record on November 21, 1857. The court entirely disregarded the rule that one of joint mortgagors where there is only one debt may release the mortgage. Another finding was that a release of a mortgage to Shubal M. Davis was released by J. A. Short, no assignment to Short appearing. The above release was made in 1855 and recited that the mortgage was duly assigned by Shubal M. Davis to J. A. Short. This

18 205 Wis. 439, 237 N.W. 260 (1931).
mortgage also covered the larger tract of land, and is apparently the mortgage referred to by Justice Fowler in *Douglass v. Ransom*\(^9\) as the one where there is no similarity between the names of the mortgagee and the party releasing.

Among the objections made by the examiner which he said should be cleared up, in addition to those already mentioned, were many due to variances in names, such as assignment of a mortgage to David J. Power and release by D. J. Power in 1859; a mortgage to Valentine Erdman released in 1862 by Valentine Ertmann; assignment of a mortgage to Jacob L. Bean and release by W. L. Bean and S. A. Bean, the examiner stating that it appeared by an abstracter's note that Jacob L. Bean died May 10, 1855, and that letters of administration were issued to Jane E. Bean, Walker L. Bean, and Sidney A. Bean. It appears by the abstract that the so-called note to which he referred was an entry by the abstracter that the records of the probate court of Waukesha County showed the death of Jacob L. Bean and the appointment of the executors, and further that at the date of the release on April 12, 1856, they were acting as such. However, the examiner does not mention the fact, as is shown in the abstract, that a mortgage appeared to Jacob S. Bean, which was released on April 12, 1856, by the said W. L. Bean and S. A. Bean, as executors.

Another criticism by the examiner was that a deed appeared to Horatio N. Ward in 1843, and a conveyance in 1846 by H. N. Ward, but that the abstract did not disclose title in the grantors of Horatio N. Ward, or whether they were all the heirs of one Josiah Barber.

The said H. N. Ward later conveyed to Charles R. Dakin, and the examiner apparently overlooked the fact that the abstract showed proceedings in the estate of Josiah Barber, who died in 1842 and that an instrument appears in said proceedings dated 1849, by Horatio N. Ward and wife Harriet E., which stated that they were the son-in-law and daughter of the deceased, that they were interested in the estate, and had procured a release or quitclaim deed from the other heirs, and that the proceedings show that the land in question was sold by the administrator under order of court to Charles R. Dakin.

In treating variances in names of the character involved in the *Douglass-Ransom* case—and most of the cases involving such variances are of a very similar character—as such defects in the record title as to make the title unmarketable, the court and the examiner who raises such objections overlook many facts which it would seem should be considered, some of which have been heretofore mentioned.

The fact is overlooked that presumably the purchaser before receiving his deed negotiated with some one whom he was satisfied was the

\(^9\) 205 Wis. 439, 237 N.W. 260 (1931).
owner; that the grantor went to some scrivener whom he knew, to have the deed prepared; that if the deed was executed in the town, city or village where the land was located, he was also known to the witnesses; that he executed a warranty deed under his seal in the presence of witnesses, and acknowledged before some officer, that he executed the instrument, and the acknowledging officer certified that the grantor was known to him and acknowledged the instrument. The fact is further overlooked that from that time forward no one has ever questioned the identity of the parties, although repeated continuations of the abstract are shown, in which the variance is disclosed and the property has been conveyed or mortgaged many times by warranty deed with no requirement on the part of a purchaser or mortgagee that anything be done to explain the variance.

In many cases the character of a variance, if the examiner has imagination, should tell him that the apparent variance may be due to error on the part of the recorder in transcribing the document, which in all of the older conveyances was written in longhand, because of either poor penmanship on the part of the scrivener or on the part of the grantor; that many letters when written in longhand are impossible to distinguish from other letters, as for instance in the case already cited of the abstract showing a mortgage to Jacob S. Bean, whereas the estate of Jacob L. Bean is shown. This is undoubtedly due to the fact that these letters are frequently confused, even today.

In a city such as Milwaukee with a large foreign population, a vast number of variances which are criticized are due to the fact that either the grantor is unable to write English well, or is unable to spell his name correctly in English, or the scrivener when the name is spelled has not been sufficiently familiar with the foreign language to correctly spell the names. This may be illustrated by the fact that if you were asking a German how to spell his name, which contains the letter "e," he would say "a," as though it were the first letter of the alphabet, and that is the way it would go into the document.

Another frequent source of criticism is the fact that persons who have been baptized Friederich, in business become Fred, or Friedrich, Frederick, Frederic, or Fritz. John, Johann and Hans may be all the same person. Francis may become Frank, and Henry becomes Harry or Heinrich. And all of these variances may be cleared up in the abstract by reference to other instruments, such as mortgages, merely by the fact that in such instruments a wife of the same name has joined, or by the name being correctly given in the body of the deed or the acknowledgment.

While on the face of the record one is technically right in saying that the abstract does not show identity of parties, and that the title is
therefore unmarketable, yet as a matter of fact and of common sense, one is perfectly justified in holding the title marketable.

The court is not consistent or logical in the application of its definition of a marketable title to such a state of facts, as is indicated by a reference to the definition in the Ransom case, where the court says that a material defect is such as will cause a reasonable doubt and just apprehension in the mind of a reasonably prudent and intelligent person acting upon competent legal advice and prompt him to refuse to accept it, that if such doubt exists as to make the title subject to probable attack by legal proceedings, or as said by Justice Pinney in Harrass v. Edwards,\(^{20}\) that if there is a reasonable doubt as to the validity of the title, it is not marketable, and other similar definitions by which the courts have attempted to determine whether a title was marketable or not. In Douglass v. Ransom\(^{21}\) the court recognized the difficulty when it said: "The general rule applicable is not difficult of statement, but it is often not easy to determine whether a particular defect falls within the rule."

A reference to many of the cases in which variances in names have been held to make the title unmarketable has not disclosed a single case in which a former owner has attacked the title because he was not the grantor who subsequently conveyed and through which the title has passed, but there are cases where an unwilling purchaser has sought the aid of the courts in relieving him from a contract which he regretted, and the courts have been altogether too willing to assist him, and have thereby created a confusion which has laid a heavy burden upon owners of real estate.

An old saying is "that the proof of the pudding is in the eating." Apply the definition in the Ransom case that a material defect is such as will cause a reasonable doubt and just apprehension in the mind of a reasonably prudent and intelligent person acting upon competent legal advice and prompt him to refuse it. The abstract in that case showed at least 156 entries. The property had been conveyed numberless times with all of the existing defects appearing in the title and had been accepted by, so far as the abstract disclosed, reasonably prudent and intelligent persons acting upon competent legal advice, many of whom were purchasers at a time when the identity of the parties could have been readily investigated.

It would certainly seem to be a strange coincidence that a person with the same initials as the former owner, or with a strikingly similar name, should have conceived that he owned a piece of property that some one with a similar name was the actual owner of, or that he

\(^{20}\) 94 Wis. 459, 69 N.W. 69 (1896).
\(^{21}\) 205 Wis. 439, 446, 237 N.W. 260 (1931).
should be mistaken in the fact of ownership and make a conveyance. With nothing in the abstract to warrant an inference of fraud or collusion other than a variance, one must assume that the grantor in the deed, if he is not the owner, perpetrated a fraud both upon the owner by clouding his title and upon the purchaser by selling him something that the grantor did not own, and this in view of the fact that such action on the part of the grantor constituted a felony under the statutes of Wisconsin, which since 1849 have provided that if any person shall falsely and fraudulently represent that he is the owner of any parcel or tract of land to which he has no title and shall execute any deed of the same with intent to defraud any person whatever, he shall be punished by imprisonment in the state prison. If the grantor in such deed intended to perpetrate fraud, it would seem that he would have used the exact name of a record owner, so that his fraud could not have been so readily discovered.

In the Ransom case, the court did not cite a single authority to justify the decision on variance in names, although decisions are numerous, and those in which variances in names have been held to warrant rejection of title have been those where there was such a variance in the deed that was tendered the purchaser or where the variance was one of recent origin, while in the case of variances of long standing the apparent weight of authority is that such variances, particularly where of the character considered in the Douglass case, do not affect the marketability of the title.

Of this character is White v. Bates, where patents were issued to S. Durley and G. T. Gorham, and deeds appear from Samuel Durley and Gardner T. Gorham. The court says that unless Gardner T. Gorham was the identical G. T. Gorham who conveyed the land in 1833, he assumed to convey all of the title when he only held a half interest in the deed from Durley. This evidence, while not absolutely conclusive, is in the court's opinion sufficient when considered in connection with the lapse of time since these deeds were made, and the further fact that neither S. Durley, nor G. T. Gorham, nor any one claiming adversely by, through or under them, or either of them, had ever set up any claim of title to the premises since the conveyances made by Samuel Durley and Gardner T. Gorham, to warrant the conclusion that S. Durley and G. T. Gorham were the same identical persons who conveyed.

In Lyman v. Gedney a deed appeared to Cushman, Eaton & Co., and a deed was made by W. H. Cushman, Seth Eaton and two others, without any recital or other evidence in the abstract that these persons

---

22 234 Ill. 276, 84 N.E. 906 (1908).
constituted the firm. The court said that "there is no necessity, of which we are aware, that this should be recited in the record," and held that, from the similarity of the names in both deeds and the fact that these persons assumed to have an interest to convey in the property, and that there was no proof that any one else had ever claimed adversely to this deed to the grantee, as a member of that firm, the proof that the conveyance was by the firm should be accepted as sufficient.

In the case of Hollifield v. Landrum it appeared that a patent was issued to Levi Hildebran in 1852, and that in 1864 O. L. Hildebrand conveyed. The court said that it might well be presumed in the absence of opposing proof, that O. L. Hildebrandt received the conveyance in his Christian name and conveyed it signing with his initials, and cited an earlier case holding that similarity of names is ordinarily sufficient evidence of the identity of a purchaser in a chain of conveyances and in the absence of evidence casting a doubt upon the identity of a party to a conveyance of land which ought to be held sufficient in every case, and cited another case where a conveyance was made to Jane Carroll, with a subsequent conveyance shown from Jane M. Tarbox and her husband, the deed reciting that they were the same person, and it was held sufficient in the absence of opposing proof.

In the case of Woodward v. McCollum objection was made to deeds because they were signed merely with the initials of the grantor instead of his full Christian name and the court said: "We think the objection without merit. It appears in each case where the grantor signed simply by his initials instead of his full Christian name the body of the deed gives the full Christian name and surname; and not only this, but the attestation clause recites that the grantor described signs it, and the notary before whom it was acknowledged certifies that the persons signing are the grantors named in the deed." The court also held that a deed by Harry Woodworth was sufficient to convey land of Henry S. Woodworth.

In Vanderwilt v. Broerman one of the parties in probate and partition proceedings was Homer Wharton, and a deed was made by Homer F. Wharton. A deed also appeared in the chain of title to George Prine, and George S. Prine conveyed. The court said: "No reason for questioning the identity is shown. It is a matter of common knowledge that the initial of the second Christian name is frequently omitted, and by

---

25 16 N.D. 42, 111 N.W. 623 (1907). Cf. Kane v. Borthwick, 50 Wash. 8, 96 Pac. 516, 18 L.R.A. (n.s.) 486 (1908), where the land was conveyed to Hanah R. Mason in 1870, and was conveyed by Hannah R. Mason, and where the court said that the objection that these names did not describe the same person was technical and frivolous.
26 201 Iowa 1107, 206 N.W. 959 (1926). Cf. Cunningham v. Friendly, 70 Or. 222, 139 Pac. 928 (1914).
the great weight of authority its omission, in the absence of special circumstances raising doubt about identity, is immaterial."

In *Benjamin v. Savage*27 a deed was made in 1864 to "Henry N. Weiming of the city of Cincinnati, county of Hamilton and state of Ohio," and in 1869 "Henry N. Wenning and Caroline, his wife, of the city of Cincinnati and state of Ohio," conveyed. More than 50 years after the record of this deed one claiming through the chain of title under it contracted to sell. It appeared that many conveyances depended upon it. No adverse title had been asserted. The vendor was in possession and delivered possession to the purchaser, and the court held that the vendee’s objection to the title was without merit.

It is true there are cases to the contrary, such as *Walters v. Mitchell*,28 where title passed in 1899 to George G. Terschuren, and the grantor attempted to make another deed to Gerhard F. Terschuren, reciting that it was made to correct the error in the grantee’s name, and in 1907, a California court held that the variance in names rendered the title unmarketable, and that the mistake was not corrected by the second deed. But such cases are contrary to the weight of authority.

A case not involving any variance in names, but which may be of some interest in this discussion, is that of *City Bank v. Plank*29. There it appeared that a deed was made to E. D. Plank, who was then deceased, and whose estate was then in probate, and the court held that it was the intention to convey the land to E. S. Plank, as executor of the will of E. D. Plank.

Another source of difficulty, and a most irritating one to the examiner of titles, is the large number of judgments frequently shown in an abstract, best illustrated by a very recent one, where the record owner was Mary Schmidt, and judgments were shown against Mae Schmidt, alias, H. L. Schmidt and Marie Schmidt, Christ. Schmidt and Marie Schmidt, Mathew Schmidt, alias, and Mary Schmidt, alias, George Schmidt, alias, and Mary Schmidt, alias, John Schmidt, alias, and Mary Schmidt, alias, his wife, Mary Schmitt, alias, Marie Schmitt, Marie M. Schmitt, and Mrs. Mary Schmitt, Jr., alias.

In view of the decision of the Wisconsin Supreme Court in the case of *Davis v. Steeps*30 that the docket entry of a judgment against Edward Davis was not constructive notice of a lien on the real estate of E. A. Davis or Edward A. Davis, the answer to what to do with such an abstract is apparently clear. The court held that the statute

---

27 154 Minn. 159, 191 N.W. 408, 35 A.L.R. 97 (1923).
28 6 Cal. App. 410, 92 Pac. 315 (1907). Cf. *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928 (1893), where the record title was in K. F. Redmond, and the deed tendered the purchaser was signed by K. F. Redman, and the court held that the variance warranted the purchaser’s rejecting the deed.
relative to docketing judgments requires the clerk to enter in the judgment docket, among other things, the name at length of each judgment debtor, with his place of abode, title and trade or profession, if any such be stated in the record, as it is only through the medium of a sufficient and legal docket of the judgment that it can become a lien on the real estate of the judgment debtor, and it is the duty of the judgment creditor to see to it if he would secure such lien that his judgment is properly docketed, for as against a bona fide purchaser for value any material defect or omission in that respect is the fault of the judgment creditor, and the loss, if any, occasioned thereby will be regarded as his own. The court said: "It is true that the common law as a general rule recognizes but one Christian name, and hence for most purposes the middle name or names, or the middle initial, letter, or letters, of a person's name are not material *** in civil *** proceedings and a variance in this respect is generally held to be immaterial. The omission or insertion of, or even a mistake in a person's middle name or initial in a conveyance is, as between the parties thereto unimportant, and there can be no doubt but the judgment in this case as between the parties is a valid judgment against E. A. Davis or Edward A. Davis, by whichever name he may be known or called."

While we know what is the trouble with the patient, the question of the remedy is not so easy, but it is one in the discovery of which examiners of title should be most interested, and should work together to find. Many schemes have been devised, some of them very elaborate, and strenuous efforts have been made to make them effective. One much talked about is the Torrens system of title registration, devised by a man named Torrens, and which is in operation in a number of the states and also in Canada. There has been proposed a uniform land registration act, based upon the Torrens system, and embodying, at least in substance, the important features of the Acts in use, which will be used for the purposes of this discussion, but the important provisions, rather than matters of detail will be considered.

This plan states its purpose to be for the certain, cheaper and more speedy settlement, registration, transfer and assurance of titles to land, having the following purposes, in detail: to establish or designate courts of land registration; to provide for the appointment and duties of registrars of title; to regulate proceedings; to obtain registration of title; to authorize the adjudication of title; to prescribe the nature of certificates of title; to provide for the registration of subsequent dealings with registered titles; to regulate sundry proceedings after registration of title; to determine the legal effects of registration of title; to establish an assurance fund, and to regulate the fees for registration

---

31 Davis v. Steeps, supra, note 30, p. 475-476.
of titles. It provides that the proceedings shall be *in rem* against the land, the decree of the court and registered transaction to operate directly on the land and quiet and establish title thereto in accordance with the provisions of the plan; it provides for an examiner of title who makes an examination of the title and reports to the court as a prerequisite to the hearing and adjudication of the court; it requires a suit for the registration to be begun by a petition to the court; it provides for notice to all persons shown in the examiner's report to be interested and to whom it may concern, such notice to be personally served when possible and by publication; it provides for the appointment of a guardian *ad litem* for all persons under disability, not in being, unascertained, unknown, or out of the state, who may have or appear to have an interest in or claim against the land; it provides for the entry of a decree of confirmation and registration which shall bind the land and quiet the title thereto, which shall be forever binding and conclusive upon all persons and shall not be attacked or opened or set aside, except as provided in the plan, and it provides for rehearings and appeals.

The decree is then copied in the office of the Registrar of Titles and becomes the original certificate of title, a duplicate is issued to the owner, and transfers are made by deed, and on exhibit to the Registrar, a new certificate issued. The land remains forever registered, subject to provisions of the act and amendments thereof, and no title in derogation of that of the registered owner can be acquired by prescription or adverse possession. The plan requires the payment of one-tenth of one per cent of the assessed value of the land to be held by the state as an insurance fund out of which persons losing any interest or title by the registration shall recover their damages. The plan only affects such municipalities as may adopt it and only such land as the owner may petition to have registered.

While the Torrens or some similar system of title registration has been adopted by a number of states, and under local option provision has been adopted in some counties containing large cities, it has not proven particularly attractive and except in a few localities has been used very little. While such a system of registration is effective for disposing of all of the objections to title and the delays incident to the present methods of title examination and transfer after the registration, it does not furnish an immediate solution of the problem.

In the first place, no person who is satisfied with his title is going to spend a considerable sum of money to have his title registered, when he has no immediate intention of conveying it and particularly when he has no assurance that the unknown prospective purchaser is going to be willing to accept a registered title. If he has a sale immediately pending, the purchaser although willing to accept a registered title may be unwill-
ing to wait until such registration has become effective after the lapse of
the necessary period during which an appeal may be taken or a review
had. The registration being voluntary, it is impossible to foresee the
time when all titles would be registered, making possible the passing of
any title by the simple process of executing a deed or a contract, and
enabling the purchaser to satisfy himself that he is obtaining a per-
factly good title, by merely examining the certificate in the registrar's
office.

Another method of escape from the present unsatisfactory situation
is title insurance or title guaranty policies. These do not depend at all
on any statutes, except the protection afforded by the legislative
requirements as to solvency of the insurer, generally by the deposit
of certain securities required at all times to be of a certain value with
some state officer. Such policies are entirely a matter of contract be-
tween the insurer and the insured, and the extent of the obligation
assumed by the insurer is fixed by the type of policy issued. It may be
a mortgagee policy, which only binds the insurer to the amount of
liability under the mortgage. It may be an owner policy, which insures
such owner against all defects in the title, or it may insure the owner,
except as to certain items noted in the policy. A limited policy or one
containing exceptions may be acceptable to a purchaser, and it may not.
If it is an absolute insurance without any exceptions the title is ordi-
narily so good that, except for the insistence of a purchaser upon such
policy, it is wholly unnecessary. It is, however, if a policy can be
obtained which a purchaser is willing to accept, a very satisfactory and
generally an economical method of getting away from objections to the
title in the instant case. However, the purchaser, unless he has pro-
tected himself in his contract with a subsequent purchaser, may find
that the title policy is not acceptable to such purchaser, and further
delay and cost may be found necessary to satisfy such a purchaser.
Again, it takes time to obtain such a policy, as it is necessary to fur-
nish an insurer an abstract of title for examination, and frequently the
correction of objections to the title, before the insurer will issue a
policy. Again, upon transfer of the insurance policy, a further fee is
generally required. In a few places where title insurance has been used
for a considerable period of time, with the experienced purchasers of
mortgagees, such policies have been found very satisfactory, and the
title passes about as readily from hand to hand as does the title to per-
sonal property. Such a situation, however, is the result only of years
of education, and of satisfactory experience with the system. It is,
however, only rarely that a property owner is going to go to the
expense of a title insurance policy until objection is made to his title
by some purchaser who can only be satisfied or who is willing to accept
such a policy, and the owner finds that the purchase of such policy is the cheapest and quickest way to bring about the consummation of the sale.

As in the use of the Torrens system, title insurance affects only the title to the particular piece of property insured and does absolutely nothing to improve the titles of other properties, and a very large percentage of it is either of insufficient value to warrant the expense, or the owner cannot afford such expense.

In connection with properties of small value, the title insurance or title guaranty policy is preferable to the Torrens system of registration, because the insurance fee is based upon the value of the property, and frequently the actual cost of the initial policy to the insurer in making its examination and satisfying itself that it can safely issue a policy is far in excess of the premium it receives, while registration of a title under the Torrens Act initially is practically the same regardless of the value of the property, except as to the small fee paid into the insurance fund.

Another manner of remedying defective or objectionable titles is by legislative enactments, and the legislatures of the various states have endeavored to provide various types of proceedings for that purpose. In Wisconsin, the statutes provide for an action to quiet title by any person having a legal title to land, against any other person setting up a claim thereto, and for such an action, by any person who has been in the uninterrupted adverse possession of any real estate for the period of ten years or more under a conveyance in writing recorded in the office of the register of deeds, or who has been in such possession for twenty years or more otherwise than under such conveyance.

In the first type of action, a person may be made a party by fictitious name or as an unknown owner, debtor, grantee, representative, or other like designation; in the second type of such actions, the plaintiff may make all persons deemed to be connected with or involved with defects in the title defendants by name, if known, and otherwise generally all persons whom it may concern by that specification, the summons in the latter type to be served on all persons specially named as defendants as in other cases, and on all others by publication, an order for such publication being obtained after the manner provided by the statutes in other cases so far as practicable. The judgment when recorded in the office of the register of deeds on such record shall be conclusive evidence of the status of the title to the lands according to the facts therein adjudged, and as to all persons not appearing and contesting, judgment may be rendered without other proof than the verified com-

plaint, proof of service of the summons and the facts as to possession as alleged.

These statutory proceedings are, just as the Torrens system or title insurance, of some expense to the property owner, and may or may not satisfy a subsequent purchaser, because of the uncertainty as to whether all persons have been barred by the judgment where they have been designated only as unknown and have been served only by publication. Except as to the formalities of service by publication on unknown owners or claimants, such a proceeding as to them is practically no more than an affidavit setting forth the necessary facts to constitute adverse possession, as the plaintiff is not subjected to any contest or cross-examination and in common practice the judgment is entered upon the verified complaint, with very little testimony except as to possession.

These proceedings while frequently used would seem a good deal like drawing a red herring over a trail, for they only serve to satisfy the requirement of a title on the record, and then not until after the lapse of the time within which the judgment may be vacated, for until then they do not create a marketable title.\(^3\)

A judgment quieting title is subject to Section 269.46 of the Wisconsin Statutes empowering the court at any time within one year after notice thereof to relieve a party from a judgment obtained against him through his mistake, inadvertence, surprise or excusable neglect, and Section 269.47, providing that when the summons is served by publication and is not received by defendant through the postoffice, he may, upon good cause shown, be allowed to defend after final judgment within one year after actual notice thereof and within three years after its rendition. The court in Kingsley v. Steiger\(^5\) held that under the first section any defendant may invoke the discretion of the court to relieve him from a judgment at any time within one year after he has received notice thereof without regard to the time the judgment was rendered, while under the second section, a defendant may demand such relief as a right, if he does so within one year after notice of the judgment and within three years after its rendition.

In the Ransom case the trial court in holding that a proceeding to quiet the title was necessary to render the title merchantable, and the Wisconsin court in sustaining such holding because of defectively satisfied mortgages and variances in names, apparently gave no consideration to the statutes last above mentioned or to the cases above cited relating to the effect of such statutes on judgments quieting titles.


\(^{35}\) 141 Wis. 447, 123 N.W. 635, 31 L.R.A. (n.s.) 1068 (1910).
The legislature of Wisconsin has provided for the filing of affidavits setting forth certain facts, which affidavits when of record for twenty years shall be *prima facie* evidence of the facts stated. Such affidavits, however, may not be satisfactory to the title examiner. Recently such an affidavit, showing that the grantee with a certain middle initial was the same person who conveyed with a different middle initial, was objected to because made by the party himself, and such examiner insisted upon a new affidavit being made by some one not interested in the property, although the statute does not specify who shall make such an affidavit. Therefore, such affidavits are unsatisfactory means of clearing up the matters mentioned in the statute because they afford no assurance against subsequent questioning by the examiner.

As to unreleased or defectively released mortgages, the legislature of Wisconsin provides for an order of court discharging the mortgage of record on proof being made to the satisfaction of the court that it has been paid or satisfied and that the mortgagee is a defunct corporation, or is a non-resident of the county, or is deceased, and if he is deceased that there is no local qualified administrator of his estate, the record of such order or certified copy thereof to have the same effect as the record of a discharge by mortgagee duly executed and acknowledged.

What evidence can be offered by the present owner of property subject to an unreleased mortgage executed originally in 1850? In the vast majority of cases, all the evidence that he does actually offer as a basis for the court order is his verified petition or his unsupported testimony that during his ownership, if he has been in possession for twenty years or more, or if less, possibly the affidavit or testimony of his predecessor in title, that he has made no payment on the mortgage. How does this meet the decision of the Wisconsin court that the statute of limitations may have been tolled by the payments by somebody else upon the mortgage debt?

The affidavit of identity, etc., and an order releasing the mortgage resorted to, only serve to satisfy to some extent the requirement of a title on the record, and as far as cutting off rights of action are farcical. In the last analysis, the title is made good only by the operation and effect of statutes of limitation. The same objection can be made to the efficacy of suits to quiet title and orders releasing mortgages as effectively disposing of ancient clouds as can be made to the Torrens registration system and title insurance; such remedies affect only a particular piece of property, and leave these questions open as to all other properties affected in a similar manner.

---

The effect of the decision of the court in the *Ransom* case is to lay the burden upon the owner of practically every piece of property in the State of Wisconsin to bring a suit to quiet title in order to make the title marketable, as there are comparatively few titles in which variances in names or unreleased or defectively released mortgages do not appear. In considering remedies for the condition created by that important decision, the remedy or remedies sought should be such as to cure speedily and cheaply the type of defects which exist in practically all record titles, so that when an owner attempts to sell or mortgage, such defects will no longer arise to create expense and delay and possibly prevent a sale.

The present statutory provisions with respect to judgment liens might well be repealed. A new statutory scheme could provide that no judgment should become a lien on any real estate of the judgment debtor until notice of levy be filed in the office of the register of deeds where the land is located, a notice of levy describing the particular lands of the judgment debtor. The twenty year period of lien is too long. It might well be limited to ten or even five years after levy.

Such a change would eliminate the great trouble in Milwaukee created by the similarity of names of a large number of people in the city, against whom judgments are frequently docketed. Under the present statute, judgments are being obtained daily in Wisconsin, not with any hope or expectation of the immediate collection of the same or for the purpose of making such judgments a lien upon real estate known to be owned by a judgment debtor, but upon the gamble that some time within ten years the debtor may own a piece of real estate, which upon the probable average of transfers will be conveyed, and the judgment creditor without any effort upon his part or the exercise of any diligence whatever, will be able to collect because the debtor finds it impossible to convey or mortgage without the satisfaction of the judgment. The effect of this practice is to place an unjust burden on many property owners of the same name.

As to the clouding of the title by unreleased or defectively released mortgages, a very simple and effective remedy would be to require every mortgage to state in the body of it the date of maturity, and then have a statute of limitations limiting the action for foreclosure to a defined number of years after maturity of the last installment as the same appears of record, and making the bar absolute in favor of the purchasers who have not assumed the mortgage. The statutes of Colorado limit such action to seven years from the date of such maturity.

The difficulties created by deeds in which no wife of the grantor joins and in which he is not described as single, and his place of residence is not shown, can be readily removed by abolishing dower, as
many of the states have done, or by allowing it only in lands owned by the husband at his death. Dower is purely statutory, and as to inchoate dower, it can be abolished at any time without violating any legal right.\textsuperscript{38}

A quick inexpensive method of curing old defects of title, such as have been discussed, is a new statute providing that enumerated defects shall not affect the title of the present owner, and giving all persons interested a limited period, at the outside two years, within which to bring suit, or be barred.

Section 330.06 of the Wisconsin Statutes (1935) provides that upon entry into possession of land under claim of title founded upon some written instrument as a conveyance or upon the judgment of a court followed by continual occupation and possession for ten years, the premises shall be deemed to have been held adversely. Section 330.07 defines adverse possession founded upon a written instrument, Section 330.09 defines adverse possession where one is not claiming under a written title, and Section 330.10 provides that an adverse possession of ten years under Sections 330.06 and 330.07, or of twenty years under Section 330.09 shall constitute a bar to an action for the recovery of such real estate so held adversely, or of the possession thereof. Unfortunately, the rights under these sections are limited by Section 330.14, saving rights of action in case disability exists, such as minority, insanity, imprisonment or absence from the state, evidence of which appears infrequently in the abstract and in a large number of cases in connection with those defects cannot be readily discovered.

That the state legislature has power to pass statutes of limitation is unquestioned.\textsuperscript{39} In Terry v. Anderson\textsuperscript{40} the Supreme Court held that an enactment reducing the time prescribed by the statute of limitation in force when the right of action accrued is not unconstitutional provided a reasonable time be given for the commencement of a suit before the bar takes effect. And in Koshkonong v. Burton\textsuperscript{41} the Court held that the legislature of Wisconsin had the constitutional power to provide

\begin{footnotes}
\item[38] Bennett v. Harms, 51 Wis. 251, 8 N.W. 222 (1881). The court said in that case (p. 258), "It would seem to follow from the weight of authority, that while the right of dower remains inchoate—a mere expectancy—and until it becomes consummated by the husband's death, it is entirely under the legislative control."
\item[39] M'Elmoyle v. Cohen, 13 Pet. 312, 10 L.ed. 177 (1839). In that case the Court said (p. 327), "Prescription is a thing of policy growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our states under our system exercise this right in virtue of their sovereignty?"
\item[40] 95 U.S. 628, 24 L.ed. 365 (1877).
\item[41] 104 U.S. 668, 26 L.ed. 886 (1881).
\end{footnotes}
DEFECTS IN TITLES

that existing causes of action should be barred, unless suits to enforce them be brought within a shorter time than that prescribed when they arose, if a reasonable time were given by the new law before the bar should take effect. This rule of law is thoroughly established, and therefore the legislature can as to all existing causes of action shorten the present periods of limitation, and make the effect of the bar as absolute as it desires, provided only that it saves to all persons the right to start their suits within a reasonable time under the circumstances.\footnote{Cole v. Van Ostrand, 131 Wis. 454, 110 N.W. 884 (1907). In that case the court said (p. 466), "Until a statute of limitation has completely run so as to vest title by excluding the possibility of attack thereon, the period of limitation is wholly within the province of a state legislature, and is not controlled by the federal provisions against either the impairment of the obligations of contract or the deprivation of property without due process of law, provided, of course, a reasonable time be allowed after the new enactment for bringing actions if the time be shortened."}

As to whether rights of persons under disability are safe from the operation of the statute of limitations it depends entirely upon whether the legislature so prescribes. In \textit{Bank of Alabama v. Dalton}\footnote{116 Wis. 155, 90 N.W. 1086, 94 N.W. 171, 61 L.R.A. 918 (1903). \textit{Cf. Vance v. Vance}, 108 U.S. 514, 2 Sup. Ct. 854, 27 L.Ed. 808 (1883), in which it was argued that because the plaintiff in error was a minor when the law went into operation it could not affect her rights, but where the Court said (p. 521): "The Constitution of the United States to which appeal is made in this case gives to minors no special rights beyond others, and it was within the legislative competency of the State of Louisiana to make exceptions in their favor or not."} the Supreme Court of the United States held that where the legislature has made no exception in a statute of limitation, the court can make none.

The Wisconsin court in \textit{Boyd v. Mutual Fire Insurance Assoc.}\footnote{9 How. 522, 13 L.Ed. 242 (1850).} held that the question of exceptions from the statute of limitations is a consideration of policy, with which the legislature can deal freely, and that, where neither the statute nor the precedents of the court warrant exception from the protection of the limitation statutes, the court may not with propriety take from them that protection which the statute by its terms gives.

A statute was enacted in Iowa in 1906 which provided that in case a husband or wife failed to join in a deed, such husband or wife, or their heirs, devisees, grantees or assigns, should be barred from recovery unless suit was brought within one year after the taking effect of the act, and in case the right of action had not accrued by the death of the party making the deed, then the one not joining was authorized to file a notice in the register's office with an affidavit setting forth the affiant's claim, together with the facts upon which the claim was based, and if such notice was not filed within two years of the taking effect of the act, the claim was forever barred. No exception was pro-
vided as to persons under disability, and in *Collier v. Smalts* the Iowa court held that the period of one year was not unreasonable.

Another effective method and one entailing no expense to the property owner would be to shorten the statutes of limitation relative to actions to recover real estate, making the bar of such statute absolute after the period limited, provided it appeared of record that the person claiming the title under a written instrument during the period of limitation, or his predecessors in title, had paid taxes, and to require that the various treasurers of municipalities collecting taxes make the receipt to show the name of the person paying, or the name of the person in whose behalf the payment was made and to require on every transfer the payment of a small tax on the value of the land to be paid to the state treasurer as an assurance fund, and provide that any person who might be deprived of any estate or interest in the land, and who would be without remedy because of the statute of limitations might within a short period next after the time at which his right to bring action had first accrued, bring an action against the treasurer of the state for the recovery of such fund and any damages to which he might be entitled by reason of such deprivation.

The present statute of limitations of twenty years necessary to confer an adverse title under modern conditions is entirely too long, unwarranted and unnecessary. Twenty years was the period of limitation fixed in many of the colonial charters. It requires no argument to demonstrate that if twenty years was regarded as necessary and proper under the conditions then existing, that a much shorter period will serve the same purpose now, and many of the states have recognized this by prescribing a shorter period.

---

45 *Iowa* 230, 128 N.W. 396, Ann. Cas. 1912 C, (1910). *Cf. Steinberg v. Salzman*, 139 Wis. 118, 120 N.W. 1005 (1909), where the court in construing what are now our ten and twenty year statutes relative to adverse possession said (p. 123): “The statutes cited, in terms, make no exceptions in favor of minors or those under guardianship, or to meet cases of fraud, and they have been strictly construed in a long line of decisions in this court. Given a written instrument purporting to convey a colorable title, and adverse possession thereunder for a period of ten years, the requirements of the statutes are satisfied. Section 4218, *Stats.* (1898), does not aid the plaintiffs, as no action was commenced within the time limited by that section.”