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DOUBT REDUCTION THROUGH CONVEYANCING REFORM—MORE SUGGESTIONS IN THE QUEST FOR CLEAR LAND TITLES

By James A. Webster, Jr.†

> Are we insisting upon the forms of an outworn, buried age? The fact is that we still do cling to a certain amount of ritualism, though our insistence upon it is on the decline.[1]
>
> The title man's idea of real property law reform is that the public records should, in so far as possible, tell all the essential facts about title; that all "equities should be kept off the record;" that the purchaser need not look behind the curtain of the record title; that conveyancing forms should be simplified and formalities reduced to a minimum; that insofar as is humanly possible, land should be made as freely a marketable commodity as personal property.[2]

This is the last in a series of articles suggesting certain reforms in real property conveyancing procedures that will reduce uncertainties in land titles. In a time of general complexity and uncertainty in human affairs, it often appears that some of the most uncertain people are the professional title attorneys whose jobs are to search out and to certify the validity and marketability of land titles. Many of the uncertainties they face result from the legal profession's[3] slavish adherence to ancient and impracticable methods of conveyancing and title recordation, wholly inconsistent with the needs of the present time. This article enumerates and analyzes a number of needless problems that title searchers face daily. It suggests modest[4] reforms that could eradicate some of the uncer-

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[1] P. Basye, Clearing Land Titles § 241 (1953).

[2] White, *The Title Man's Idea of Real Property Law Reform*, 10 Cornell L.Q. 181, 200 (1925).

[3] The practitioners of real estate law must accept the blame. This is pure "lawyers' law," particularly "real estate lawyers' law" and if anything is to be done about it, property lawyers will have to take the initiative.

[4] The suggested reforms are called "modest" because they entail no wholesale revamping of the existing system of land conveyances and recordation but instead seek merely to improve on the existing vehicles. While tract indexing systems or the Torrens title system, perhaps modernized and coupled with automatic modes of information retrieval, may eventually result in the discarding of current land conveyancing practices and existing recordation systems, it is not likely that this will come to pass in the near future."

tainties in conveyancing practices and that could thus assure title searchers, owners, purchasers, lenders, and encumbrancers that the land titles with which they deal are freer from doubt and more easily marketable. This article considers title difficulties that arise from the following defects: (1) the omission of the formalistic seal on deeds of conveyance, (2) the omission of procedural technicalities in certain interspousal conveyances, (3) the necessity for checking title instruments outside the vendors' chains of title, and (4) the problems caused by secret trusts and trusts only partially disclosed in real property records. After an analysis of each of these problems, legislation is proposed to improve the current conveyancing system by remedying the respective defect.

THE NECESSITY FOR SEALS ON DEEDS IN NORTH CAROLINA

One problem of marketability of land titles results from the sacrosanct judicial rule that a seal is absolutely essential to the validity of instruments conveying legal title to land in North Carolina.

Consider the following factual situation. A title-searching attorney discovers in his chain of title that several tracts of land were formerly owned by the federal government. It appears the federal government through its agents executed deeds to a prospective vendor's predecessors in title several years and several conveyances ago, but the federal government's agents omitted to put seals on its deeds.[5]

In the foregoing factual situation, applying the rule existent in North Carolina, that a deed without a seal does not pass legal title to land,[6] the title-searching attorney discovers that his client's prospective vendor does not have a marketable title to the property because of the omission of the seal.

(O)ur title destiny lies in another direction, for it is impractical to expect a Torrens revolution short of an actual breakdown of the present machinery." J. CRIBBETET, PRINCIPLES OF THE LAW OF PROPERTY 249 (1962).

[5] This factual situation was recited to the writer by an able, well-known title attorney who practices in North Carolina.

[6] 2 MORDECAI'S LAW LECTURES 916 (2d ed. 1916). See Strain v. Fitzgerald, 128 N.C. 396, 38 S.E. 929 (1901): "A deed is an instrument of writing, signed, sealed and delivered. The *seal* is what distinguishes it from a parol or simple contract. Land can only be conveyed by a *deed,* that is, an instrument of writing signed, sealed and delivered. A paper, in form a deed, is *not a deed* without a seal . . ." (Emphasis added); Willis v. Anderson, 188 N.C. 479, 124 S.E. 834 (1924); Morton v. Blade's Lumber Co., 154 N.C. 336, 70 S.E. 623 (1911); Pickens v. Ryner, 90 N.C. 282, 47 Am. Rep. 521 (1884); Hinsdale v. Thornton, 74 N.C. 167 (1876).

If the title lawyer is then employed by the prospective vendor to make the title marketable, he runs into further difficulty. Who among federal bureaucrats will voluntarily assume to quitclaim, under seal, all claims and interests of the federal government in the land without a consideration? Moreover, North Carolina's apparent solution to the problem, the rule that "an instrument ineffectual as a deed because not under seal may nevertheless be enforceable as a contract to convey when it is supported by a valuable consideration,"[7] is not as simple as it sounds. Even if it can ultimately be proved that a consideration was in fact paid several years and several conveyances previously, which may not be easy, to get the instrument without the seal enforced at present will require a lawsuit, perhaps in a court at some point distant from the land involved.[8] In addition to the travel to find a court, the formation of the necessary pleadings, the search for the necessary parties, service of process, payment of attorneys' fees incident to the action,[9] and the inevitable consumption of time unnecessarily burden the title attorney, and may make the prospective grantee grow restive and renege on his expressed desire to purchase the particular land.[10] After all, the prospective purchaser wants a marketable title *now.* He may take his commercial, industrial, or residential plans elsewhere, perhaps to another state. Hence, the impediment in the title caused by the omission of the seal not only may prevent a prospective vendor from selling his land, but also may conceivably cost a town, a city, or a state in which the land is located the value of an annual

[7] Dunn v. Dunn, 242 N.C. 234, 87 S.E.2d 308 (1955).

[8] In the instant factual situation, the suit against the federal government, if for less than 10,000 dollars, at best would have to be instituted in the federal district court. See 28 U.S.C. § 1346 (1964). *Quaere,* whether the action could be instituted *at all* if the action involves more than 10,000 dollars and is against the United States? In such case, can the United States be made a party without its consent? Who should be served? It is obvious that the journeyman title-searching lawyer, employed for the "simple purpose of clearing up my title," would have his hands full if the action to clear the title involved the federal government as a defendant! Nor do the statutes of limitations aid the status of the title as against the United States Government, which is exempt from their operation.

[9] An alternative to these steps would be for the vendor to accept the price that the purchaser is willing to wager that the title by the vendor will never be assailed, a rather unhappy alternative for the vendor.

[10] The omission of the seal by any grantor in the chain of title of a prospective vendor has title-clogging potentialities which may necessitate court proceedings, but will not be nearly so frustrating and confusing as the possible difficulties that could arise when the United States Government conveys without affixing a seal to its deed.

payroll that could have resulted had the prospective grantee been offered a marketable title.

There seems to be nothing redemptive that can be said for continuing to require seals on deeds. Originating among the Persians and Jews, seals were introduced into England by the Normans who used them as a substitute for signing their names because of their inability to write. By the time of Edward I (1272) every freeman and many villeins had their distinct seals. After the Crusades the coats of arms employed by the knights in those wars were introduced into seals as distinctive markings for identifying and authenticating instruments. From the time of the Norman invasion, until a much later time when the statute of Frauds was adopted, signing an instrument was not necessary; the seal alone was sufficient to authenticate deeds. When the Statute of Frauds was enacted, it became essential that every deed purporting to convey land should also be *signed* by the party to be charged therewith.[11] From the time of the Statute of Frauds, therefore, the private seal has thus had no real utility. The requirement of the signature of the party to be charged on an instrument completely meets the authenticating function formally and formerly served by the seal. This is further illustrated by the fact the "seal" that is required on sealed instruments today need not be distinctive at all. While at the common law a seal was required to be a distinctive impression upon wax or wafer or some other substance capable of being impressed, the law has been so relaxed in North Carolina today that the presence of the word "seal" in parenthesis on an instrument is deemed sufficient.[12] A square piece of paper affixed with a wafer or a scrawl is effective as a seal.[13] Thus the seal no longer has any rational connection to the authentication of an instrument. It does not distinctively identify a grantor or maker of an instrument; since it is non-distinctive, the seal no longer proves itself. Today whether a mark or character upon an instrument is to be regarded as a seal depends on the intention of the executant.[14] A number of

[11] 2 MORDECAI'S LAW LECTURES 913, 914 (2d ed. 1916).
[12] Federal Reserve Bank v. Kalin, 81 F.2d 1003 (4th Cir. 1936).
[13] Hughes v. Debnam, 53 N.C. (8 Jones) 127 (1860).
[14] Williams v. Turner, 208 N.C. 202, 179 S.E. 806 (1935). *See* Ingram v. Hall, 2 N.C. (Haywood) 194, 200 (1795) for an excellent history of the seal and the liberalization of its use:

> The people began at length, to forget the original use of this institution, and to seal with any impression they could get; and the law, rather than invalidate the whole transaction, left it to the jury to decide

cases raise the question of whether or not the word "seal" written in a place on the instrument not on the line with the signature of the grantor can be the seal of the signer of the instrument.[15] It has been held that the intent of the signer to adopt or not to adopt the seal is determinative. It appears, therefore, that not only may title searchers have to go to court to clear up titles where the seal has been omitted entirely, but also court actions may be necessary to clear up marketability problems where an odd form of seal has been used or where there are multiple grantors in an instrument and only one "seal" placed somewhere close to their signatures. These court actions will be necessary to determine if some odd marking is in fact a seal or whether all of multiple grantors adopted one seal.

If there is a redeeming value to the seal, this writer cannot discover it in connection with deeds to real property. Though perhaps infrequently, the omission of seals on conveyancing instruments still causes land title searchers inconvenience and necessitates the procurement of quitclaim deeds or the institution of actions to compel specific performance of conveyances. This unnecessary waste of time could be obviated by the abolition of the requirement of seals on land title instruments. The legislature of North Carolina, and the legislature of any other state that retains the require-

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> whether that was the seal of the party or not. In this country the people have departed still further from the true use of seals, by not making any impression at all, scratching something like a seal upon the margin of the paper, and making that pass for a seal. To the first of these abuses the law has conformed, and will now deem the sealing to be sufficient, if found by the jury to be the seal of the party. For fear of destroying some contracts improperly made at first, it has relaxed from strict propriety, and the practice of sealing with any impression has become general; and is now from necessity, allowed to be good in every instance . . . but still the contemplation of law is in conformity to the ancient use of seals. They are deemed signs of authenticity, are supposed to have an intrinsic evidence in themselves, and for that reason are carried out by the jury.

In other words, any mark *may* be a seal *if proved to be* a seal. But if additional proof is necessary to show that a mark is a seal, *i.e.* that it is authentic, of what use is the seal?

[15] *See, e.g.*, Harrell v. Butler, 92 N.C. 20 (1885), where the word "seal" was written by a subscribing witness' name instead of the grantor's signature. It was held sufficient as the grantor's seal. See also Pickens v. Rymer, 90 N.C. 282, 47 Am. Rep. 521 (1884), where there were two makers of an instrument and only one word "seal" by the two signatures. The court held that it was a question for the jury to determine whether both parties adopted the same seal. If both adopted the same seal, the instrument was a sealed instrument as to both. If both did not, it was a sealed instrument as to one party and a simple contract as to the other.

ment of a seal on a deed, should follow the statutory precedent set in the Uniform Commercial Code with reference to "Sales," wherein seals are made inoperative in the law of sales of goods,[16] and should thus abolish the requirement that deeds must be sealed.[17]

The following statute is proposed for adoption:

> *Use of Private Seals Unnecessary on Deeds of Conveyance, etc.* The use of private seals upon deeds, mortgages, deeds of trust, and other instruments shall not be necessary to create and convey rights, titles, and interests in real property from and after (effective date of statute). The addition of a private seal to any deed, mortgage, deed of trust, or other instrument, shall not affect its validity or legality in any respect.[18]

THE ARTIFICIAL RITUAL THAT MUST BE PERFORMED WHEN MARRIED WOMEN CONVEY LAND TO THEIR HUSBANDS

A frequent impediment to marketable land titles in North Carolina finds its source in the outmoded requirements for conveyances from married women to their husbands. North Carolina retains a statute which provides:

> (a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, nor shall any separation agreement between husband and wife be valid for any purpose, unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.
>
> (b) The certifying officer examining the wife shall incorporate in

[16] N.C. GEN. STAT. § 25-2-203 (1965).

[17] A large majority of the states have abolished private seals already. The following states still require a seal or some form of substitute in the form of the word "seal," a scroll, or the initials "L.S." (for *locus sigilli*, the place of the seal): Arkansas, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, North Carolina, Oregon, South Carolina, Vermont, Virginia, and Wisconsin. A seal is also required in the District of Columbia.

[18] It will be observed that this statute proposes to make only "private" seals unnecessary. It would not affect the requirements of seals on corporate deeds, although some thought might very well be given to abolishing the requirement of the corporate seal on corporate conveyances. The North Carolina General Assembly apparently does not view the requirement of corporate seals as inviolate, as it periodically enacts remedial legislation validating corporate deeds from which corporate seals have been omitted. See N.C. GEN. STAT. § 47-71.1 (Supp. 1965).

> his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife. The certificate of the officer shall be conclusive of the facts therein stated but may be impeached for fraud as other judgments may be.
> (c) Such certifying officer must be a justice of the Supreme Court, a judge of the superior court, a judge of the district court, a clerk, assistant clerk, or deputy clerk of the superior court, or a justice of the peace, or magistrate, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment and examination is made. . . .[19]

The foregoing statute, framed for the purpose of protecting the married woman from the "grasping acquisitiveness of her husband,"[20] makes deeds and contracts relating to her real property absolutely void unless executed in conformity with statutory requirements.[21] The law presumes that contracts between a wife and her husband affecting her real estate are executed under the influence and coercion of the husband, and to rebut this presumption and to render the contract valid, an officer of the law designated by the statute must examine the contract and be satisfied that the wife is doing what is reasonable and not hurtful to her, and so certify.[22] If a deed from a married woman to her husband does not have the required completed certificate of the proper officer, it not only does not convey a *marketable title* but it conveys *no title* at all.[23]

This statute, therefore, has two harmful and inconvenient effects that prevent land from being a "freely marketable commodity" in the state where it operates. One is that the statute necessitates a useless, time consuming, form-filling ceremony[24] every time the

[19] N.C. GEN. STAT. § 52-6 (Supp. 1965).
[20] 1 POWELL ON REAL PROPERTY § 123 (1949).
[21] Caldwell v. Blount, 193 N.C. 560, 137 S.E. 578 (1927).
[22] Kearney v. Vann, 154 N.C. 311, 70 S.E. 747 (1911).
[23] The presumption that a wife's contract or deed affecting her real estate has been executed under the influence and coercion of her husband is so strong that her deed is invalid without the proper officer's certificate *even though the married woman is represented by counsel at the time she executes the deed or contract!* See Joyner v. Joyner, 264 N.C. 27, 140 S.E.2d 714 (1965).
[24] N.C. GEN. STAT. § 52-6 (Supp. 1965) is deemed an enabling act and is strictly construed. Caldwell v. Blount, 193 N.C. 560, 137 S.E. 578 (1927). The certificate of the designated officer must be attached or annexed to the deed or contract. In the absence of the certificate, neither the wife nor her heirs are estopped by the deed. Capps v. Massey, 199 N.C. 196, 154 S.E. 52 (1930). While the office of justice of the peace has been abolished by N.C. GEN. STAT. § 7A-176 (Supp. 1965) upon the establishment of district courts

wife-grantor desires to enter into a contract involving her real property with her husband. Though perhaps originally conceived to serve the purpose of requiring an independent judgment of a public officer as to the reasonableness of her deed or contract made with her husband, the ceremony has at this date become only a perfunctory act.[25] Sample interrogation of title lawyers over North Carolina indicates that the certifying officer almost always "simply signs the established form, collects his fee, and rarely, if ever, makes a real inquiry as to whether the contract is unreasonable or injurious to the wife."[26] No statutory standard is established for the officer's "conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife;" this is left to the discretion of the certifying officer.[27] These certifying officers in almost all

under the 1965 Court Reform Act, "magistrates" were added in 1965 to N.C. GEN. STAT. § 52-6 (Supp. 1965) to the list of officers who can make the required certificate.

[25] That the function is merely perfunctory was recently demonstrated to the writer by one of the best known clerks of the Superior Court in North Carolina. A husband and wife had come before the clerk to record a deed which had been executed by the wife, conveying her real property to the husband. The clerk was requested to examine the wife and the deed pursuant to the statute's requirements and to certify the deed's fairness and reasonableness. The clerk determined that the wife's deed to the husband was made without any real consideration passing to the wife and declined to certify it under N.C. GEN. STAT. § 52-6 (Supp. 1965) (then N.C. GEN. STAT. § 52-12, before it was renumbered in 1965). Failing to get the clerk's certificate, the husband and wife left the office of the clerk and went immediately across the street to the office of a justice of the peace. The justice of the peace quickly supplied the required certification specified by the statute as a prerequisite to the validity of a married woman's deed to her husband. The husband and wife immediately reappeared before the clerk and demanded to have the deed probated and recorded. The clerk accepted the deed for probate and recordation, since the certifying officer's certificate is conclusively presumed to be true and is not subject to inquiry except for fraud. *See* Frisbee v. Cole, 179 N.C. 469, 102 S.E. 890 (1920); Kiger v. Kiger, 258 N.C. 126, 128 S.E.2d 235 (1962); Best v. Utley, 189 N.C. 356, 127 S.E. 337 (1925). In Best v. Utley, the supreme court sustained the lower court's denial of the testimony of the justice of the peace *himself* that in fact he "did not make any examination whatever into the nature of the transaction, as to the consideration or its value" although he had certified that the deed was not unreasonable or injurious to the grantor-wife. *Id.* at 360, 127 S.E. at 340.

[26] This conclusion is derived from questionnaires sent to a number of North Carolina attorneys engaged primarily in real estate practice. See in accord R. LEE, NORTH CAROLINA FAMILY LAW § 111 (3d ed. 1963) wherein the author states: "A mockery is made of what was once upon a time probably intended."

[27] "One wonders how any person can truthfully say that a wife's deed to her husband is not unreasonable or injurious to her unless she actually receives in return at least the marketable value of the real estate. R. LEE, NORTH CAROLINA FAMILY LAW § 111 (3d ed. 1963).

instances are the minor, non-legally-trained justices of the peace,[28] assistant clerks of the superior court, and deputy clerks of the superior court. That the law permits these inferior officers to make "conclusions and findings of fact" as to the reasonableness or fairness of deeds and contracts of married women, without prescribing any guiding standards for this determination, is a clear indication that the statutory requirement has become only formalistic.[29]

The other effect of the existing statute, other than the useless inconvenience to the grantor and grantee themselves, is that titles to land are rendered unmarketable by noncompliance with the statute. In the event that the record chain of title discloses a conveyance from a married woman to her husband without the required certificate of reasonableness and fairness, the deed is void *ab initio*. Not only are deeds directly from the wife to the husband invalid without the proper certificate, but conduit grants from the wife to a third person with the intent that the third person shall in turn reconvey to the husband are likewise invalid in the absence of certification under the statute.[30] Neither the wife nor her heirs are estopped to

[28] *See* note 24 *supra*.

[29] While N.C. GEN. STAT. § 52-6 (Supp. 1965) does not permit notaries public to make the required examination and to certify the reasonableness and fairness of deeds and contracts, the legislature has passed a curative statute which validates deeds and contracts executed by married women and certified by notaries public prior to 1955. N.C. GEN. STAT. § 52-7 (Supp. 1965). See also N.C. GEN. STAT. § 52-8 (Supp. 1965), another curative statute which purports to provide that contracts between a wife and her husband within the provisions of N.C. GEN. STAT. § 52-6 (Supp. 1965), executed between October 1, 1954 and June 20, 1963, are validated notwithstanding the lack of a private examination of the wife. *But see*, Foster v. Williams, 182 N.C. 632, 109 S.E. 834 (1921); Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 131 S.E.2d 456 (1963). In the latter two cases the North Carolina Supreme Court raises doubt about the efficacy of such subsequently passed statutes to render valid previously executed defective instruments.

Such "curative" legislation, perhaps legislative "erasers" of particular lawyer-legislators' errors, demonstrates the arbitrary nature of the requirement of the certificate on married women's deeds to their husbands; if the legislature can so easily dispense with the proper certificate by the proper officer by so-called "curative" legislation, why should it require such certificate in the first place?

[30] The court says "a married woman cannot convey her real property to her husband directly or by any form of indirection without complying with the provisions of G.S. 52-12 [now G.S. 52-6]. Any manner of conveyance, testamentary devises excepted, otherwise than as therein provided is void." Davis v. Vaughn, 243 N.C. 486, 91 S.E.2d 165 (1956); Brinson v. Kirby, 251 N.C. 73, 110 S.E.2d 482 (1959). *But see*, Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957); McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948) (mere conveyance by the husband and wife of the wife's lands to a third person and the subsequent reconveyance by such third person to

claim subsequently that title did not pass by the wife's conveyance.[31] A deed of a married woman to her husband without the proper certificate annexed may not thereafter be amended by the designated officer who has mistakenly omitted to certify the fairness and non-injuriousness of the wife's deed, so as to make it valid.[32] In addition, the adverse possession statutes are not of much value in perfecting titles arising out of married women's deeds to their husbands. While a married woman's deed that fails to pass title for failure to comply with this statute *does* constitute color of title,[33] questions often arise concerning the date the adverse possession starts. Since these questions are not answerable by matters of record, they cannot be relied on by a title searcher in certifying the validity of a title proffered to a prospective purchaser or lender.[34] That the statute raises many litigious issues is evidenced by the many cases cited in the annotations to the statute.

Most jurisdictions have abandoned restrictions on future interspousal conveyances and contracts and have validated past interspousal conveyances.[35] North Carolina has itself shown legislative inclinations toward the removal of all coverture incapacities imposed on married women with reference to the disposition of their property owned in their own right. Prior to 1945, all of a married woman's deeds conveying her real property to third persons as well as to her husband required the private examination of the wife and a finding by the proper officer that the married woman's deed was executed voluntarily and that the married woman-grantor was free of fear or compulsion of her husband. In 1945 the North Carolina General Assembly abolished the requirement of the private exam-

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the husband does not establish *as a matter of law* an attempt to circumvent the statute, the burden being on the party asserting it to prove the purpose to circumvent the statute).

[31] Capps v. Massey, 199 N.C. 196, 154 S.E. 52 (1930).

[32] Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915).

[33] Best v. Utley, 189 N.C. 356, 127 S.E. 337 (1925); Whitten v. Peace, 188 N.C. 298, 124 S.E. 571 (1924); Norwood v. Totten, 166 N.C. 648, 82 S.E. 951 (1914).

[34] *See* Kornegay v. Price, 178 N.C. 441, 100 S.E. 883 (1919), which raises questions as to when adverse possession starts as between spouses. The court states that "owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues." *Id.* at 441-42, 100 S.E. at 883. The court states that the possession of the husband under a void deed does not become adverse until after his wife's death. The case expressly *quaeres* whether adverse possession commences against the wife's heirs *before they demand possession.*

[35] 1 POWELL ON REAL PROPERTY § 123 (1949).

ination of married women with respect to their conveyances to third persons.[36] Prior to 1957, the statutory restriction on contracts between a married woman and her husband forbade the making of any contract that would "impair or change the body or capital of the *personal* estate of the wife, or the accruing income thereof, for a longer time than three years" unless such contracts were certified as reasonable and non-injurious to the wife.[37] In other words, contracts made by a wife with her husband involving her personal estate had to be certified in the same manner as her real estate contracts and conveyances now have to be certified. In 1957 the North Carolina General Assembly deleted personal property contracts, other than separation agreements entered into between wives and their husbands, from the certification requirements of N.C. GEN. STAT. § 52-12 (1950), (now N.C. GEN. STAT. § 52-6 (Supp. 1965).[38] The anomaly in the present state of the law relating to a married woman's contracts and deeds with her husband is that a wife may make a million dollar deal with her husband as to her *personal property* and such contract is completely valid without any certificate of reasonableness and fairness to the wife, but she cannot validly convey a small outhouse to her husband without such a certificate. Since personal property comprises the greatest wealth owned today, and since married women are allowed to make contracts with reference to their personal property estates without any imputation of undue influence or coercion by their husbands, married women should be allowed to convey and make contracts concerning their real property without the intervention of any justice of the peace, magistrate, or other minor fee-collecting official. Moreover, in an election held in 1964, the people of North Carolina evinced their intention that married women should have freer control of their real property by approving a constitutional amendment which did away with the requirement that husbands had to give their written consent to their wives' deeds of conveyance.[39] The legislative ten-

[36] N.C. GEN. STAT. § 47-14.1 (Supp. 1965).
[37] N.C. GEN. STAT. § 52-12 (1950).
[38] N.C. GEN. STAT. § 52-12 (Supp. 1963).
[39] *See* N.C. CONST., art. 10, § 6, amended January 14, 1964. Prior to this amendment a married woman's deed was absolutely void unless it contained the written assent of her husband. *See* Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944) for the former law. The law now, under N.C. GEN. STAT. § 52-2 (Supp. 1965), is that a married woman may contract and convey her real property to third persons in the same manner and with the same effect as if she were unmarried.

dency has therefore been toward the abolition of disabling rules relating to married women's contracts and conveyances. The following proposed statute is designed to completely remove the last vestige of these laws that deprive married women of their capacity to deal with and to convey their real property.

A statute similar in form to the following is suggested to the General Assembly of North Carolina for its adoption:

Contracts and Conveyances Between Married Women and Their Husbands

From and after the (effective date of statute), a married woman shall have the power to contract with and to convey her property to her husband in the same manner and to the same extent as though she were unmarried.

In the interest of promoting the marketability of land titles and of simplifying conveyancing by the eradication of idle and useless formalities[40] which impede free alienation, the foregoing statute or one similar to it in form and purpose is recommended for adoption. That such a statute would also eliminate one of the last archaic stigmas on married women in North Carolina would be an added basis for its adoption.

The Burden of Searching the Records for Instruments Outside the Vendor's Chain of Title

"I find the Supreme Court is mighty free and easy with my time and energy."[41]

Practitioners of law in the area of property law occasionally feel that appellate courts, by reason of their insularity, sometimes make decisions that are not in keeping with the needs and practices of the times and that unnecessarily result in injustices and consumption of lawyers' time and efforts to prevent such injustices.[42]

[40] Wallin v. Rice, 170 N.C. 417, 87 S.E. 239 (1915).

[41] Comment of title lawyer to the writer when asked about the case of Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957).

[42] *See, e.g.*, the recent case of Riegel v. Lylerly, 265 N.C. 204, 143 S.E.2d 65 (1965), holding that the rule in Shelley's Case applies to *personal property*. *Accord*: Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

See also the series of cases holding that a clause following the descriptive clause in a deed purporting to reserve a life estate in the grantor shall not be effective for such purpose. Tremblay v. Aycock, 263 N.C. 626, 139 S.E.2d

A case imposing particularly troublesome and impractical burdens on real estate lawyers was decided in 1957 by the North Carolina Supreme Court, That case, *Reed v. Elmore*,[43] decided by a divided court,[44] resulted in requiring longer and more detailed searches of the indexes and records of land titles. The consequences have been a slowing of the issuance of title certificates of title attorneys and, if the time of such attorneys is money as is so often stated, an increase in the costs of title searches to the consuming public. The rule of this case, its utility, and a suggested statutory alternative to such rule are discussed in this section. The statutory proposal is designed to simplify and to expedite, to some extent, title searches by title attorneys, thus making land more easily and economically marketable.

898 (1965); Oxendine v. Lewis, 252 N.C. 669, 114 S.E.2d 706 (1960); Jefferies v. Parker, 236 N.C. 756, 73 S.E.2d 783 (1953); Kennedy v. Kennedy, 236 N.C. 419, 72 S.E.2d 869 (1952). These latter cases prevent grantors or their attorneys from *typing* in or *writing* limitations upon *printed* deed forms *in the space after the description* and invalidate such *typed* or *written* limitations. The court holds that such limitations at the foot of the descriptive clause are repugnant to the fee simple estate that would otherwise be granted pursuant to the deed form. This mechanical rule of construction causes injustices. One correspondent of the writer, a well known attorney in North Carolina, writes: "Time and again I have seen deeds in which an old person has conveyed land to his children, presumably at their insistence, with the reservation of a life estate appearing only through a sentence or two at the end of the description. It seems monstrous to me for the court to adopt such a technical rule as to deprive such a person of what may well be his only security for his old age . . . . I would go to the opposite extreme of establishing a rule that nothing written or typed in a printed form deed should be rejected because of repugnance to the printed portion." This rule also results in an unnecessary consumption of attorneys' time, since attorneys are precluded from using form deeds for simple transactions wherein a life estate is reserved to the grantor, even when the intention of the grantor could be made perfectly clear by a typed or written statement at the foot of the descriptive clause in the deed. *But cf.* Triplett v. Williams, 149 N.C. 394, 63 S.E. 79, 24 L.R.A. (n.s.) 514 (1908), which has never been expressly overruled, and which holds that "the whole instrument without reference to formal divisions" should be given due force and effect in determining the meaning of an instrument. *See also* Shepard v. Horton, 188 N.C. 787, 789, 125 S.E. 539, 540 (1924): "Ordinarily the written and printed parts of a deed are equally binding; but if they are inconsistent the writing will prevail over the printed form" and "Antiquated technicalities . . . should not be permitted to override the intention expressed by the makers of the deed; and if there should be doubt as to their intention the court shall adopt such construction as would accord with their presumed meaning." Statutes should be designed to make the grantor's intention control regardless of the place in the deed in which it appears.

[43] 246 N.C. 221, 98 S.E.2d 360 (1957).

[44] The decision was a 4-3 decision.

The Problem Created

> [I]f a deed or a contract for the conveyance of one parcel of land, with a covenant or easement *affecting* another parcel of land owned by the same grantor is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel. The rule is based generally upon the principle that a grantee is chargeable with notice of *everything* affecting his title *which could be discovered by an examination of the records of the deeds or other muniments of title of his grantor.*[45]

Although the foregoing statement sounds orthodox and innocuous enough, a pause for analysis indicates that the principle not only requires a title lawyer of North Carolina (and lawyers of many other states) to search the indexes and grants of a prospective grantor and his predecessors in title for "out" conveyances relating to the *particular tract of land being purchased,* but also to search the indexes and to open *every* deed of *every* grantor-predecessor in title involving *each* piece of land conveyed during his respective ownership. *Each* deed of *each* predecessor in title, executed during the period that he owned the particular land, must be read in detail even though the *index* to the recorded deeds indicates that the deed does not relate to the particular land which is being searched.[46]

In the *Reed* case a landowner (Shannon) owned a tract of land which she subdivided into seven lots in 1936. Five of the lots were sold free from any restrictions as to their future use; the grantor retained the lots numbered three and four. In 1937 the grantor Shannon sold lot number three to the plaintiff Reed, and specified in plaintiff's deed that no structure should be erected on lot number three within a certain number of feet from a public highway.[47] In the plaintiff's deed to *lot number three,* it was also specified that no structure should be so built on *lot number four* which had been re-

[45] Reed v. Elmore, 246 N.C. 221, 231, 98 S.E.2d 360, 368 (1957) (emphasis added).

[46] *See* note 50 *infra.*

[47] The restriction or "negative easement" was expressed in the following language: "The foregoing lands are conveyed subject to the condition or restriction that no structure shall be erected by grantee within 550 feet of the Pineville-Matthews Road, it being understood and agreed that the 100-foot strip leading to said tract of land from the Pineville-Matthews Road shall not be used for the purpose of constructing any building thereon, *and this restriction shall likewise apply to Lot No. 4 retained by the grantor, said Lot No. 4 being adjacent to lands hereby conveyed.*" (emphasis added.)

tained by the grantor.[48] The deed conveying lot number three, *describing lot number three only*, was duly indexed and recorded.[49] Subsequently, in 1942, the grantor Shannon conveyed *lot number four* and by mesne conveyances lot number four eventually came to the defendant Elmore in 1955, there being no reference in any of the mesne conveyances to the restrictions on lot number four established in the deed which conveyed lot number three to the plaintiff Reed. When the defendant Elmore started to further subdivide lot number four, the plaintiff Reed instituted an action to restrain the defendant Elmore from erecting buildings within the proscribed distance of the public highway and from selling lots for such purpose in contravention of the restriction that appeared in plaintiff Reed's deed to lot number three. The trial court enjoined defendant "from erecting any structure or building on that portion of Tract 4 lying within 550 feet of the Matthews-Pineville Road," and this judgment was affirmed by the Supreme Court of North Carolina on defendant's appeal.

The Supreme Court of North Carolina, with three justices dissenting, in effect holds that *every* deed "out" of every person who has previously owned a particular piece of real property is within the "chain of title" to such property if it "concerns" or "affects" a tract of land whose title is being searched. It is not sufficient for a title searcher to examine only the recorded deeds and instruments in his direct "line of title." To determine if deeds of a prospective grantor's predecessors in title "affect" or "concern" a particular tract or parcel of land, it will be necessary to check *all* of the deeds of a prospective grantor's predecessors in title executed during the period of their respective ownerships of a specific tract of land,

[48] *Ibid.*

[49] The deed was indexed according to the conventional "grantor-grantee" system in the following manner:

GRANTORS					GRANTEES		
Date of Record	Surname	Given Names	Book	Page	Kind of Instrument		Brief Description
4/2/37	Shannon	Sallie W.	912	214	Deed	C. S. Reed	Providence Township

(Taken from the Grantor Index to Real Estate Conveyances, Register of Deeds Office, Mecklenburg County, N.C.)

whether or not the index to the records ostensibly affects or involves the title being searched.[50]

In adopting the rule, the North Carolina Court has chosen sides on a question concerning which there is "sharp disagreement"[51] among the various jurisdictions. The majority opinion of the court quotes at length from what is designated as the "majority rule" in an often cited annotation:

> The weight of authority is to the effect that if a deed or a contract for the conveyance of one parcel of land, with a covenant or easement *affecting* another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel.[52]

The status of the rule's being the "majority" view or the "minority" view is subject to some question.[53] Suffice it to say that a number of other jurisdictions follow this rule, as North Carolina now does.[54]

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[50] *See* Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125, 173 (1944): "[A] subsequent purchaser must, to save himself, read *in extenso* every earlier recorded deed (not merely the description of the land, which will show that it is not the tract which the searcher contemplates buying) given by every record owner in his chain of title. The only exception would be, seemingly, that of deeds beyond the county line. . . ." *See also* Finley v. Glenn, 303 Pa. 131, 154 A. 299 (1931), quoted at length in Reed v. Elmore, 246 N.C. 221, 231, 98 S.E.2d 360, 368 (1957): "Coming upon this conveyance, it was their duty to read it, not . . . to read only the description of the property to see what was conveyed, but *to read the deed in its entirety, to note anything else which might be set forth in it.*" (emphasis added.)

[51] *See* G. THOMPSON, REAL PROPERTY § 4341 (1963).

[52] Annot., 16 A.L.R. 1013 (1922) (emphasis added).

[53] *See* Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125, 173 (1944) and 36 N.C.L REV. 233 (1958), which observe that H. TIFFANY, REAL PROPERTY, on which the North Carolina court relied (2 TIFFANY, 2188) was written in 1920 when this view was a 2-1 minority. The cited law review articles indicate that the stated principle is no longer the majority view. *See*, however, H. TIFFANY, REAL PROPERTY § 1265 (3d ed. 1939), which states the principle in language indicating that this is still the "general" view. In 2 WALSH, REAL PROPERTY § 221 (1947) it is stated that "the great weight of authority" is in accord with the principle announced in the quoted annotation and in Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957). In 4 AMERICAN LAW OF PROPERTY § 17.24 (1952) it is stated that only an *equal* number deny protection to the purchaser. THOMPSON, REAL PROPERTY § 4341 (1963) simply states that there is "sharp disagreement" among the cases.

[54] *E.g.*, Taylor v. Melton, 130 Colo. 280, 274 P.2d 977 (1954); Harp v. Parker, 278 Ky. 78, 128 S.W.2d 211 (1939); Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915); McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921); King v. Union Trust Co., 226 Mo. 351, 126 S.W. 415 (1910); Finley v. Glenn, 303 Pa. 131, 154 A. 299 (1931); Boyden v. Roberts, 131 Wis. 659, 111 N.W. 701 (1907).

The North Carolina Supreme Court did not follow the minority position,[55] although a strong argument was made for such a rule by Justice Denny (later Chief Justice), who stated:

> [I]t is the duty of a purchaser of land to examine every recorded deed or instrument *in his line of title* and he is conclusively presumed to know the contents of such instruments and is put on notice of any fact or circumstances affecting his title which either of such instruments reasonably discloses. *He is not, however, required to examine collateral conveyances of other property by any one of his predecessors in title.*[56]

The adoption of this latter view, favored by some commentators[57] as well as by some courts,[58] would make it unnecessary to check "out" conveyances of a prospective grantor's predecessors in title other than those recorded conveyances in the prospective grantor's direct line of title. In other words, under the latter view, if a prior grantor has executed a deed to lot *A* to a particular grantee and the body of the deed to lot *A* also imposed a restriction on lot *B* retained by the grantor, a subsequent purchaser for value of lot *B*

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[55] *E.g.*, Hancock v. Gumn, 151 Ga. 667, 107 S.E. 872 (1921); Glorieux v. Lighthipe, 88 N.J.L. 199, 96 A. 94 (1915); Buffalo Academy of the Sacred Heart v. Boehm Bros., 267 N.Y. 242, 196 N.E. 42 (1935); Hayslett v. Shell Petroleum Corp., 38 Ohio App. 164, 175 N.E. 888 (1930); Yates v. Chandler, 162 Tenn. 388, 38 S.W.2d 70 (1931).

[56] Reed v. Elmore, 246 N.C. 221, 235, 98 S.E.2d 360, 371 (1957) (dissenting opinion) (emphasis added).

[57] *See, e.g.*, C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" 162 (1929):

> The rule is well settled that a purchaser takes with notice from the record only of encumbrances in his direct chain of title. Hence in the absence of actual notice, before or at the time of his purchase, an owner of land in the neighborhood is only bound by the restrictions if they appear in some deed of record in conveyances to himself . . . his direct predecessors in title.

R. PATTON, LAND TITLES § 69 (1957) states:

> [T]he only fair rule is to hold that the record of an instrument will not afford constructive notice, if it is outside the chain under which a purchaser or incumbrancer claims title or lien.

[58] *E.g.*, Buffalo Academy of the Sacred Heart v. Boehm Bros., 267 N.Y. 242, 196 N.E. 42 (1935); Schermerhorn v. Bedell, 163 App. Div. 445, 148 N.Y.S. 896 (1914), *aff'd* 221 N.Y. 536, 116 N.E. 1074 (1917); *See also* Lizzio v. Craft, 135 N.Y.S.2d 748 (1954). In Camp Clearwater, Inc. v. Plock, 52 N.J. Super. 583, 598, 146 A.2d 527, 536 (1958) it is stated: "[T]he provisions of the Recording Act are deemed not to charge a purchaser of lands with constructive notice of easements or covenants affecting his lands which appear in an earlier deed by his grantor, conveying property other than the property involved in the purchaser's chain of title." *See also* the cases cited and quoted in Yates v. Chandler, 162 Tenn. 388, 38 S.W.2d 70 (1931).

would not take constructive notice of the restriction imposed on lot *B* by the deed which described and conveyed lot *A*; the deed conveying lot *A* would not be in the direct line of title to lot *B*. Under this socalled "minority" view, notwithstanding the recordation of the deed conveying lot *A* (which contained the restriction on the retained lot *B*), the subsequent purchaser for value of lot *B* would not be charged with notice of the restriction. Thus only the direct muniments of title to the particular land that is the object of the title search need be checked under the "minority" view.

Both views appear to be inadequate and both views appear to be problem producers in connection with land titles, especially in the context of the grantor-grantee indexing system which is prevalent in the United States.

Under the "majority" view adopted by the North Carolina Court in *Reed v. Elmore*,[59] subsequent purchasers are charged with constructive notice of all that "could"[60] be discovered by a search of the deeds and records. Therefore, for safety's sake, the title examiner must look at *every* deed of *any* tract of land of both immediate and prior grantors that was executed during the duration of each one's ownership of the land in question. Furthermore, beyond requiring the title searcher to go beyond the index books into the actual deed books to look at deeds conveying lands other than the lands being searched, the title examiner must read *each* of these collateral deeds in *detail*, not merely their descriptions,[61] to find latent restrictions, servitudes, or easements imposed in such collateral deeds. When this requirement is considered with the rule existent in most jurisdictions that deeds are construed as a whole and meaning is given to every part without reference to formal divisions,[62] it becomes obvious that the title searcher is given an entirely impracticable and unreasonable task.[63] The requirements of the "ma-

[59] 246 N.C. 221, 98 S.E.2d 360 (1957).

[60] *See* notes 45 and 52 *supra* and accompanying text.

[61] *See* note 50 *supra*.

[62] Triplett v. Williams, 149 N.C. 394, 63 S.E. 79, 24 L.R.A. (n.s.) 514 (1908); R. PATTON, LAND TITLES § 214 (1957).

[63] That this problem can become staffering for the title examiner is readily demonstrable when one multiplies the transactions entered by a particular grantor by the number of prior grantors in a chain of title to particular land, and contemplates the many thousands of sub-divisions which have been developed in recent years, plus the many more that will be developed in the future, in almost all of which easements and equitable servitudes of one kind or another have been imposed. See Rykman, *Notice and the "Deeds Out" Problem*, 64 MICH. L. REV. 421 (1966).

jority" rule adopted by *"Reed v. Elmore*[64] completely frustrate the purpose of convenience for which the recording system of land titles was designed.[65] As a consequence of this view, accurate searches to determine the validity of land titles are necessarily made more time consuming. Title lawyers must either raise their fees for land title searches or endure an uneconomical use of their own time and energy. Drudgery for title attorneys is greatly increased in those states which have adopted the view of *Reed v. Elmore.*[66]

On the other hand, the contrary view,[67] which requires a title searcher to check only "instrument in his line of title," does not adequately protect a former grantee of a collateral lot who has been given a right in his deed that "affects" lands retained by his grantor. If the law allows the creation of an easement or servitude in a grantor's retained lands via a deed to a grantee, why should such grantee's right not be protected upon his recordation of the deed in the title recordation books in the only manner available under the recording acts? Under the existing recording acts what more could the grantee do? Should pragmatic considerations and the imperfections of the "grantor-grantee" indexing system favor only *subsequent* purchasers for value when a *prior* purchaser for value has done all that is possible under the existing recording system to protect himself and his rights and interests in his grantor's retained lands?

A Proposed Statutory Solution

If neither of the rules set out above adequately protects the interests of both prior and subsequent purchasers of land, the law should move forward to provide a method of indexing which will accomplish this dual objective. This result could be achieved by a

[64] 246 N.C. 221, 98 S.E.2d 360 (1957).

[65] The reason of the legislation and the argument *ab inconventi* point to the same result. . . . A purchaser may well be held bound to examine or neglect at his peril, the record of the conveyances under which he claims; but it would impose an intolerable burden to compel him to examine all conveyances made by everyone in his chain of title.

Glorieux v. Lighthipe, 88 N.J.L. 199, 202, 96 A. 94, 95 (1915).

See also Buffalo Academy of the Sacred Heart v. Boehm Bros., 267 N.Y. 242, 250, 196 N.E. 42, 45 (1935): "Recording constitutes notice only of instruments in the chain of title of the parcel granted. To have to search each chain of title from a grantor lest notice be imputed would seem to negative the beneficent purposes of the recording acts."

[66] 246 N.C. 221, 98 S.E.2d 360 (1957).

[67] *See* cases cited in note 55 *supra* and accompanying text.

statutory directive that any right or interest created in lands retained by a grantor shall not be valid as against purchasers for value unless the instrument creating such right or interest is indexed under the names of both the grantor and the grantee and unless the land to be "affected" by the covenant, servitude, or easement creating such right or interest is specifically described on the *index* books. Draftsmen of deeds containing restrictions on land retained by grantors will be required to include descriptions of the retained lands made subject to such restrictions. In addition, it will be necessary to index the description of the lands retained by a grantor, upon which the restrictions are imposed, as well as a description of the land conveyed to the grantee. In short, a description of the "land affected" in any way by an instrument of conveyance must be *indexed* to effect notice to purchasers for value and creditors.[68] Though a duty is imposed on draftsmen of instruments and grantees to see that deeds contain descriptions of "lands affected" and to see that such descriptions are properly indexed, the grantees of lands who are given additional rights in lands retained by grantors are protected against subsequent dealings by their grantors that might extinguish their interests. Moreover, subsequent grantees from grantors, and their title-searching attorneys, can readily discover if specific retained land has been made subject to any covenant, restriction, or servitude. This particular "needle in a haystack" will no longer need to be sought.

A statute similar in form to the following is suggested to the General Assembly of North Carolina for its adoption:

> *Index of Descriptions of Lands Retained by Grantors When Affected by Restrictive Covenants or Servitudes*
>
> Where a grantor, who owns more than one lot or tract of land, conveys one lot or tract of land by deed or other instrument, and such deed or other instrument expressly imposes a restriction or servitude on a lot or tract of land retained by the grantor, such restriction or servitude shall not be valid with reference to the retained lot or tract of land as against purchasers for value and lien creditors of the grantor unless the deed or other instrument creating the restriction or servitude describes the retained land upon which the restriction or servitude is imposed and unless the description of such land is indexed by

[68] This should be required whether the instrument of conveyance passes title or merely creates rights or interests in the form of restrictions, easements or servitudes in the "land affected."

> reference to a recorded instrument or plat, street address, tax and block number or any other information sufficient to enable a person of ordinary prudence to locate the instrument imposing the restriction or servitude on lands retained by the grantor, and unless such description is indexed and recorded under the names of both the grantor and grantee in the "grantor-grantee" indexes in the office of the Register of Deeds in the county in which the land lies.

The foregoing proposed statute is designed to implement the recordation statutes and to make them more effective. The requirement of indexing a description of the land retained by a grantor that is affected by a restrictive covenant or servitude is consistent with the rule that the proper indexing of deeds is an essential part of the registration.[69] It preserves the purpose of recordation, by giving real and findable notice to purchasers and creditors of the status of land titles.[70] The protection of both prior grantees and subsequent grantees, encumbrancers, and creditors can be easily achieved by the indexing of descriptions requirement.

Last, but not the least important, a statutory requirement that compels the indexing of a description of lands retained by grantors that are affected by grantors' collateral conveyances will aid title-searching attorneys. Every restriction, covenant, or servitude imposed on lands retained by grantors is an "out" conveyance and certainly affects the status of grantors' retained lands. By requiring the description of the retained servient lands to be spelled out and indexed, these "out" conveyances will be brought into the open where they can be more readily and conveniently discovered by title-searching attorneys. Title searchers will no longer have to look at *all* the "out" conveyances of *all* predecessors in title; they can limit their searchers to only the "out" conveyances in-

[69] Dorman v. Goodman, 213 N.C. 406, 196 S.E. 352 (1938); Fowle v. Ham, 176 N.C. 12, 96 S.E. 639 (1918); Ely v. Norman, 175 N.C. 294, 297, 95 S.E. 543, 545 (1918) states that "A different ruling with the large number of books and more accumulating, would render a satisfactory examination well-nigh impossible and practically render valueless our registration laws in their purpose of protecting creditors and subsequent purchasers for value."

[70] [T]he underlying philosophy of all registration is to give notice, and . . . hence the ultimate purpose and pervading object of the statute is to produce and supply such notice. Therefore, if the indexing and cross-indexing upon a given state of facts is insufficient to supply the necessary notice, then such indexing ought to fail as against subsequent purchasers or encumbrancers.

West v. Jackson, 198 N.C. 693, 694. 153 S.E. 257, 258 (1930).

volving particular tracts of land in which they are interested, which conveyances are readily discoverable from the indexes. Lawyers' work will be made easier, quicker, more accurate,[71] and perhaps cheaper.

The achievement of one or more of these objectives as a result of adoption of the proposed statute would contribute toward making land titles more easily marketable.

"Blind" and "Curtained" Trusts

A frequently encountered problem in marketability of land arises from "blind trusts." This problem is met when a title searcher discovers a grant in a chain of title to a person described in the record simply as "trustee." The deed "out" of such person, perhaps several links back in the "chain," is probably signed by the grantor, followed by the words "as trustee." Or perhaps a conveyance in the chain of title describes a predecessor in title as "trustee" for named *cestuis que trustent* but fails to set out any of the terms of the trust or the powers of the trustee. There obviously *is* a trust under which the trustee holds for named beneficiaries, but the trust instrument has not been recorded. The title-searching attorney who finds such a situation within a chain of title is unable to determine *from the records*[72] whether a particular grantor in the chain of title designated "as trustee" in a prior, perhaps remote, deed has acted within the scope of his authorized legal powers as trustee when he executed a particular deed purporting to dispose of the land. And until the title searcher or purchaser of land locates and determines the exact scope of a trustee's powers under an unrecorded trust referred to or alluded to in a deed within a chain of title, it is not safe to assume that the

[71] Discussion of the problems involved in the case of Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957), with a number of title lawyers indicates that most do not check every deed of predecessors in title to see if retained lands are subject to restrictions, easements, or servitudes. Many title lawyers admit to "hunching" and "chancing" that prior deeds of grantors did not impose restrictions on the grantors' retained lands. Some lawyers, however, check *all* conveyances made by everyone in his chain of title whether or not indexed as involving the particular land being searched. Law students who serve summer clerkships to lawyers in North Carolina and in other states have reported to the writer that some lawyers require the reading of *every* deed of *every* predecessor in a particular chain of title even though the index does not indicate that such deeds involve the particular land being certified.

[72] After several conveyances spanning a number of years, the terms of a trust which is collateral to the records may not be discoverable at all, *even outside the records!*

person designated as "trustee" had the authority or the power to make a conveyance of the land.[73]

Under the majority rule, if a conveyance to a predecessor in title describes a grantee as "Jones, trustee," a subsequent purchaser of the land from Jones is put on inquiry as to whether a trust exists, and if so, whether the fiduciary had the authority to make the conveyance in question.[74] If the trustee breached the trust by making the conveyance, the land may be reclaimed for the benefit of the *cestuis que trustent*.[75] This potential existence of beneficial rights creates understandable reluctance on the part of title lawyers and prospective purchasers to deal with titles in the "blind trust" situation.

While it may not be too much to require a prospective grantee from an immediate grantor (designated as "trustee") to investigate as to the existence of a trust, to determine the identity of any possible holders of equitable interests under a possible trust, and to ascertain the exact limits of the trustee-grantor's authority and power, these requirements may be unduly burdensome after the passage of several years and several transfers of the land in question. Indeed, the very existence of a trust and the details and terms of the trust may not even be discoverable.[76] Since title lawyers and purchasers are understandably reluctant to assume the burden of possible defects in title that may arise from "blind" or "curtained" trusts, chains of land titles are relegated to a perpetual state of unmarketability.[77] These potential defects of title often cannot be unequivocally removed except by the costly and time consuming procurement of decrees entered in actions wherein the courts have gained jurisdiction of "unknown parties"[78] and have determined the existence or non-existence of the rights and interest of possible trust beneficiaries.[79]

[73] R. PATTON, LAND TITLES § 417 (1957): "As a foundation for transfer of title by a trustee, the creating instrument must not only establish a valid trust, but contain a power of sale." 4 AMERICAN LAW OF PROPERTY § 18.58 (A.J. Casner ed. 1952).

[74] L. SIMES & C. TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 109 (1960). See collection of cases in Annot., 137 A.L.R. 460, 469 (1942).

[75] G. BOGERT, TRUSTS AND TRUSTEES § 893 (1962).

[76] White, *The Title Man's Idea of Real Property Reform*, 10 CORNELL L.Q. 181, 197 (1925).

[77] P. BASYE, CLEARING LAND TITLES § 21 (1953).

[78] 4 AMERICAN LAW OF PROPERTY § 18.58 (A.J. Casner ed. 1952).

[79] A correspondent of the writer, a title attorney in North Carolina, states

Statutory Solutions to the "Blind" or "Curtained" Trusts in Certain States

In order to prevent land from being rendered permanently unmarketable as a result of an unrecorded trust instrument referred to in the record chain of title, a number of states have enacted legislation dealing with this problem.[80]

Some of the statutes deal with the situation where the chain of title discloses an instrument conveying land to a named grantee, as "trustee" or "agent," but completely omitting the name of any beneficiary or principal. These statutes provide that the mere appearance of the words "trustee," "as trustee," "agent," or "as agent" following the name of the grantee in any deed or conveyance, without other language in the deed or conveyance showing a trust, shall not be deemed to give notice to or to put on inquiry any person dealing with the grantee that any trust or agency exists.[81] Under these statutes, a conveyance by the grantee, whether he signs in his own name only or follows his signature with the words "trus-

in a letter: "In such a case (involving a lawsuit to clear a land title), it is frequent that the actual problem arose many years in the past and that it would be impossible to actually run down the defendants, resulting in the necessity for service by publication. At this point many title searchers simply turn down the title." He indicates that often when a person wants to build a house or conduct a business venture on certain land it simply is not practicable to bring a lawsuit. Deals which require lawsuits are especially likely to be "chilled" if there is other available land which does not require litigation.

[80] L. SIMES & C. TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 107 (1960) states that no fewer than 20 states have enacted legislation for this purpose.

[81] *E.g.*, ARK. STAT. ANN. § 50-142 (1947):

> Conveyance to trustee or agent. The appearance of the words "trustee", or "as trustee" or "agent" following the names of the grantee in any deed of conveyance of land heretofore or hereafter executed, without other language showing a trust, shall not be deemed to give notice to or put on inquiry any person dealing with said land that a trust or agency exists, or that there are other beneficiaries of said conveyance except the grantee named therein, and such conveyance shall vest the title to such land in such grantee, and a conveyance of and by such grantee, whether followed by the words "trustee" or "as trustee" or "agent" or not, shall vest title in his grantee free from any claims of all persons or corporations. This act shall not apply to any suits now pending.

See also COLO. REV. STAT. § 118-1-9 (1963); CONN. GEN. STAT. ANN. § 47-20 (1960); MINN. STAT. ANN. § 507.35 (1947); MISS. CODE ANN. § 877 (1942); MONT. REV. CODES ANN. § 73-206 (1947); OHIO REV. CODE ANN. § 5301.3 (1964); 60 OKLA. STAT. ANN. § 156 (1963); UTAH CODE ANN. § 57-1-6 (1963); WIS. STAT. ANN. § 231.201 (1957); WYO. STAT. ANN. § 34-54 (1957).

tee," "as trustee," "agent," or "as agent," vests all the interest that he purports to grant by his conveyance, free from the claims of all persons who may claim as undisclosed beneficiaries of a trust or agency.

Some states go even further and create a conclusive statutory presumption that a deed to a person designated simply as "trustee" creates title in the grantee in his own right free from any trust.[82]

Other states accomplish the same result by providing that, notwithstanding the disclosure of a trust or an agency relationship (in which beneficiaries are not named), the trustee or agent shall have the power and authority to make a complete disposition of the real estate unless there is a specific limitation on his authority and powers in the deed granting land to him or in a declaration of trust *that appears of record.*[83]

These stautes, though beneficial where property has been conveyed to a person "as trustee" or "as agent," without naming any beneficiaries, do not solve the marketability problem where beneficiaries are named in a recorded instrument but the powers of the trustee are not set out in the land title records. Although it may

[82] CAL. CIV. CODE ANN. § 869a; MASS. ANN. LAWS, ch. 183, § 14 (1955); N.D. CENT. CODE 47-90-12 (1960); WYO. STAT. ANN. § 34-54 (1959). A North Carolina case, Freeman v. Rose, 192 N.C. 732, 135 S.E. 870 (1926), appears to reach this result *by decision.* That case holds that a purchaser from one who has taken a grant from one designated simply "John T. Patrick, Trustee" takes and can convey a fee simple; that the word "trustee" in such case is *descriptio personae,* a matter of description and not of substance, and that no trust was created. The case limited the extent of its holding, however, by stating:

> Whether such interference is permissible usually depends upon the circumstances of the particular case . . . We find nothing in the deeds to Patrick to indicate that the word 'agent' or 'trustee' was intended to be other than descriptive or that he took title other than in his individual capacity. The undisputed evidence shows very clearly that there were no beneficiaries or undisclosed principals to claim an interest in the land.

Id. at 733, 135 S.E. 871.

Quaere, what if the deed had been written as it was but a collateral instrument not of record had turned up? Can a title searcher be assured that such a trust agreement will not turn up, disclosing the names of beneficiaries and the terms of a trust agreement forbidding a sale of real property that is the subject of a title search? Are purchasers and title searchers safe in ignoring the possibility that evidence *will* turn up disclosing a trust and existing beneficiaries? Would a title searcher certify good marketable record title without requiring title clearing litigation?

[83] FLA. STAT. ANN. § 689.071 (Supp. 1966); MONT. REV. CODES ANN. § 73-206 (1947); NEB. REV. STAT. §§ 76-266, 76-267, 76-268 (1943); ORE. REV. STAT. § 93-210 (1965); 21 PA. STAT. ANN. § 262 (1955); TEX. REV. CIV. STAT. ANN., art. 7425b-8 (1960).

be reasonable to require a title searcher or his client to make inquiry of a known beneficiary of a trust as to the extent of a trustee-grantor's authority and powers, it may be impossible or extremely difficult to determine whether or not the trustee has carried out the terms of the trust in making the conveyance when such trustee's deed is discovered in a remote link of a chain of title. To the extent that the terms of such partially disclosed trusts cannot be determined from the records, land titles subject to such trusts may still be questionable and unmarketable notwithstanding the enactment of these statutes.[84]

A Proposed Statutory Solution

A statute merely requiring that the beneficiaries of a trust be named in a deed or conveyance to a person "as trustee," and that such instrument be recorded to apprise purchasers and title searchers that a trust in fact exists, is not sufficient, as the record still will give no notice of the authority or powers of the trustee. When the title is searched at some date subsequent to a trustee's conveyance under such a trust, a marketability problem will arise. A statute is needed, therefore, that makes conveyances to and from persons designated "as trustees" (or "as agents") valid and marketable unless the records disclose the actual existence of a trust, the names of the beneficiaries, *plus* the terms and conditions in the trust (or agency) that may limit the powers of the trustee (or agent) to make a conveyance of the land. If the recording statutes are to serve their purpose of convenience in ascertaining the status of land titles, their effectiveness should not be impaired by giving force to secret or partially disclosed trusts. The land should pass free of these "off the record" equities when a person described "as trustee" conveys land. Though beneficiaries of a trust could still have their equitable claims attach to the proceeds derived from an unauthorized sale of real property in a trust that does not appear of record, or could still sue the trustee for breach of his trust, the land could not be reached, and purchasers from trustees would

[84] See White, *The Title Man's Idea of Real Property Reform*, 10 CORNELL L.Q. 181, 197 (1925): "[T]o the extent of his inability to learn the facts the purchaser has to assume the burden of a possible defect in title. It is just another case of punishing the wrong party. If the trustor has seen fit to put the title behind the curtain of an undisclosed trusteeship, why should the purchaser be obligated to look behind the curtain?"

have marketable titles. To this end, the following statute[85] is proposed for adoption:

> *Section 1. Undisclosed Limitations Upon Powers of Trustees and Agents.*
>
> When any instrument affecting title to real estate describes a party as trustee or agent, or otherwise indicates that a party is or may be acting as trustee or agent, but does not set forth his powers or specify some other recorded instrument setting forth such powers and the place in the public records where it is recorded, and there is no recorded instrument in the record chain of title to such real estate setting forth such powers, then the description or indication shall not be notice to any person thereafter dealing with the real estate of any limitation upon the powers of the party nor require any inquiry or investigation as to such trust or agency. Such trustee or agent shall be deemed to have full power to convey or otherwise dispose of the real estate; and no person interested under such trust or agency shall be entitled to make any claim against the real estate based upon notice given by such description or indication. This act shall not prevent claims against the trustee or agent or against property other than the real estate.
>
> *Section 2. Act Retroactive; Recording Notices of Limitations.*
>
> This act shall apply to instruments recorded before or after its effective date, but shall not bar any claim based on notice given by any instrument if, within one year after the effective date, a written notice of the claim is recorded, identifying the place in the public records where the reference to a fiduciary may be found, stating the powers of such fiduciary, and naming the person who is then the record owner of the real estate affected. Such notice of claim shall be signed and acknowledged by the person executing the same, and may be executed by any person interested under such trust or agency, or by his attorney, agent, guardian, conservator, parent, or any other person acting on his behalf, if for any reason he is unable to act. The notice of

[85] The proposed model statute is taken from L. SIMES & C. TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 110 (1960). The authors, Professor Lewis M. Simes and Clarence B. Taylor, patterned their statute after a draft statute recommended in REPORT OF THE COMMITTEE ON IMPROVEMENT OF CONVEYANCING AND RECORDING PRACTICES OF THE SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW OF THE AMERICAN BAR ASSOCIATION, Part II, 64, 72 (1958). This model statute and the other statutes referred to above that permit trustees' deed to pass full title, where terms of trusts and limits on trustees' powers are not disclosed of record, stem generally from an American Title Association proposal made in 1913 by White, *The Title Man's Idea of Real Property Reform*, 10 CORNELL L.Q. 118 (1925).

claim shall be recorded and indexed under the name of the person declared therein to be the record owner.

This statutory proposal has been designed to comply with "the title man's idea of real property law reform"[86] and the underlying purpose of the recording acts—that the public records should, in so far as possible, tell all the essential facts about title. If land titles can be made more certain and more easily marketable by this proposed statute, this "title man's idea of real property law reform" will promote the general public's needs and desires for more efficient conveyancing and titles that are readily marketable.

CONCLUSION

Sound and workable laws of conveyancing that promote the free alienability of land are necessary to the economic progress of a state. This article, as others in this series of articles,[87] has attempted to demonstrate by analysis the need for the modernization of real property conveyancing laws and practices in North Carolina. While North Carolina has recently made long and significant strides in the modernization of much of her law,[88] her legislature, her courts, and her practicing bar have been less creative and progressive than those of many other states in improving the land law and the machinery for securing real estate titles. The statutory reform suggestions outlined in this article have been proposed with these objectives in mind: (1) to protect the public and make its land titles more secure and more easily marketable and (2) to brush away some of the useless deadwood of the law that renders the status of titles obscure and necessitates slow, laborious, complicated, and non-productive efforts on the part of the conveyancing bar. Too often the good title attorney has to inform

[86] *See* note 2 *supra* and accompanying text.

[87] Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?* 42 N.C.L. REV. 807 (1964); Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation,* 44 N.C.L. REV. 89 (1965); Webster, *A Relic North Carolina Can Do Without—The Rule in Shelley's Case,* 45 N.C.L. REV. 3 (1966); Webster, *Toward Greater Marketability of Land Titles—Remedying the Defective Acknowledgment Syndrome,* 46 N.C.L. REV. 56 (1967).

[88] *E.g.,* within the past dozen years the General Assembly of North Carolina has made massive changes in a variety of areas by adopting a new corporation code, a new intestate succession act, the Uniform Commercial Code and a whole new system of court reforms.

prospective purchasers that titles are not marketable because of the existence of ancient technicalities that have no current justification for existing. Too often, after exhausting resources under the recording system, the title attorney is relegated to limiting the scope of his certificates of title to protect himself (but not his client) from latent equities that do not clearly appear on the land title records. Too often, also, do commercially advantageous enterprises die stillborn because title attorneys cannot certify marketable titles because of such defects.

To these ends these articles are directed. It is felt that both the public and the real estate bar can be benefited by ridding the law of clumsy, wasteful, and inefficient rules and systems that are not compatible with contemporary standards of business and life. The statutory proposals suggested here have been designed to accomplish more secure land titles, the status of which can be made more quickly and economically ascertainable, with a minimum displacement of those laws and traditions of practice that have given land law its relative stability in this country.