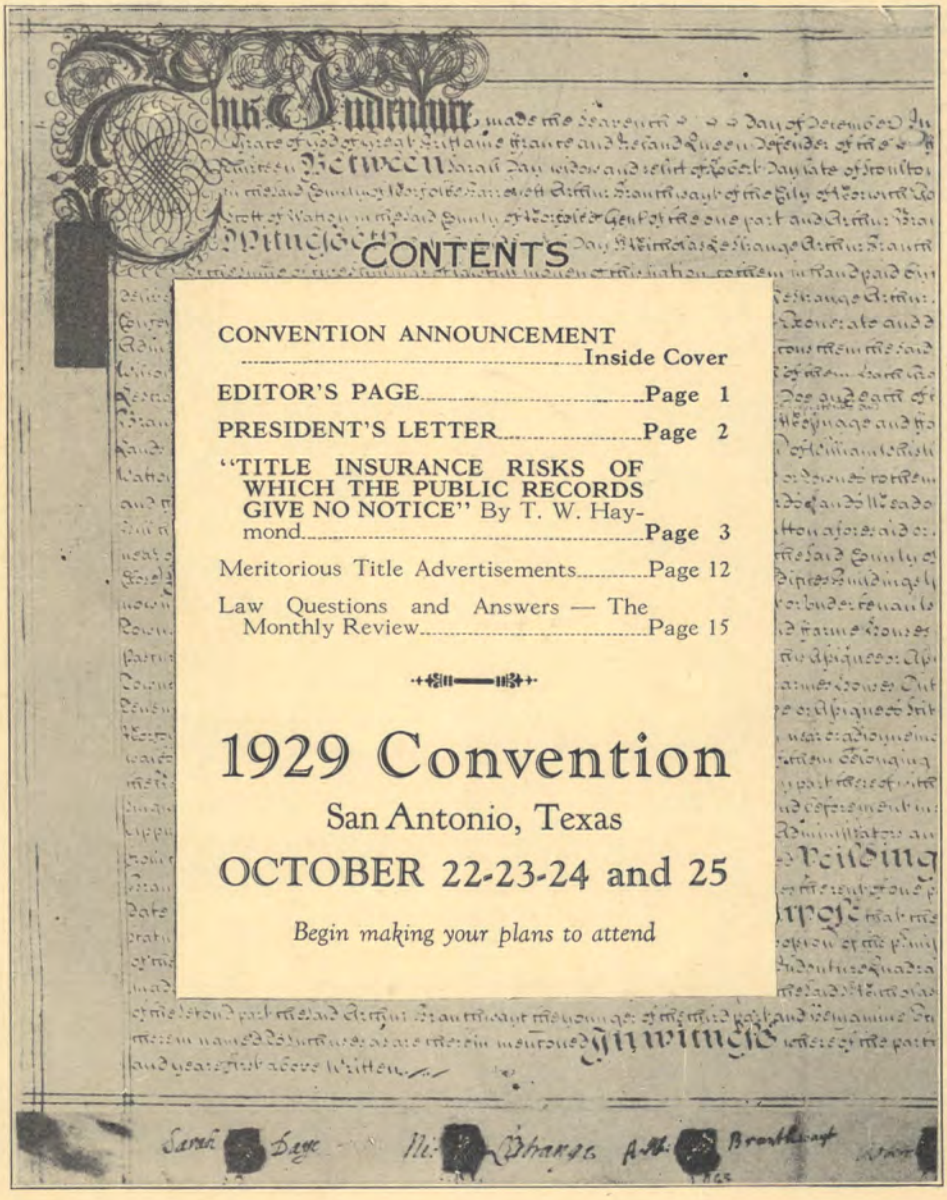
Title News

Vol. 8 *MARCH, 1929* *No. 3*



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1929 Convention

San Antonio, Texas

OCTOBER 22-23-24 and 25

Begin making your plans to attend

What—

The Twenty-third Annual Convention
of the
American Title Association

Where—

SAN ANTONIO, TEXAS

When—

October 22 - 23 - 24 and 25

Make your plans NOW *to attend*

As a business proposition you cannot afford to miss it. Just a plain case of whether or not you want to make more money. Going there won't cost you—it's staying away that will.

As a pleasure trip, you couldn't plan a better one or be at any event where you could have such a good time.

The title folk of Texas will be our hosts.

REMEMBER—

Texas hospitality is a special brand

TITLE NEWS

Issued Monthly by and as the Official Publication of
The American Title Association

Publishers, Kable Brothers Company, 404 N. Wesley Ave., Mount Morris, Ill. Price, $3.00 per year.
Editor—*Richard B. Hall, Midland Building, Kansas City, Mo.*
Advertising Representative, *Orson Angell, 850 Graybar Building, New York City.*
Published monthly at Mount Morris, Ill.; Editorial office, Kansas City, Mo. Entered as second class matter, December 25, 1921, at the post office at Mount Morris, Ill., under the Act of March 3, 1879.

Vol. 8 MARCH, 1929 No. 3

Editor's Page

GETTING out TITLE NEWS is a real pleasure. It is one of the most pleasant parts of the Association work. There is a lot of satisfaction to be derived from the work connected with it. First, it is one of the Association's most practical and worth-while activities. A wealth of information has been and will continue to be broadcast through its columns. If the members will just read and study it thoroughly, and then apply the valuable data and suggestions, they will profit. And the majority of them do. It has been published for several years now and it is surprising all the things that have been presented and discussed in the various issues. Most of the questions and problems of the title business have at some time or other been answered or explained in the many articles that have appeared.

I never realized the extent of this until just recently, when work began on the compilation of an index of all the issues of TITLE NEWS and the separate printed proceedings of the various conventions. It is amazing to thus see the number of things prepared on title subjects and given some time or other, either through the magazine or the old type separate convention proceedings. This index will shortly be published.

Then there is satisfaction in the preparation of the issues. It's a lot of work, and comes as regularly as day and night, but it's interesting to see the evolution of scraps of paper, typewritten sheets, notes and the other material first into proof, then into the printer's "dummy," and then appear as the finished magazine. The Association has not only attempted to make its contents worth while, but likewise produce a magazine attractive in appearance; something that will creditably reflect the character of the title business.

I want to say a word for those who furnish the material. The response to requests for it has been wonderful and such cooperation is gratifying. A whole army of people have spent hours and days preparing and writing the special articles. Others have generously given their permission to use and reprint things that have been originally prepared for addresses at meetings, or written for other publications. Then there is that vast amount of material, things of interest and value to others, that members constantly send in for the interesting news items and short stories.

And as that explains the subject matter and the worthiness of the contents, so must I say a good word for the influence responsible for its attractive appearance. Credit must go to the printers—Kable Brothers, a concern specializing in the publishing of organization magazines. Their plant is in a little Illinois town—Mount Morris—but their name is known throughout the publishing world. Many people have asked me who prints the magazine. This concern gives us a high-grade product at a minimum of cost. Throughout their highly efficient, more or less mechanical "system," making such service possible at this cost, there is intermingled close personal attention and interest.

So each issue represents considerable time, work, energy and the talents of many—a volume, or the issues of a year—a staggering amount when considered in the aggregate.

I HAVE just returned from a trip to Texas, and, while in the vicinity of San Antonio, went over there for a day to see the next convention city. Had not seen it for a number of years, and, to use the worn-out expression, "you wouldn't know the place now." San Antonio is a marvelous place, and I imagine that the above-mentioned phrase could have been expressed by anyone who anytime within the past ten years had returned to the city after a year's absence.

Anyone who has never been there has a great surprise in store for him. Anyone who has not been there for a few years has an even greater one. It is an ideal convention place and all of Texas is proud of it for that feature as well as others. Principally on account of its convention facilities and environment was it chosen by the Texas title people as the place to entertain us.

The dates have for sometime been fixed and announced. That time is the finest season down there. The Texas people are anticipating our visit and being hosts. The San Antonio title people are certainly enthusiastic about their job as local arrangers. Everything looks hot. It's going to be some convention. It's in a readily accessible place—especially so to the great number in the Middle West. Get all ready to go and then go.

THE first of two valuable articles pertaining to title insurance appears in this issue. It is entitled "Title Insurance Risks of Which the Public Records Give No Notice," and written by T. W. Haymond, of Los Angeles, Calif. Mr. Haymond is a recognized title authority and is general counsel of the Security Title Insurance and Guarantee Co.

The second of the series will appear in the April TITLE NEWS.

They are printed through the generous permission of the author, and also with the consent of the Southern California Law Review, in which publication they first appeared.

"Some Live Problems in Abstracting" will prove exceptionally interesting to the abstracters. The author, C. C. Kagey, needs no introduction. Abstracter, title examiner—he knows the ins and outs of both sides. He is author of several title works, charter member of the national association, its sixth secretary, active always in the national and Illinois associations.

The American Title Association

Founded in 1907

EDWARD C. WYCKOFF
PRESIDENT

755 BROAD STREET
NEWARK, N. J.

The National Association of
Title Insurance Companies
Title Examiners
Abstracters

March 28, 1929.

To all the members of the American Title Association:

A suggestion that each issue of the "Title News" should include a letter from the President has seemed to furnish an opportunity to make as close a contact as possible with the whole membership at reasonable intervals during the year, and so I have deemed it advisable to fall in with the suggestion.

To the Presidents and Secretaries of each of the state associations I express the hope that they will feel at liberty to write me not less than once a month as to how matters are progressing in the state associations and what the problems of the past month have been.

If nothing has happened just write me a line and say so and express what you hope will happen in the future, but let us build up a feeling of friendship rather than mere acquaintance.

May I urge upon the membership at large the desire of the officers of your National Association to write them what you think when you think it and not put off the writing until some future day. We may think wisely and on things which would be of inestimable value to the association but if we take it out in thinking what good does it do the rest of the boys.

I am sure that all of the officers will only be too pleased to hear from any of you at any time but I am positive that I will be glad. Let's get acquainted through the mail.

Sincerely yours,

Edward C. Wyckoff

President

Title Insurance Risks of Which the Public Records Give No Notice*

By T. W. Haymond†, Los Angeles, Calif.

Title to real property has been quite uniformly defined to be the means by which the owner of lands has the just possession of his property or the right to the just possession thereof.[1] It is also said to be the right by which one has possession of lands, tenements or hereditaments, or a right to the possession of such property.[2] Title is the right of possession as distinguished from actual possession or occupancy.[3] An owner is one who has the right of exclusive dominion.[4]

Ownership may not always extend to the whole of the property, and may reach only an interest in it, and the word "owner" may be applied to any defined interest in it;[5] and while there must be the union of possession, the right of possession, and the right of property to constitute a complete or perfect title to real property, one may have title to a lesser estate than a fee.[6]

In common language, therefore, the "title," whether perfect or imperfect, is the evidence of all of the "muniments" or "links" in a complete chain whereby one proves his right of just possession.[7] This title may be limited or modified by acts of occupancy or possession, by the laws of constructive notice and the recording laws, or by matters and facts not disclosed by the records.[8]

Nature of Title Insurance Contract.

There can be no right conception of title insurance, or of the risks thereby assumed, without constantly keeping in mind the foregoing definitions, and especially the truth, generally not very well understood, that in dealing with titles to real estate we are dealing mainly with the right of possession. So title insurance concerns itself chiefly with the right of just possession. Unless given a broader meaning by state statute, title insurance is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the insured in a specified amount against loss through existing defects, liens or encumbrances affecting the title to real estate wherein the latter has an interest, either as purchaser or otherwise.[9]

The essentials of such a contract of indemnity, as actionable, have been said to be, first, the existence of a valid contract, second, the occasion that fixes the liability thereunder, and, third, loss or damage sustained;[10] and, while the decisions regarding title insurance contracts are found to be largely concerned with the proper construction of certain special provisions and exceptions therein inserted to restrict liability, where the question has directly arisen it has generally been held that a loss occurs when the insured is compelled to pay something to make good his title or mortgage or other interest.[11] The liability, of course, is upon the contract of indemnity, and not for negligence in searching the records.[12]

An insurable interest capable of forming the basis of a title insurance policy may be any interest in or relation to the property of such character that a loss or failure of title or encumbrance would result in pecuniary loss to the insured. An insurable interest does not necessarily imply property. An interest in a mechanic's lien is an insurable interest, even while inchoate, and the interest of a stockholder of a corporation owning land is probably an insurable interest. A mortgagor and mortgagee each have a distinct and separate insurable interest, but the mortgagee can insure for the value of the mortgage, interest and costs only, while the owner of the equity of redemption may insure for the full value of the property.[13]

It will thus be seen that the title insurance policy is capable of being used to cover almost every conceivable interest or relation to real property. For this reason the title to real property has come to mean, in the popular mind, the sum total of all actual interests in it, or in other words, the entire picture including not only the ownership of the fee, but all of the limitations, burdens, liens, encumbrances and defects as they exist at a fixed time. Remembering that most insurable interests do affect or fix the right of possession or enjoyment of property, the popular conception may not be altogether incorrect.

Division of Subject.

The defects, liens and encumbrances against which the indemnity is placed, derive their force and effect from two very distinct sources, namely, from the recording laws and the doctrine of constructive notice, in which case the record title shows or gives some information concerning some defect, lien or encumbrance, other than as insured;[14] or from the existence of facts and matters of which the public records give no notice or information, by reason of which either certain parts of the record title

*[A second installment, to appear in a subsequent issue, will consider certain risks of title insurance that do not affect the validity of any link in the chain of record title.]

†[Of the Los Angeles Bar. General Counsel, Security Title Insurance and Guarantee Company.]

[1]2 Bl. Com. 195; Marshall v. Schafter, 32 Cal. 176 (1867); Donovan v. Pitcher, 53 Ala. 411 (1875); Houston v. Farris, 71 Ala. 570 (1882); Arrington v. Liscom, 34 Cal. 365 (1868); Pratt v. Fountain, 73 Ga. 261 (1884); Pannill v. Coles, 81 Va. 380 (1886).

[2]Springfield Fire & Marine Ins. Co. v. Allen, 43 N. Y. 389 (1870); Guier v. Bridges, 114 Ky. 148, 70 S. W. 288 (1902).

[3]Campfield v. Johnson, 21 N. J. L. 83 (1847).

[4]The owner "is he who has dominion of a thing real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right." Bouv. Law Dict.; Ombony v. Jones, 19 N. Y. 234 (1859); Dow v. Gould, etc., Silver Mining Co., 31 Cal. 629, 649 (1867); Fall Brook Irrigation Dist. v. Abila, 106 Cal. 355, 39 Pac. 794 (1895).

[5]Florman v. School Dist. No. 11, 6 Colo. App. 319, 40 Pac. 469 (1895); Gitchell v. Kreidler, 84 Mo. 472 (1884).

[6]Co. Inst. 266a; Frank v. Arnold, 73 Iowa, 370, 35 N. W. 453 (1887).

[7]Undoubtedly, as applied to the examination of titles, and the issuance of policies of title insurance thereon, in the United States, the word "title" is often given a wider application than this, and is frequently applied to any insurable interest in real property. Houston v. Farris, 71 Ala. 570 (1882); Roberts v. Wentworth, 5 Cush. 192, 192 (Mass. 1849); Davenport v. Farrar, 2 Ill. 314 (1836).

[8]Weber v. Shelby, 116 Ill. App. 31 (1904).

[9]Foehrenbach v. German American Title and Trust Company, 217 Pa. 331, 66 Atl. 561 (1907); also see Frost on Guar. Ins., par. 162 wherein the writer defines title insurance as quoted in the Foehrenbach case. The word "defects" must be read to include liens and encumbrances, otherwise the definition given in Frost falls short. The Supreme Court in that case, however, used the following language: "Title insurance is designed to protect the insured and save him harmless from any loss arising from defects, liens or encumbrances that may be in existence, affecting the title when the policy is issued." See also Barton v. W. J. Tit. & Guar. Co., 64 N. J. L. 24, 44 Atl. 871 (1899).

[10]Draper v. Del St. Grange etc., 5 Boyce, 143, 91 Atl. 206 (Del. 1914); Wilson v. Stilwell, 14 Ohio St. 464 (1863); Palliser v. Title Ins. Co., 61 Misc. 490, 115 N. Y. Supp. 545 (1908); Henderson-Achert Lith. Co. v. John Shillito Co., 64 Ohio St. 236, 60 N. E. 295 (1901); Purcell v. Land Title Guar. Co., 94 Mo. App. 5, 67 S. W. 726 (1902).

[11]Empire Development Co. v. Tit. Guar. & Trust Co., 225 N. Y. 53, 121 N. E. 468 (1918); Banes v. N. J. Tit. Guar. & Tr. Co., 142 Fed. 957, 74 C. C. A. 127 (1906); Jeffers & Hackett v. Johnson, 21 N. J. L. 73 (1847), holding that there must be a loss prior to a right of action on a contract of indemnity.

[12]Trenton Potteries Co. v. Tit. Guar. & Tr. Co., 176 N. Y. 65, 68 N. E. 132 (1903); Provident Loan Trust Co. v. Walcott, 5 Kan. App. 473, 47 Pac. 8 (1895); Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545 (1892).

[13]Spare v. Home Mut. Ins. Co., 15 Fed. 707 (C. C. D. Or. 1883); Carter v. Humboldt Fire Ins. Co., 12 Iowa, 287 (1861); Franklin Fire Ins. v. Coates, 14 Md. 285 (1859); Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058 (1890); Gould v. Maine Farmers' Mut. Fire Ins. Co., 114 Me. 416, 96 Atl. 732 (1916); Royal Ins. Co. v. Stinson, 103 U. S. 25 (1880); Carpenter v. Providence Wash. Ins. Co., 41 U. S. 495 (1842).

are shown to be intrinsically ineffective or void, thus breaking the apparent chain of record right of possession, or, by reason of actual possession, actual knowledge, or the actual condition and character of the property as affected by the law of the land, the unrecorded muniments of title or encumbrance shall prevail over the right of possession indicated by the public records. No further consideration will be given herein to that vast field of title defects and encumbrances falling within the former classification, but attention will be directed, in the main, to a consideration of some of the risks of which the public records give notice, but which are proper risks of the title insurance contract, unless specifically excepted thereby.[15]

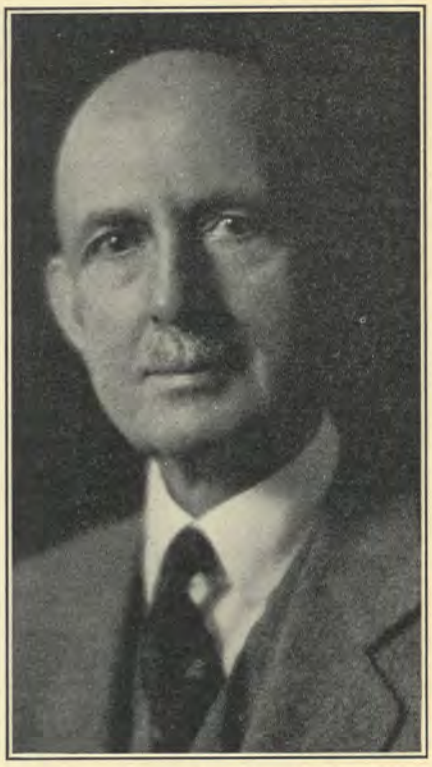
The notice of the public records and the right of possession dependent thereon, may be defeated in many ways by which a transfer, or encumbrance, or link in the record chain is rendered void or invalid. There may be enumerated frauds in general, forgeries and false personations, wrong identity of persons, want of legal delivery, copyists' and recorders' errors, deeds by minors and others under disability, rights of husband and wife, wills void as to after-born child or pretermitted heir, decrees and judgments void for want of jurisdiction, invalidity of mortgages or other liens, charges or encumbrances by reason of violations of usury laws, title or priority of mortgages or other liens charges or encumbrances as affected by mechanics' lien laws, and any other matter or fact not disclosed by the public records, which in law or equity, would render void or invalid any transfer, proceeding or encumbrance in the chain of record title, recording and registration acts and the laws of constructive notice notwithstanding.

Frauds in General.

That fraud vitiates all contracts into which it enters is axiomatic. There are few titles to real estate in any community long settled, but one or more of the links in the chain are tainted by some form or degree of fraud. Such fraud may render an instrument or other transaction either void or voidable. An instrument that is void confers no rights, but if voidable only, a bona fide purchaser for a valuable consideration without notice may not be affected by such fraud.[16] We have, therefore, three general classes of risks resulting from fraud: first, transactions in the record chain that may be absolutely void; second, those that may be set aside, even as to subsequent purchasers under the record, by reason of the failure of such purchasers to qualify as to all of the three requisites, to-wit, good faith, valuable consideration, no notice; and finally, transactions that may not be set aside as to bona fide purchasers taking in good faith for value and without notice, under the recording acts of the jurisdiction.

Since in each of the three classes of risks mentioned the ultimate facts, from which it must be determined whether the transaction is void, or may or may not be successfully avoided, are matters not ordinarily disclosed of record, such risks are properly herein considered. By reason of statutory modifications of the doctrine of constructive notice, as applied to public records, as well as modification by judicial construction, the record title is not to be considered absolute or final.[17] Except in a few cases provided by state statute, the way is always open to defeat the recording laws as to title and priority, by showing that the insured, by reason of his wrong is not entitled to their protection. In most cases the facts of good faith, consideration and notice or knowledge, may be tried. Thus appear, as normal title insurance risks, all transactions tainted with any degree of fraud, ranging from forgery and the use of violence on the one hand to mere false representation, or even negligence imputed as fraud, on the other.[18]

Under the general term of fraudulent transactions fall



T. W. Haymond.

[14]"While the title to real property may be disclosed by the record to be in one person, it may, in fact, be in another through adverse possession or in one in occupation of the property under an unrecorded conveyance." Bothin v. The California Title Ins. Co., 153 Cal. 718, 96 Pac. 500 (1908). In this opinion occurs the following: "Necessarily the record title is all that a title insurance company can safely or judiciously insure." If true at the time this statement was made, it is not now true. The risks of title insurance are not now limited to the record title. Indeed, scores of financial institutions throughout the United States will not accept such policies. It is not now left to the investor "to determine by an inspection and examination of the property whether there was adverse occupancy or not; to determine for himself by actual measurement, survey, or examination of the premises whether he was getting what he contracted to purchase, or whether there was an adverse claim of title of any character by the occupants of the whole or any portion of the premises." So rapidly has the attitude of the investing public changed in recent years, that to-day a title insurance company, in order to obtain first class business must be prepared to assume all legitimate title risks—whatever may affect the "right of just possession"—whether recorded or unrecorded, legal or equitable. This seems a logical and natural development, since the recording acts are powerless to prevent the record chain from breaking by reason of void or invalid links, or to prevent failure of the whole chain of title by reason of acts of possession or other matters having no relation to the recording acts.

See also mechanics' lien as insurable interest, Stout v. City Fire Ins. Co., 12 Iowa, 371 (1861); lien by contract, Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47 (1875); and judgment debtor as not having insurable interest, Grevemeyer v. Southern Mut. Fire Ins. Co., 62 Pa. 340 (1869). Owner of stock in a profit corporation has insurable interest in its property. Warren v. The Davenport Fire Ins. Co., 31 Iowa, 464 (1871).

[15]Bothin v. Cal. Title Ins. Co., *supra* note 14; Place v. St. P. Tit. Ins. & Tr. Co., 67 Minn. 126, 69 N. W. 706 (1897); Quigley v. St. P. Tit. Ins. & Tr. Co., 60 Minn. 275, 62 N. W. 287 (1895); Minn. Tit. Ins. & Tr. Co. v. Drexel et al., 70 Fed. 194 (C. C. A. 8th Minn. 1895); Giltinan v. Lehman, 65 N. J. L. 668, 48 Atl. 540 (1901).

[16]Deputy v. Stapleford and Willis, 19 Cal. 302 (1861); Stewart v. Walker, 80 Neb. 68, 113 N. W. 814 (1907); Johnson v. Hess, 126 Ind. 298, 25 N. E. 445 (1890).

[17]Hart v. Farmers & Mechanics Bank, 33 Vt. 252 (1860). In Taylor v. Harrison, 47 Tex. 454 (1877) it is held that a recorded instrument gives constructive notice only of what might be learned by reading the record, and does not extend to matters contained therein that might put a prudent man upon inquiry. Jones v. McNarrin, 68 Me. 334 (1878).

[18]One holding a mortgage upon land, who puts it into the

many risks that affect titles under statutes against transfers in fraud of creditors—risks dependent upon facts outside of the records. Most of such statutes require proof of insolvency before fradulent intent can be established.[19]

Forgeries and False Personations.

Among the risks mentioned, perhaps the most feared, by both insured and insurer, is forgery. A forged instrument, of course, is void and ineffective for any purpose. The recording of it creates no rights of any kind or character, not even in favor of an innocent purchaser.[20] Where one procures the signature of another without his intention to sign, or where the name of the grantee is erased and changed, or a blank deed filled in without authority, it is a forgery.[21] A mortgage which has been assigned to an innocent person, after alteration by the mortgagee, is void and cannot be enforced.[22] None but genuine instruments are entitled to be recorded, yet no means is provided whereby their genuineness may be tested. While the instrument itself is generally proof of its genuineness, it is not always preserved after being copied. The records give no notice of forgeries, and one who relies upon the record title must suffer all losses therefrom. A deed or mortgage made under an assumed name may be valid,[23] but one who falsely assumes the name of, and impersonates another, commits the equivalent of a forgery.

Identity of Persons.

There are many persons in every community bearing like names. A title insurance policy insures that every John Smith in the records is the John Smith that owns the property. No inconsiderable risk is this, when it is realized that before it can be said that a title to real property is good, it must be first found that all persons named in the public records, grantors, grantees, heirs, devisees, officers, notaries public, etc., as having done or received something affecting the title, are the real persons in interest, and not persons of the same name. Prima facie, an indentity of persons is presumed from identity of name.[24] But this is only prima facie, and upon proof that one person bearing a similar name has signed or acted in the chain of title, being not the real party in interest, the whole chain of record title must fall.[25] Whether the crime is that of forgery, or merely the result of mistake or ignorance, the result is the same, absolutely no rights accrue under the act, not even to a bona fide purchaser for value—the recording laws being powerless to protect. Rarely do the public records give forth any information as to identity of persons, yet this risk is of tremendous importance in establishing the right of just possession of real property.

Want of Legal Delivery.

Of the risks under consideration, none is more difficult of ascertainment by the insurer, or more difficult to protect against than that of want of legal delivery of instruments in the chain of record title. A deed (and the same is true in a general way of other instruments constituting contracts affecting the title of, or encumbrances upon, real property) is not effective until there has been a delivery, either actual, implied, or constructive.[26] That the recording acts afford little protection against such risks follows inevitably from a consideration of what constitutes delivery and the proof of it. It is beyond controversy that the evidence of delivery must come from without the deed. In other words, a deed never shows upon its face, nor by the terms thereof, a delivery, and parol evidence thereof must be admitted when the question of delivery arises.[27] The question of fact is often difficult to determine,[28] as it is largely a matter of intention and is not conclusively established by the passing of the instrument from the grantor to the grantee.[29] The circumstances of possession of grantee may be shown,[30] and if delivery to the grantee was unauthorized, it is ineffectual,[31] or where the grantee obtains possession by any wrongful means, there is no delivery,[32] and in the latter case it requires a considerable degree of negligence on the part of the grantor to work an estoppel, even against a subsequent purchaser for value without notice.[33] Cases holding that there has been no delivery by reason of the existence of facts without the public records, might be multiplied beyond reasonable limits.[34] Under modern business practices a considerable portion of all transactions involving the title to real estate are handled through escrow, either by regularly constituted escrow corporations or by individual agents. Many deeds also are delivered to third parties to be recorded after the death of the grantor. In both classes of cases, in the final analysis, the facts determining delivery, or want of delivery, whether dependent upon intention, actual parting with control by the grantor, delivery upon condition, a wrongful act of someone, or words of the grantor written or oral at the time of deposit, are subject to proof to defeat the recorded chain of title. Even where there has been a conditional delivery and the courts are inclined to protect a bona fide purchaser for value, the facts establishing his status as bona fide purchaser must be proved before he may

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power of another to sell or mortgage the property to a third person who is ignorant of the condition, cannot afterwards assert his priority. Rice v. Rice, 2 Drew 73, 61 Eng. Rep. 646 (1853); Briggs v. Jones, L. R. 10 Eq. 92, 98 (1870). In Union Trust Co. v. Real-Est. Tit. Ins. and Tr. Co., 27 Pa. Co. Ct. 187, a copy of a mortgage and an assignment of it were forged, the papers being furnished to the title company by plaintiff, a trust company. Defendant filed assignment and closed the transaction, and was sued by the trust company on its policy of title insurance. No question was raised as to the liability of defendant on its policy, but the court weighed the "innocence" of the parties and held the plaintiff was at fault in misleading defendant as to the identity of the parties. A valid mortgage was of record.

[19]In re Shaw, 7 Fed. (2d) 381 (D. C. N. J. 1925), in which it is held that in order to establish a "preference" under the Bankruptcy Act, it is essential to first establish "insolvency" at the time of the transfer, which, of course, is a question of fact.

[20]Palau v. Helemano Land Co., 22 Hawaii 357, 361 (1914); Reck v. Clapp, 98 Pa. 581 (1881); Cole v. Long, 44 Ga. 579 (1872); Hopkins v. Fresno County Abstract Co., 36 Cal. App. 699, 173 Pac. 106 (1918). And where the signature was genuine and the acknowledgment was obtained by forgery, the deed afforded no protection. Marden v. Dorthy, 160 N. Y. 39, 54 N. E. 726 (1899). In Stensgaard v. St. P. Real-Est. Tit. Ins. Co., 50 Minn. 429, 52 N. W. 910 (1892), the land belonged to one Uihlein and immediately prior to the issuance of a policy of title insurance by defendant the plaintiff purchased and recorded a conveyance from a person whom he supposed to be Uihlein, who, however, was not Uihlein, but falsely personated him and forged the deed, wherefore, it was held that the plaintiff got no title.

[21]Hays v. Dillard, 176 Ala. 109, 57 So. 695 (1912); Pry v. Pry, 109 Ill. 466 (1884).

[22]Anderson v. Bellenger, 87 Ala. 334, 6 So. 82 (1889); Bacon v. Hooker, 177 Mass. 335, 58 N. E. 1078 (1901); Vaca Valley, etc. R. R. v. Mansfield, 84 Cal. 560, 24 Pac. 145 (1890).

[23]Blackman v. Henderson, 116 Iowa, 578, 87 N. W. 655 (1901); Preiss v. Le Poidevin, 19 Abb. N. C. 123, 9 N. Y. St. 695 (1887).

[24]Biaggi v. Ramont, 189 Cal. 675, 208 Pac. 892 (1922); Mott v. Smith, 16 Cal. 533 (1860).

[25]U. S. v. Long, 30 Fed. 678 (C. C. Ga. 1887); People v. Peacock, 6 Cow. 72 (N. Y. 1826); Edwards v. State, 53 Tex. Cr. 50, 108 S. W. 673 (1908).

[26]Barr v. Schroeder, 32 Cal. 609 (1867); Williams v. Armstrong, 130 Ala. 389, 30 So. 553 (1901): Younge v. Guilbeau, 70 U. S. 636 (1866); Johnson v. Kramer, 203 Fed. 733 (1913); Lewis v. Burns, 122 Cal. 358, 55 Pac. 132 (1898); Schultz v. Schultz, 274 Ill. 341, 113 N. E. 638 (1916); Perry v. Hackney, 132 N. C. 368, 55 S. E. 289 (1906).

[27]Whitney v. Dewey, 10 Idaho, 633, 655, 80 Pac. 1117 (1905).

[28]Williams v. Kidd, 170 Cal. 631, 151 Pac. 1 (1915); Whitman v. Heneberry, 73 Ill. 109 (1874).

[29]Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028 (1909); Dietz v. Farish, 44 N. Y. Super. Ct. 190 (1878); Hastings v. Vaughn, 5 Cal. 315 (1855); Black v. Sharkey, 104 Cal. 279, 37 Pac. 939 (1894); Lee v. Richmond, 90 Iowa, 695, 57 N. W. 613 (1894).

[30]Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359 (1852); Carnes v. Platt, 29 N. Y. Super. Ct. 270 (1868).

[31]Stephenson v. Southerland, 150 App. Div. 275, 134 N. Y. Supp. 774 (1912); Cannon v. Cannon, 26 N. J. Eq. 316 (1875).

[32]Holmes v. Salamanca, etc. Co., 5 Cal. App. 659, 91 Pac. 160 (1907); Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509 (1916).

[33]Carusi v. Savary, 6 D. C. App. 330 (1895); Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323 (1893); Henry v. Carson, 96 Ind. 412 (1884); Stanley v. Valentine, 79 Ill. 544 (1875); Hall v. Weaver, 34 Fed. 104, 13 Sawy 188 (1888), holding that proof will be allowed to show whether alteration of deed was made before or after delivery.

[34]Fitch v. Bunch. 30 Cal. 208 (1866); Alsop v. Swathel, 7 Conn. 500, (1829); Metcalfe v. Brandon, 60 Miss. 685 (1882); Culmore v. Genove, 24 S. W. 83 (Tex. Civ. App. 1893); Lewis v. Burns, *supra* note 26; Hall v. Waddill, 78 Miss. 16, 27 So. 936, 28 So. 831 (1900); Elliott v. Merchants Bank & Trust Co., 21 Cal. App. 536, 132 Pac. 280; (1913); Stephensen v. Southerland, 134 N. Y. Supp. 774 (1912); Burke-Mobray v. Ellis, 44 Tex. Civ. App. 21, 97 S. W. 321 (1906); Morgan v. Morgan, 82 Vt. 243, 73 Atl. 24 (1909).

enjoy the protection of the recording acts, or of the laws of equity.[35]

In connection with the handling of escrows, litigation is common, resulting, perhaps, from uncertainty as to delivery, and the time when it actually takes place.[36] The agreements on which delivery hinges may be either written or oral, and disputes arise as to whether the terms of the escrow have been complied with,[37] at what point of time the escrow holder becomes the agent of the seller,[38] as to whether there is such an agreement as to constitute a valid escrow,[39] and upon many other points affecting the passing of the legal or equitable title.

When a deed or other instrument is handed to a third person to be delivered after the grantor's death, questions arise as to whether the deposit was made beyond recall,[40] and whether the deed is to take immediate effect or be postponed until after the death of grantor.[41] In both classes of escrows mentioned, the existence of the facts upon which title is predicated, is a normal risk of the title insurance policy.

Copyists' and Recorders' Errors.

Occurring less commonly, perhaps, than some of the foregoing defects of title, but of some importance in this connection, are defects in the transcribed records, generally termed copyists' or recorders' errors. While there are conflicting decisions, in a considerable number of the states it is held that in the case of an error of the recorder, it is the bona fide purchaser who suffers, rather than the one who attempted to have the instrument recorded.[42] Where the opposite rule prevails, it is held that an instrument, erroneously copied, gives constructive notice only of its contents as written and must be "recorded according to law" in order to give notice.[43] Under the former line of decisions, as in case of forgery, false personations, or wrong identity, no rights accrue by virtue of the error, and the evidence of the truth is hid away, perhaps, in the desk, trunk, or house clock of the beneficiary of the instrument itself. Under the latter line of decisions there is still the matter of proving that the purchaser was without actual knowledge of facts sufficient to put him upon inquiry.[44]

Minors and Others Under Disability.

Deeds made by minors and infants, within the varying regulations of statutes, are voidable by the infant on coming of age,[45] and unless in equity he is estopped from disaffirmance which rarely occurs, he may disaffirm as against the purchaser and no protection to the latter is afforded by the recording or registration acts.[46] The deeds of persons under disability by reason of being wanting in mental capacity to contract, either from degrees of insanity,[47] old age,[48] or extreme intoxication, where the grantee has taken an unfair advantage of his condition,[49] may be set aside. Where there is no mind in the grantor capable of contracting, the instrument makes no record and gives no notice.

So, also, one may be under disability to own real property by reason of alien birth and descent from Asiatic races. The character of the name appearing of record is sometimes slightly indicative of the race, as in case of Japanese and Chinese names, but ordinarily it is impossible to ascertain from the records whether the person is a high caste Hindu,[50] a Syrian,[51] or an Arabian or a Japanese,[52] and therefore incapable of holding title to real property, or whether the person is an Armenian, or of other race of remote European origin, and therefore entitled to enjoy the privileges of citizenship.[53] Except in rare cases, where statutes provide for making a record, the public records do not disclose the disabilities of those dealing with real property.

The Relation of Husband and Wife.

The major difficulties encountered by the insurer of titles, growing out of the relation of husband and wife, consist not altogether in the uncertainties of the law in relation to the acts of the parties to the marital relation as written into the public records, but in large part those difficulties arise from the impossibility of obtaining from such records information as to the existence of the marriage relation, or the point of time it is entered into, upon which facts all rights of the parties depend. It is true there is an abundance of judicial decision on community property, the right of dower, estates by entirety, homestead, the trust relation of the spouses, and the rights and disabilities of married women, as these rights and disabilities are provided for in various jurisdictions, but strangely enough, rarely has any attempt been made to make an effective record of the fact of marriage as a condition precedent to dealing with real property. That is to say, there has been no attempt made by the statutes of the various states to create a record of marriages which shall be conclusive in the matter of conveyancing. Perhaps it could not be done. At any rate the fact of marriage is one to be proved in open court. Recitals contained in deeds that a party is "single" or "married," or that the parties are husband and wife, are merely self serving, and not conclusive. The records of the county where the real property is situated may even show a record of a marriage and yet the marriage may have been dissolved in another county or state.

Under the common law the legal identity of the wife was merged in the man she married, and her contracts were generally void.[54] The common law has been modified by the various statutes of the states fixing the rights of the spouses with respect to property.[55] Some of these statutes restore the wife to the status of a single woman with respect to her separate estate,[56] while others limit somewhat her control of such property.[57] The structure

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[35]Chapman v. Ostergard, 73 Cal. App. 539, 238 Pac. 1081 (1925); 2 POMEROY, EQUITY JURISPRUDENCE (3rd ed. 1905) §755; William E. Burby, *Deeds Delivered on Condition* (1927) 1 So. CAL. L. REV. 32.

[36]Lynn v. McCoy, 200 S. W. 885 (Tex. Civ. App. 1917); Grimm v. Williams, 200 S. W. 1119 (Tex. Civ. App. 1918); Los Angeles City H. S. Dist v. Quinn, 195 Cal. 377, 234 Pac. 313 (1925).

[37]Miller v. Deael, 239 S. W. 679 (Tex. Civ. App. 1922).

[38]Shreeves v. Pearson, 194 Cal. 699, 230 Pac. 448 (1924); Neal v. Owings, 108 Kan. 73, 194 Pac. 324 (1921).

[39]Schmidt v. Baar, 283 S. W. 1115 (Tex. Civ. App. 1926); Hargett v. Hargett, 201 Ala. 511, 78 So. 865 (1918); Lewis v. Rouse, 240 Pac. 275 (Ariz. 1925).

[40]Taft v. Taft, 59 Mich. 185, 26 N. W. 426 (1886); Cook v. Brown, 34 N. H. 460 (1852).

[41]Trask v. Trask, 90 Iowa, 318, 57 N. W. 841 (1894); Hathaway v. Paine, 34 N. Y. 92 (1865); Crozer v. White, 9 Cal. App. 612, 100 Pac. 130 (1908); Standiford v. Standiford, 97 Mo. 231, 10 S. W. 836 (1889).

[42]Throckmorton v. Price, 28 Tex. 606 (1866); Gillespie v. Rogers, 146 Mass. 612, 16 N. E. 711 (1888); Mims v. Mims, 35 Ala. 23 (1859); Lewis v. Hinman, 56 Conn. 55, 13 Atl. 143 (1888).

[43]Cady v. Purser, 131 Cal. 552, 63 Pac. 844 (1901); Taylor v. Amer. Nat. Bank, 64 Fla. 525, 60 So. 783 (1913); Frost v. Beckman, 1 Johns. Ch. 288 (N. Y. 1814); Bamberg v. Harrison, 89 S. C. 454, 71 S. E. 1086 (1911); Gilchrist v. Gough, 63 Ind. 576 (1878).

[44]See Donald v. Beals, 57 Cal. 399 (1881), showing the effect of slight means of knowledge upon the status of a purchaser in such cases.

[45]Irvine v. Irvine, 76 U. S. 800 (1869); Hastings v. Dollarhide, 24 Cal. 195 (1864); Dixon v. Merritt, 21 Minn. 196 (1875); Flinn v. Powers, 36 How. Prac. 289 (N. Y. 1868); Wilson v. Branch, 77 Va. 65 (1883).

[46]Tucker v. Moreland, 35 U. S. 345 (1836). On estoppel, see Pace v. Cawood, 33 Ky. L. 592, 110 S. W. 414 (1908).

[47]Essary v. Marvel, 274 Ill. 576, 113 N. E. 859 (1916).

[48]Morton v. Davis, 105 Ark. 44, 150 S. W. 117 (1912).

[49]O'Connor v. Rempt, 29 N. J. Eq. 156 (1878); More v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76 (1901).

[50]U. S. v. Bhagat Singh Thind, 261 U. S. 204, 43 Sup. Ct. 338 (1923).

[51]Ex Parte Shahid, 205 Fed. 812 (D. C. S. C. 1913).

[52]U. S. v. Ali, 7 Fed. (2d) 728 (D. C. Mich. 1925); Ozawa v. U. S., 260 U. S. 178, 43 Sup. Ct. 65 (1922).

[53]U. S. v. Cartozian, 6 Fed. (2d) 919 (D. C. Or. 1925).

[54]The incapacity of the wife to contract was a canon of the common law. Blythe v. Dargin, 68 Ala. 370, 375 (1880). "Legal existence of the wife merged in the husband." Hall v. Johns, 17 Idaho, 224, 105 Pac. 71 (1909). See Hames v. Castro, 5 Cal. 109 (1855); Forsythe v. Barns, 228 Ill. 326, 81 N. E. 1028 (1907); Drury v. Foster, 69 U. S. 780 (1864).

[55]Mayo v. Gleason Bank, 140 Tenn. 423, 205 S. W. 125 (1918); Carter v. Becker, 69 Kan. 524, 77 Pac. 264 (1904), holding that such laws are designed to restore to the wife her control of her separate estate, which, under the common law, she lost by marriage.

[56]Wood v. Wood, 83 N. Y. 575 (1880).

[57]Barnett v. Harshbarger, 105 Ind. 410, 5 N. E. 718 (1886).

of the law thus built up throughout the states by statute and constitution, has resulted in this situation, that the titles to real estate that married persons, single or together, have dealt with, as shown by the public records, may be said to be good or bad only upon proof, not only of the fact of the existence of the marriage relation and the time entered into, but of the nature of the estate itself, which, in turn is dependent upon, first, when the property was acquired, whether before or after marriage, and second, how acquired, whether by gift, bequest, devise, descent, or purchase, and if by purchase, the source and character of the funds as to ownership. In short, the entire body of the risks resulting from the marriage relation are dependent upon the existence or nonexistence of facts, which, from their very nature, except in rare cases, cannot be ascertained from the public records.[58]

This is true, not only in those states where the right of dower is preserved, or estates by entirety are permitted, but it is particularly true in the community property states. Indeed, it is safe to say that in the community property states few titles are insured where the insuring company has any actual dependable knowledge, either from the records or otherwise, as to whether the one who signs as wife is such, or as to whether the property owned or conveyed was community property or otherwise.[59]

Generally speaking, it may be said that the laws controlling the ownership and alienation of real property, as affected by the marital relation, have been developed quite independently of the registration laws. The estates in real property held by husband and wife, almost without exception, are conditioned upon facts entirely unrelated to the recording laws. The right of dower, under the common law, depended upon: (1) a lawful marriage; (2) seisin of the husband during the marriage of an estate of inheritance in land; and (3) death of the husband, leaving the wife surviving.[60] Substantially the same principles are carried into the statutes of the states that have established statutory dower. When the wife releases or fails to release her dower of record,[61] the making of the record or the want of a record has little significance. So, also, the requisites of an estate of curtesy were marriage, seisin in the wife, birth of issue, and death of the wife;[62] of estates by entirety, a lawful marriage, and a conveyance to husband and wife during the existence of the marriage relation. A conveyance to a man and woman, describing them as husband and wife, creates no estate by entirety, if in fact, they are not husband and wife.[63]

It is because both the common law and the Spanish law of community property have their sources in countries where the American system of recordation was unknown that examiners of titles are unable to rely upon the records of transfers to or by husband and wife, or by a man or woman alone. Therefore, has grown up the custom of requiring the wife to sign in all cases, whether necessary or not. And for this reason no titles to real property are shown by the records to be perfect, where any transfers by men or women appear of record.

The After-Born Child And Pretermitted Heir.

Title by descent or devise, as a general rule, vests upon the death of the decedent or testator, subject to the limited authority of the probate courts for settlement of the estate, or execution of the will,[64] and while, as a general rule, it may be conclusively determined from the probate proceedings who are heirs or devisees, or in whom title vests upon the death of the testator, in some important instances, neither the will nor the probate proceedings are conclusive as to certain persons, as where the testator fails to name a child or children, though born after the demise of the testator, or issue of a deceased child or children. Many state statutes provide that such omission shall operate to revoke the will as to them, or that the testator shall be deemed to have died intestate as to such omitted heirs.[65]

It has also been held that where the will is void as to a pretermitted heir, since he cannot be deprived of his inheritance by the will, sales of property under the will are illegal.[66] Thus it is obvious that the records give no warning of the vested rights of the after-born child or pretermitted heir in such cases, and subject to what protection may be afforded by statutes of limitation or the doctrine of laches, such risks will be found to be not few in number and very real.

Void Judgments And Decrees.

Many decrees and judgments of the courts are void for want of jurisdiction; and though, in the absence of fraud committed upon the court, the general rule is that the want of jurisdiction must appear from the record in order to render the judgment subject to collateral attack,[67] nevertheless, there are an alarming number of cases of recent years where judgments effecting the title to real property, appearing regular upon the record, have been held absolutely void for fraud in obtaining service of process or otherwise in obtaining the judgment; the rule being that an attack upon a judgment for having been procured by fraud is a direct attack, since the establishment of the extrinsic fraud shows that no judgment has been rendered.[68] In all such cases where a judgment or decree of court is void for extrinsic fraud rarely, if ever, is there anything to put one upon inquiry shown in the public records affecting the title of the property.

Violations Of The Usury Laws.

That the risk of failure, either in whole or in part, of a mortgage or trust deed securing indebtedness, by reason of invalidity of the contract as in violation of statutes against usury, is a normal risk of title insurance has been asserted by some and denied by others who have written or spoken upon the laws of title insurance. For the purposes of this survey no attempt will be made to present the many interesting cases bearing upon the general subject of usury.[69] Our concern will be to ascertain if such risks, or any substantial part of them, fall within the classification under consideration.

Most of the states have laws against usury. As to when there is a violation of the usury laws must largely depend upon the terms of the statute. Generally defined, usury is the contracting for or reserving something in excess of the amount allowed by law for the loan or forbearance of money.[70] A contract which upon its face is prohibited by

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[58]In the State of California, for instance, the recitals of the husband in the deed, whereby he attempts to convey without the wife joining, are of no avail, if in fact the property is community property, and he is, in fact, married. The manner and time of acquisition, and whether during coverture, determine the character of the property. Killian v. Killian, 10 Cal. App. 312, 101 Pac. 806 (1909).

[59]Where a deed to the wife recited, "as and for her separate estate," the separate character of the property is established of record. Peck v. Brummagim, 31 Cal. 440 (1866). So, also, by §164 of the Civil Code, certain disputed presumptions arise when property is transferred to a married woman by an instrument in writing, that she takes it as her separate property, which presumptions are conclusive in favor of a "purchaser in good faith and for a valuable consideration." This statute, and §§1401 and 1402 of the same code, and the record of estate distributions in the Probate Courts provide the principal aids given by the public records in determining the nature of property in California, whether separate or community. Seldom is the record sufficient of itself to determine title, even where the presumptions of the statute apply.

[60]Whiting v. Nicholl, 46 Ill. 230 (1867); Rumsey v. Sullivan, 166 App. Div. 246, 150 N. Y. Supp. 287 (1914).

[61]White v. Graves, 107 Mass. 325 (1871).

[62]Day v. Burgess, 139 Tenn. 559, 202 S. W. 911 (1918).

[63]Carver v. Smith, 90 Ind. 222 (1883); Fulper v. Fulper, 54 N. J. Eq. 431, 34 Atl. 1063 (1896).

[64]Hall v. Hall, 98 Wis. 193, 73 N. W. 1000 (1898); Jones v. Shomaker, 41 Fla. 232, 26 So. 191 (1899).

[65]Schneider v. Koester, 54 Mo. 500 (1874); Estate of Ryan, 191 Cal. 307, 216 Pac. 366 (1923).

[66]Kolp v. Kolp, 3 Yeates 164 (Pa. 1801); Smith v. Robertson, 89 N. Y. 555 (1882); Smith v. Olmstead, 88 Cal. 582, 26 Pac. 521 (1891), where it is held that the pretermitted child succeeds immediately on the death of the testator and that that title could not be divested by a sale by the executrix; Rowe v. Allison, 87 Ark. 206, 112 S. W. 395 (1908).

[67]Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. 781 1889).

[68]Patch v. Ward, L. R., 3 Ch. App. 207 (1867); FREEMAN, JUDGMENTS, §495; "An attack upon a judgment on the ground that it was procured by fraud is a direct attack since the establishment of the fraud shows that no judgment has been rendered." Parsons v. Weis, 144 Cal. 410, 415, 77 Pac. 1007 (1904).

[69]See Raymond B. McConlogue, *Usury* (1928) 1 So. CAL. L. REV. 253.

[70]U. S. Mortgage Co. v. Sperry, 26 Fed. 727, 730 (C. C. Ill. 1885).

positive law is under the condemnation of the law, and the beneficiary of such contract cannot come into court and ask to have his illegal objects carried out.[71] If the definitions of the title to real estate and of title insurance forming the premises of these notes are well formed, any contract that purports to create a lien upon, or a charge against real property, if appearing of record, would be covered by a policy of title insurance under said definition. It will be conceded that the interest of mortgagee, or beneficiary under a deed of trust securing indebtedness, constitutes an insurable interest for the purposes of title insurance. Therefore, if the policy insures against loss by reason of title, liens or encumbrances, one who loses by reason of invalidity of a mortgage shown upon the record, must be entitled to recover under the plain terms of the policy, where the record shows that the interest agreed to be paid is illegal.[72] This concerns the record title only and may be assumed to be true. But there are two elements of the offense of usury, one the "contracting for" and the other the "receiving," and it is well settled that the court will look to the real character of the transaction regardless of its form. Not only will the court look into the acts of the parties at the time of the execution of the contract, but subsequently to determine whether there is usury.[73] Although a valid mortgage is not affected by a subsequent usurious agreement,[74] even a verbal agreement for an additional advantage or compensation to the lender, in addition to interest reserved at the highest legal rate, renders the mortgage usurious,[75] if a part of the original transaction. So if any part of the principal is retained as a bonus or commission, which, when added to the interest reserved exceeds the permitted rate, the mortgage is usurious in fact, although appearing to be valid upon the face of the record.[76] The rule established by the Supreme Court of the State of California in *Haines v. Commercial Mortgage Company*[76a] is amply supported by the authorities of other jurisdictions, and is applicable to all usury statutes. In that case the note secured by trust deed was set out in the deed of trust, and neither the note nor the deed of trust disclosed any violation of the usury law; but on proof that three per cent. of the principal of the loan had been retained as a commission by an officer of the lender corporation, the full legal rate of twelve per cent. per annum being provided for in the note, the court held that the three per cent. was usurious interest, although included in the principal of the note, and restrained the foreclosure of the trust deed as to all sums of interest. Therefore, a mortgage or trust deed securing an indebtedness may be valid upon the face of the record, but incapable of being enforced as to the interest reserved by the note or notes. Indeed, the validity or invalidity of a lien or charge upon real estate, as affected by usury laws, depends primarily upon the agreement and intent of the parties at the time of entering into the transaction, and not upon the form of the written agreement;[77] and while in some jurisdictions the defense of usury is held to be a personal privilege on the part of the debtor,[78] and in others it is held that it may be taken advantage of by any purchaser who does not purchase subject to the mortgage or trust deed, or by a subsequent mortgagee,[79] it is immaterial here, for if the lien or charge is unenforceable, in whole or in part, by reason of usury, and it has been insured as a valid and prior lien or charge in favor of a mortgagee, there may be loss to the insured.[80]

Under this view of the law of title insurance, the insuring company, when issuing a policy of title insurance, covering the validity and priority of the lien or charge of a mortgage or deed of trust upon real property, in favor of the owner of the indebtedness (such being the insurable interest) must of necessity assume liability for the legal disposal of the funds or proceeds of the loan, regardless of the face form of the note or notes. Moreover, many mortgages and trust deeds do not set out all of the terms of the contract; and in such cases the risk of usury is assumed by the insurer, unless specifically excepted by the terms of the policy, or the obligations thereof are strictly limited to the record title.[81] It is alike immaterial whether the lien or charge is void only as to interest or void as to both principal and interest. Nor is the situation similar to the one arising where there is a set-off or defense to a valid mortgage. In the latter case the mortgage and note are valid contracts; but where a contract forming the basis of a lien or charge upon real property is tainted with usury, there is an intrinsic invalidity, similar to that resulting from fraud or forgery, which destroys its effectiveness for any purpose to the extent prohibited by statute. In some cases, perhaps, the public records may indicate the probable presence of usury, but in no cases are the records proof of the absence of usury.

Mechanics' Liens

The risks of title insurance end where the risks of other insurance begin. Title insurance is designed to protect the insured and save him harmless from any loss arising through defects, liens or encumbrances that may be in existence, affecting the title when the policy is issued. But it is not necessary that a lien or encumbrance be of record at the date of the policy, or that the lien shall have been perfected. The right creating the defect or encumbrance may be an inchoate right, such as the right of mechanics' liens between the time of commencement of performance of the contract or labor, or the furnishing of the materials and the filing of the notice of lien. By the statutes of many of the states the lien relates back to the time of beginning the work or furnishing the material. A title policy which insures against claims of title or encumbrance prior in date and time to the date of the policy, insures against this inchoate right of mechanics' lien.[82]

The theory of the right of mechanics' lien is that one who has enhanced the value of property has a preferred right to follow his labor and material into the property.[83] The right is either of statutory or constitutional origin,[84] and while the statutes differ widely in their provisions, the things that fix the time when the lien attaches, and its priority as to other rights, are general throughout the states, by reason of the very nature of the lien itself, the very right to a lien being conditioned upon actual notice resulting from the commencement of work upon the property, and not upon any notice imputed by the records. The theory is that the purchaser or mortgagee, when acquiring an interest in, or a lien upon land, should know that

[71] Sage v. Hampe, 235 U. S. 99, 35 Sup. Ct. 94 (1914); Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022 (1892).

[72] First National Bank v. Phares, 70 Okl. 255, 174 Pac. 519 (1918); Blodgett v. Rheinschild, 56 Cal. App. 728, 732, 206 Pac. 674 (1922); Klein v. Title Guaranty & Surety Co., 166 Fed. 365 (1909); Dale v. Duryea, 49 Wash. 644, 96 Pac. 223 (1908); Mills v. Association, 75 N. C. 292 (1876); Wallace v. Zinman, 200 Cal. 585, 254 Pac. 946 (1927).

[73] Dozier v. Mitchell, 65 Ala. 511 (1880); Fox v. Lipe, 24 Wend. 164 (N. Y. 1840).

[74] Allison v. Schmitz, 31 Hun. 106 (N. Y. 1883); Dotterer v. Freeman, 88 Ga. 479, 14 S. E. 863 (1891).

[75] Vilas v. McBride, 62 Hun. 324, 17 N. Y. Supp. 171 (1891).

[76] Cox v. Mass. Mut. Life Ins. Co., 113 Ill. 382 (1885); Barger v. Taylor, 30 Or. 228, 42 Pac. 615 (1895); Haines v. Commercial Mtg. Co., 200 Cal. 609, 255 Pac. 805 (1927).

[76a] *Supra* note 76.

[77] See cases *supra* note 76.

[78] Stickney v. Moore, 108 Ala. 590 19 So. 76 (1895); Studabaker v. Marquardt, 55 Ind. 341 (1876).

[79] Banks v. McClellan, 24 Md. 62 (1865); Bard v. Fort, 3 Barb. 632 (N. Y. Ch. 1847); Matthews v. Ormerd, 140 Cal. 578, 74 Pac. 136 (1903).

[80] It has been the practice of title insurance companies, until recently, to exclude from their policies liability for usury, and for this reason the point has not been directly raised in the courts of last resort. Recently, however, investors have demanded that such policies cover invalidities in mortgages on account of violations of the usury laws, and thus the question has been squarely presented for decision.

[81] Under the rule laid down in Foehrenbach v. Ger. Amer. Title and Trust Co., *supra* note 9, it is quite probable that the title insurance company would be liable to the mortgagee procuring title insurance without misrepresentation, notwithstanding such insured may have doubted the validity or priority of the lien of his mortgage, at the time of the application for insurance.

[82] State v. Minn. Title Ins. and Tr. Co., 104 Minn. 447, 116 N. W. 944 (1908); Wheeler v. Real-Est. Tit. Ins. & Tr. Co., 160 Pa. St. 408, 28 Atl. 849 (1894); Minn. Tit. Ins. & Tr. Co. v. Drexel, 70 Fed. 194 (C. C. A. 8th, 1895); Tit. Guar. & Tr. Co. v. Wrenn, 36 Ore. 62, 56 Pac. 271 (1899); Quigley v. St. Paul Title Ins. Co., 60 Minn. 275, 62 N. W. 287 (1895).

[83] Mochon v. Sullivan, 1 Mont. 470 (1872).

[84] Martin v. Becker, 169 Cal. 301, 146 Pac. 665 (1915).

buildings have been commenced thereon, and that the work will go on to completion. This situation, in ancient times, was quite satisfactory, but under modern conditions where vast sums of money from the great financial centers are being invested in lands and securities far distant therefrom, those who propose to insure the title of such lands and the priority of liens thereon are presumed to cover the entire title and the whole question of priority. Title insurance, being required to insure against mechanics' liens, whether of record or inchoate, inquires, what are the factors fixing the time when the lien attaches, and the priorities with relation to other liens and rights? From a survey of many cases under many statutes, it may be said that the factors which, as a general rule, determine and fix priority as between mortgagees, or other purchasers or encumbrancers, and lien claimants, and which must be tested by the insuring company, are, first, time of recording the mortgage, or in some states, the execution of the mortgage, in relation to the commencement of the building or the commencement of labor or the delivery of materials, second, existence or nonexistence of a valid contract between the borrower and lender, third, knowledge or lack of knowledge on the part of claimant and mortgagee of existence of the rights of the other at the time of recording the mortgage or commencement of work, and, fourth, time of actual recording of claim of lien.[85]

If the insurer is undertaking to insure against defects of title and priority of liens and encumbrances by a contract of indemnity such as has been defined by the courts, it will be able to obtain from the records the date of the recording of the mortgage, and the date of the recording of the claim of lien, and nothing more. The important things that fix the priorities are matters not of record, and must be verified by the insurer by inquiry of the parties by taking proof of the time of commencement of labor or the furnishing of materials, and of the facts as to the existence of contracts, as to knowledge as constituting actual notice, and of the facts as to the disposal of the funds of the loan. While seeking by the recording acts, on the one hand, to discourage secret liens and equities, the law, on the other hand, has so favored those who contribute something of value to property in the form of labor and materials, that the value of the records in determining the existence of mechanics' liens has been reduced to a minimum. The records in a given case may show what liens are valid, but the risks of mechanics' liens, from the standpoint of the insurer, are not record title risks.

The foregoing survey of matters that may defeat the apparent record title is not intended to be exclusive of many others of like effect. Attention has been called to a number of the most important risks of title insurance resulting from some inherent defect or invalidity in a link of the chain of title to real property, no notice of which is given by the public records. It will be observed that most of these result from frauds and dishonesty of men, or an entire lack of the existence of a valid contract for one reason or another, so that the recorded instrument is not what it purports to be. Obviously, if human beings were not dishonest and were so infallible that no recorded instruments appeared of record save those that represent the absolute truth, the recording or registration acts would afford an adequate basis for title insurance as to the greater part of the matters herein referred to. Since, however some men are dishonest, and none are infallible, and since the recording laws, however beneficent in their purpose, cannot be used as a means by which one may defraud another, or by which one may take away the property of one who is faultless, and who has not willed to part with it, or who is incapable of parting with it, title insurance must look to the actual facts, and must assemble and consider all of the muniments of title, which, under the law, constitute the means of proving the right of just possession.

This broader view of title insurance has been recognized by some of our courts of last resort, although many of the decisions directly affecting the title insurance contract are filled with discussions as to what particular construction should be placed upon special provisions therein contained.[86] Such cases have very well established the general nature of the title insurance contract, but they are not very helpful in an attempt to ascertain in what respects the public records are not conclusive.[87] There remain yet to be considered the most interesting of such risks—those arising out of, or connected with, actual possession.*

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[85]There must be a binding contract to make advances, otherwise mortgage recorded is not superior to lien for construction work commenced later. San Francisco Lumber Co. v. Yates, 54 Cal. App. 109, 204 Pac. 423 (1921); Fickling v. Jackman, 53 Cal. App. Dec. 1358, 259 Pac. 84 (1927). Actual notice by a lien claimant of an unrecorded mortgage has the same effect as a prior record of the mortgage. Miller v. Stoddard, 50 Minn. 272, 52 N. W. 895 (1892). See Hardy v. Frey, 49 Cal. App. 551, 196 Pac. 92 (1920). After commencement of work every person dealing with the property is charged with notice of liens regardless of the state of the public records. Keating Imp. Co. v. Marshall Electric Light & Power Co., 74 Tex. 605, 12 S. W. 489 (1889); Crowell v. Gilmore, 13 Cal. 54 (1859).

[86]Foehrenbach v. Ger. Am. Tit. & Tr. Co., *supra* note 9; Fid. Ins. Tr. & Safe Dep. Co. v. Earle, et al., 23 Pa. Co. Ct. 449, 9 Pa. Dist. 198; Taylor v. N. J. Tit. Guar. & Tr. Co., 70 N. J. L. 24, 56 Atl. 152 (1903), 68 N. J. L. 74, 52 Atl. 281 (1902); Dove and Guth v. Commonwealth Tit. Ins. & Tr. Co., 6 Pa. Dist. 263; Giltinan v. Lehman, 65 N. J. L. 668, 48 Atl. 540 (1901); Barton v. W. J. Tit. & Guar. Co., 64 N. J. L. 24, 44 Atl. 871 (1899); Wheeler v. Equitable Tr. Co., 206 Pa. St. 428, 55 Atl. 1065 (1903), 221 Pa. 276, 70 Atl. 750 (1908); Ocean View Land Co. v. W. J. Tit. Guar. Co., 71 N. J. L. 600, 61 Atl. 83 (1905). Practically all title insurance policy forms in use in this country by their terms insure against loss by reason of defects, liens and encumbrances and priority thereof, but the special provisions therein inserted are of as many varieties as there are title insurance corporations engaged in the business. As to how conclusive the record shall be, when the right of action accrues, whether insurance is against unmarketability, and as to a multitude of conditions, stipulations and exceptions, there is no uniformity.

[87]The citations herein are not numerous and necessarily refer to principles of law elementary in their character; and these notes are not intended to be informative, but suggestive only, of the possibility that the value of a mere record title to real property has been over estimated.

*[These matters will be discussed by Mr. Haymond in a subsequent issue of TITLE NEWS.]

Some Live Problems in Abstracting

By C. C. Kagey, Champaign, Ill.

I am somewhat embarrassed to make such a talk before some of you who have been long in the work, but I am allowing myself to assume that in this, as in other professions, new members come in from year to year and that some of you may not have had such instructions, or that others of you, perhaps, have not read your texts of instruction in your annual reports, which should be filed away and reviewed from time to time for just such suggestions as I shall give you.

Having been an abstracter myself for some fifteen years, having had the honor to be a charter member of this Association, and also having had the pleasure of sitting in judgment on your literary efforts for several years, I will talk from both sides of the question. As I said to you when I was writing you letters as an examiner: "I have been there; I served my apprenticeship; I grew up through it; I know what you abstracters can do."

Abstracting, Not Copying.

I recall one instance in my experience which happened less than two years ago. An abstracter in a western county of the state had prepared an elaborate exhibit of a title, and I say "elaborate" advisedly. In the title had occurred the death of a mother who left minor children. A guardian had been appointed, the mother having had an interest in part of the land, and the zealous abstracter not only abstracted the proceedings, he rather inserted verbatim, et literatim, everything from the time of the appointment, including the annual reports. Then later when the father died, some of the children were yet minors, and the process was repeated, comprising in all some thirty or forty pages of such material. The title did not pass until all of the children had arrived at legal age.

In my notes on the title there were pertinent matters apparently missing, and I suggested that a review of certain chancery proceedings, with further showing of service (the prayer in the bill, etc.) be had, rather than such an extensive copy of non-essential guardianship proceedings.

The gentleman returned the abstract with the illuminating advice that he had "been in the abstract business for forty-two years, that the attorneys who handled and conducted the chancery proceedings were of good repute," he added "locally," and that he did not question the decree as shown, along with other information of a similar optimistic nature. When I asked for a further showing of a report of service, he announced convincingly, not in a separate communication, but as a note in the abstract, that "the sheriff who made the return committed suicide some two years before, without advising anybody of the reason for his rash act."

Now, I was sorry that he had misunderstood my criticism. I was also sorry that he should have felt called upon to add such showings as an addition or memorandum to the abstract, rather than to communicate them in a separate letter.

So, in the first place I would impress upon all of you abstracters and abstract officers that when an examiner asks for a certain additional showing, it is not always a criticism of your

C. C. Kagey

work. It is for the assistance you may render him to meet the requirements of some other examiner a thousand miles away in New England, who knows nothing except what is on the paper he sees, whose ability may be largely based on the diploma he has from some eastern law college, and who is not yet sufficiently experienced to understand the limitations and explanations of titles in Illinois.

I say this as a sort of preface, hoping that the suggestions I may make in this informal talk, gathered from items of my experience, will be kindly received.

Let me reiterate: Whenever you may have occasion to reply to an examiner's query, if you have any comment for his personal edification, do not add it on the abstract where he who runs may read, but write it in a separate letter.

Proof-Reading Abstracts.

The most arduous duty an examiner has to perform, and one which inevitably arouses his antagonism, is the proof-reading of abstracts before him. Now I mean by proof-reading, correcting, not from the legal standpoint but from the production side, so to speak, letters omitted from words thus changing the sense, wrong pronouns, and other errors that are merely a matter of typing. I think that seventy-five per cent of the abstracters whose literature I have been permitted to enjoy, did proof-read their abstracts. But with the other twenty-five per cent there was the eternal necessity of sending back for typographical corrections.

Numbering Abstracts Consecutively Throughout.

Another pet peeve of the examiner is the necessity of going through an entire exhibit and numbering it from beginning to end before he can begin the examination.

Not often do we find an abstract which is not numbered down to a certain date, 1, 2, 3, 4, etc., beginning again at the next continuation, perhaps, for two years, 1, 2, 3, 4 etc. and then beginning again and again, running through the entire exhibit. You can best please the examiner if every abstract sent out of your office is serially numbered from caption to last certificate. If you want to number each one of the continuations, very well, but on the margin continue the original numbering throughout, so that when the examiner, in making his notes, refers to any part, it is to a certain number in the entire serial and easily understood.

Arrangement of Subject Matter.

I think there should be a plan developed by your state association whereby abstracts could be arranged in a uniform order, that is, a logical order, from the alienation of title by the Government down to the last common owner. You, who have not had the privilege of sitting in review on abstracts from many different counties do not understand how annoying irregular arrangement is. Here will be an abstract with the instruments arranged in the chronological order of their filing. Maybe a man in the early part of the title forgot to record his deed for ten or fifteen years after its date and you find it down near the end of the abstract; or perhaps another died and his estate for some reason or other was not probated until later years. After you get all the way through, there it is.

Maybe there will be first several pages of deeds, then a section of mortgages and releases; following these a section of probate, and after all that,

a division devoted to chancery. Indeed, such a sectional arrangement is far from uncommon.

The proper method, as I see it, is the logical order in the inspection of the title. Begin with the Government entry and proceed with the regular chain of title as the owner acquires it, even if his deed was not filed until fifty years after its date. Insert everything where it belongs to show the correct chain of title, so the examiner can check the changes as he goes along, from Government patent to last owner. If an owner made a mortgage that was released or foreclosed, it follows in this arrangement before the title changes to the next owner. I am glad to say a very large majority of abstracters do follow such a logical order of arrangement, with the serial numbers from beginning to end.

Captions.

An extremely important feature of every abstract is the opening entry, the caption. You would be surprised to see how many abstracts come to the examiner's desk with no caption at all. When the abstract is finished, if it started originally with a quarter section and there has been executed a deed for an eighty without any supplemental caption, the examiner does not know whether the abstracter has examined the whole quarter or whether the examination has only been for the land in the deed he has shown. A caption correctly describing the land you have under examination should appear as the first number of your abstract. After you have made a first certificate and are making a continuation, your next first number should be a *supplemental caption* describing the land that you are searching title for. It may not be as extensive as the original caption, but nevertheless there should be this supplemental caption, including not only the description of the land, but also the date from which you are beginning your search. Be careful to make this date join up to the date of the last certificate. If the previous certificate stopped without an hour date, your supplemental caption should begin with the previous date to cover the whole day. Do not let the lapse of a day, or even one hour, occur between your original certificate and the supplemental caption, so that the abstract needs to go back for further certifying.

The Certificate.

I think you have been instructed that it makes little difference what you say in your certificate, you are equally legally bound. Therefore a little printer's ink or a little extra typing cost does not matter. I would suggest that the certificate might be a little longer than some I have seen, that it include the time of search from beginning to closing, the matters of the items you are certifying against, and, in the search for judgments, the names of the parties against whom you have searched for judgments. You perhaps say, "No judgments." Well, you are equally bound, nay, more so than if you had said, "No judgments against John Smith, Thomas Brown, Harry Jones and G. W. Jones, executor." Therefore name the parties and relieve the mind of the examiner of his worry over whether you did search for all of the people who appear in the title. If he discovers in the title someone who has an interest and whom you have not named in your search, he must needs write and suggest that you include "So-and-so."

And in the matter of taxes: The examiner must know concerning special assessments in cities and quite uniformly as to farm taxes in later years. This may be a little trouble to look up, but your certificate should always tell whether or not you have searched for special assessments.

Names in the Chain of Title.

The next matter of interest is that of names. Some of our more ancient records were written in the quill style, in a Spencerian hand, when shades and curlicues were the order of the day. Often it devolves on an abstracter to decipher a name. Where your abstract clearly shows that the title was acquired by Thomas Davis, in the time when script record was used, do not make it read *Fhomas* Davis and underscore the "F." This I saw less than thirty days ago. Now, the recorder who made that "T" just ran the hand flourish across the down strike, and it would not be very much of a strain on any abstracter's conscience to show it a "T."

But if title was taken in the name of T. J. Thomas and Theodore J. Thomas conveys in the granting clause, with "T. J." in the signature or acknowledgment, there is a case where all names in the conveyance part should show; if you have in any of these three parts, the granting clause, the signature or the acknowledgment, a name that harmonizes with the last grantee the Supreme Court has said in two or three separate instances that that is sufficient identity. A good many abstracters do not show the identifying names; they merely show that land was deeded to T. J. Thomas, and conveyed by Theodore J. Thomas. The examiner has no way of knowing whether the name T. J. Thomas occurred in the granting clause, the signature, or the acknowledgment. If either one name mentioned harmonizes with the last grantee, show how it is and where.

The Acknowledgment.

If you are not satisfied that the form is regular, it might be well to give a copy: "Acknowledged as follows" . . . The examiner will know from the copy whether or not it is a satisfactory acknowledgment at the place of its execution. The venue of your acknowledgment gives the place of execution. It may be Kansas, Indiana, or Ohio, and the acknowledgment perfectly good there, but if you fail to copy the venue, the examiner must write back to inquire, "Was this an Indiana form of acknowledgment, a Kansas acknowledgment, or what?" Whereas, if the acknowledgment were shown as given, the first showing would be sufficient.

Question of Dower Interest.

Another point that so many, many times arises in an examination of title is the question of dower. The examiner must write back to you for information, when you have shown: "John Jones, no wife joining."

There are four or five ways in which you can answer this deficiency. There are two or three ways in which you might have placed a separate number in your abstract and made yourself money by showing, "John Jones deeds in 1875 as a widower" or "bachelor." The chances are that in your own county you know John Jones, or can find someone who did know him, more easily than can the examiner, fifty or sixty miles away. Get an affidavit from someone who knew John Jones that he died a bachelor or was a widower or bachelor at the time of deeding.

Failing in this, look into the probate records and see if John Jones has been dead over seven years. If so, show the item, "Estate of John Jones, probated a certain year," etc. If it is shown that he died leaving *no* widow, *so mention* it. If he died testate leaving a widow, and she took under the will, exhibit this fact. Any of these answer the requirements.

You will be paid for your trouble in showing this by the charge for the extra numbers, and furthermore you will save the examiner much trouble and delay.

When you are preparing affidavits, when you are drawing a conveyance, and your office is the natural conveyance office, or when you are executing a deed for William Brown or Mary Smith, designate them by the determinative "widow," "spinster," "widower" or "bachelor." Do not say, "unmarried" and let it go at that. They may be, and courts have been very lenient with this. Do not say "single," because often that term is applied to those who are divorced.

Always use the definite term. Educate your clients to use the definite term, and educate yourself to employ it. Then the question will not recur irritatingly in the future, when it has passed beyond you to where the information is not available.

Names of Parties to Proceedings.

When you are abstracting probate proceedings, if the heirship is determined by an attested petition or by evidence before the court, so indicate it. An examiner a thousand miles away relies more on a petition setting up an heirship if it is said that the petition was "sworn to." Because, a petition is sworn to, does not necessarily make it correct; but it does add the fact that there was a little more formality in the suggesting of the heirship. This fact of its being attested satisfies a majority of examiners, though even an attested petition is sometimes in error.

Recently a case came under my observation, where the party setting up the heirship stated the death of the father, and that the widow (naming her) and certain children survived, a couple of years later a partition suit was filed by an heir not named. The explanation was, "Oh yes, I remember; he was married once before, but those children were by his first wife. I did not think they inherited anything." So at the best the examiner is skating on thin ice. An investor must rely on the best available showing. If there has been evidence before the court in the determination of the heirship it is usually more deliberate and more authoritative.

In setting out the names of the defendants in your chancery proceedings, if they harmonize you will have no trouble; but if they do not harmonize, an examiner will frequently require that the names as given in the petition or other part of the chancery proceedings, be identified with the heirs named in the probate. They may not be the same. The heir in the probate may have died and left a subheir who is not mentioned. So always harmonize these if possible, and if any names are at variance, I suggest that you have such variance underscored. If you underscore, every examiner knows that you have paid particular notice to the discrepancy.

Wills: Their Showing and Filing.

The matter of foreign wills particularly has been before the Illinois Supreme Court, and it has pronounced methods by which foreign wills pass title, or are evidences of title. I think you understand that in showing a will you should not abstract it, but should copy it. The interpretation of a will is burdensome enough to the examiner, and an abstracter need not assume this responsibility. Equally important is the showing of the certificates to a foreign will, because in the certificates is the crux of whether or not a will is properly authenticated to convey the title.

In a very recent case the Illinois Supreme Court decided that because a will was certified from Pueblo County, Colorado, to the effect that it was "admitted to probate and record in conformity with the laws" of that state, it was not a properly authenticated will to pass title and title failed.

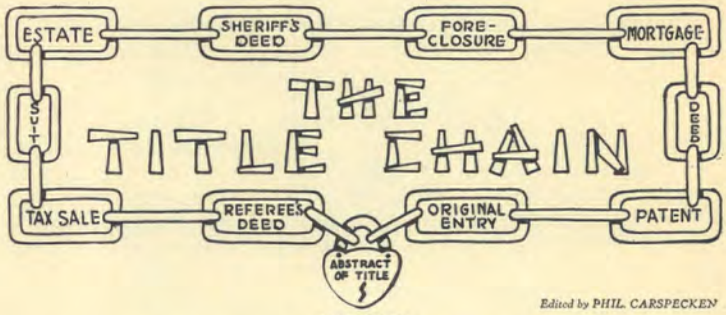
Our Supreme Court has held that there are about ten words necessary to pass title by foreign will filed in the state of Illinois. The certificate of an authenticated copy should contain these words: "Executed and approved agreeably to the laws of this state," and "this state" means the state of probate and not the state of the execution of the will. So, in setting out the certificates of probate of a foreign will, I would suggest that you copy the entire certificates.

As to the place of filing a foreign will, you abstracters do not determine that, you are merely to show them,

(Continued on page 13.)

MERITORIOUS TITLE ADVERTISEMENTS

(Examples of advertisements for the title business. A series of these will be selected and reproduced in "Title News," to show the methods and ideas of publicity used by various members of the Association.)



Edited by PHIL CARSPECKEN

CERTIFIED BY

Des Moines County Abstract Company

205-6-7 Iowa State Bank Bldg.

BURLINGTON, IOWA

September 22nd, 1928.

FOREWORD:

This is the first issue of The Title Chain, a little publication which will be distributed generally, when the spirit moves, and whose mission is to bring about closer contact and better understanding between the legitimate abstracter and the attorney, banker and realtor. In it we aim to set forth the oddities and quirks of the record which come to our attention daily, and which may be of interest to those dealing with titles. It is our hope that this voice from the record may lead to friendly co-operation which will accomplish needed reforms in the interest of the property owner, and bring to Des Moines County that which it sorely needs - modern title service.

THE SEPTEMBER BAR DOCKET

We have before us two September bar dockets. One is for the September Term, 1928 - a neatly printed volume of 110 pages, crisp and fresh from the press, and compiled by Carrie Ingram, the factotum of the Clerk's Office. The other is for the September Term, 1839 - a frayed volume, yellow with age, ruled and written by hand, and bound with tape. It may be of interest to the local bar of 1928 to learn what the gentlemen of the profession were doing in 1839 - just eighty-nine years ago.

The first page gives a list of the attorneys who practiced before the territorial court. They are: Isaac Van Allen, U.S. District Attorney, (probably a forbear of our friend, A. M. Van Allen, of Mt. Pleasant;) William H. Starr, District Attorney; Wm. W. Chapman; I. D. Learned; David Rorer; M. D. Browning; James W. Grimes; James W. Woods; W. Henry Starr; W. J. A. Bradford; Charles Weston; Alfred Rich; Edward Johnson; Geo. W. Teas and M. Reed. Familiar names these - especially to those of us who delve into the records of long ago.

There are twenty-three state causes listed. Two are for murder, one for keeping a faro bank, one for cutting down apple trees (?), one for selling liquor without a license, seven for gaming, three for keeping a gaming house, two for keeping a gaming table, one for keeping a bawdy house, one for riot and four for larceny. From which we gather that then, as now, the boys had their fling and helled around quite a bit, and even stayed out late at night felling apple trees. We can envision the apple tree culprit appearing before the Court: "Guilty, your honor - I cannot tell a lie. I did it with my little hatchet."

Here are two causes, both linked together on the docket, which caught our eye. "U.S. vs Henry H. Williams, for Losing Money on a Wager," and "U.S. vs Wm. F. Johnson, for Winning Money on a Wager." Apparently Hank and Bill staged a little bet down on the wharf - possibly as to the outcome of a steamboat race - and both were haled into Court. Our sympathies all are with Hank, who lost his bet and yet felt the stern arm of the law.

Before we leave the docket we might add that among the petit jurors listed was one Abraham Beanblossom.

"ETHICS" is not a soft, purring sound heard only at Service Club luncheons. Time was when the principle of Caveat Emptor prevailed and when "sharp practice" was countenanced. That time has passed. Every business and profession now has its Code of Ethics, and men carry into their business and professional life the same principles of honesty and fair-dealing that govern their conduct in home and church. We, as members of the American Title Association, are striving to elevate the standard of our work and eliminate certain practices which have proven detrimental. There should be nothing in a title transaction which cannot bear the white light of public scrutiny. If there exists a secret agreement which will not bear such scrutiny, somewhere there has been a violation of an ethical code.

A mimeograph "house organ," issued monthly by Phil Carspecken. Mailed to customers and prospective customers. Issues are three or four pages, legal size. Each one full of real, interesting and clever stuff. Should attract nation-wide attention. The efforts of the producer should most certainly be appreciated to full value and this publication bring profitable returns.

SOME LIVE PROBLEMS!!

(Continued from page 12.)

wherever they are filed. My experience leads me to note that the majority of foreign wills have been filed in the recorder's office. In a late case cited in the 313th Illinois, the Supreme Court said that foreign authenticated wills are to be filed in the office of the probate clerk. There are other cases that refer to the recording acts, and suggest that they be filed with the recorder. The absolutely safe way for you abstracters to educate your lawyer friends is to see that they are filed in both places, but more particularly that they are filed in the office of the probate clerk. In your showing of wills, do not fail to copy the will, and do not fail to copy the certificates showing the probate of a will from a foreign state.

Overlapping Deeds.

If you are abstracting the title to the North half of Lot 16, which on the original map shows a dimension of 50 feet, and which by a later actual survey from your records shows a dimension of only 49 feet, the North half of the lot by actual measurement, then, is only 24½ feet, and there may be many deeds which have conveyed the South 25 feet of the lot. I hardly think it is up to the abstracter to determine whether or not there is an overlapping interest or whether or not there is an outstanding interest that should be secured for the benefit of the North half. But the abstracter in his certificate must certify that he has shown everything of record affecting the title. If there is an overlapping deed, even though it is by mistake; if there is a wild deed (by the wrong section, wrong range, wrong township, or wrong lot number) show it. If there has been a correction deed made in place of such a wild deed, so indicate it also in a number "for reference."

Plats.

There is one other thing I do want to say. I want to compliment one or two of the particular abstract offices on their care in the preparation of maps. The first map that every abstracter should show is the map of the Government survey, because "the North half of the South-East quarter" does not mean anything unless you know how the Government has platted the section; or a certain "Lot 8 of the North-East quarter" is equally meaningless with no map. Then, if there is any other map of record by which you can identify the land under examination, make a copy of it; if it has referred to the "North-East corner" of another lot or subdivision for a starting point, show enough of that map also for a reference point. Do not be afraid that you will ever get too many maps in your abstract.

THE ABSTRACTER'S CHILD, OR WHERE IS OUR WANDERING ABSTRACT TONIGHT?

(A Tragedy in Two Acts—with a Moral thrown in)

By Phil Carspecken

Chapter 1. Our abstract issues from our office as neat and immaculate as conscientious workmanship can make it. The best of paper is used; the typing is carefully arranged and free from erasures; the plats are painstakingly drawn and shaded; and to further protect our offspring we clothe it in a typed container. Proudly we gaze upon the finished product as it leaves the old homestead in its freshly starched bib-and-tucker. Blessings on thee, child! * * * *

(Stars indicate a lapse of a week or a month or a year, as the case may be, during which time our child wanders out into the cold, cold world, and falls into the fell clutch of the examining attorney.)

Chapter 2. The abstract comes knocking at our door for continuation. Ha! The attorneys have not done right by our Little Nell! Gone is the bib-and-tucker; the cover is thumb-printed and soiled; the erstwhile immaculate sheets are dog-eared and marred by penciled notations; and the abstract generally is in a bedraggled and besmirched condition. Mournfully we take in the fallen creature and busy ourselves in removing its impurities. With eraser we clean the befouled sheets, and re-write those which are hopelessly contaminated. The abstract is thoroughly renovated and reformed, clothed in a new cover, tucked in a fresh container, and again sent forth on its journey, with the admonition to go and sin no more—and beware of the examining attorney!

MORAL: The abstract is *loaned* to the attorney for examination—not delivered over to him, body and soul, to be hacked and mutilated and despoiled of the virtue with which we invested it. No entry or notation of any kind should be made in any abstract, except by the abstracter who gave it birth. So sayeth the abstracter.

County Recorders Asked Repeal of Torrens Act

Several times lately inquiries have come to the association office asking about a move in Colorado to repeal the Torrens law, such a request being a movement of and coming from the county recorders of the state. There was such a sentiment a few years ago, because the law, as in all places, is inoperative, a dead letter, the administrative officers not acquainted with it and an application for a registration would only cause a lot of trouble and inconvenience. This was all the more significant and indicative of the absolute inapplication of the act in our country, because it came from such a source—the county officials and those charged with its enactment and conduct.

It was not done however, it finally being decided that it was such a dormant thing and so utterly unknown that it was not worth the effort of conducting an attempt to repeal the law.

Title Company Boosts Local Product

E. M. McCardle, vice president of the Security Title Insurance Guarantee Co., California, and in charge of the Fresno office, has cooperated in a movement to advertise one of the community's leading products by sending out boxes of fine grapes. Grapes are one of the San Joaquin Valley's prides and the growers and citizens of the community unite in creating a greater outlet for the marketing and consumption of grapes, raisins and their products.

"National Grape Week" was recently started, and the menus of dining cars and cafes featured grape dishes. Mr. McCardle personally, and the company in addition, sent out many boxes of the grapes. First a post card was sent by air-mail notifying the recipient that they would be forthcoming. Then the expressmen would walk in a few hours later with a box of ice cold grapes, two varieties, right out of an express refrigerator car from the San Joaquin Valley.

Uniform Certificate Adopted in Several States

Idea Being Put Into Effect

A uniform certificate for abstracts has long been recognized as an applicable and desirable thing. Practically all states have considered it; many have now adopted and put one into use.

Oklahoma, Minnesota, Wisconsin and North Dakota have had one for some time now. Kansas just adopted a form and is presenting it for use. Nebraska and Montana are preparing drafts as per action taken at their last conventions.

NON-ADVERTISERS FAIL.

We knew that non-advertisers have little chance of succeeding in business but ye gods and little fishes, we had no idea the mortality rate was so great among them. The Midwest Coal Retailer, published at St. Louis, has some interesting figures in regard to non-advertisers.

"A careful checkup through the Federal Bankruptcy courts," says the Retailer, "shows that the average percentage of failures made by non-advertisers in 32 cities is 83.6 per cent. In Los Angeles 92 per cent of the failures since the first of 1927 have been non-advertisers. The lowest non-advertising mortality rate was shown in Bridgeport, Conn., and Nashville, Tenn., with 60 and 67 per cent, respectively, while Troy, N. Y., was the highest with an even 100 per cent."

In other words, out of every 100 business men who fail 83 of them are men who haven't advertised. Seventeen who are classed as advertisers fail but this may be because they didn't advertise consistently or because they spent their money unintelligently. Men who know how to advertise intelligently and get the most possible for every dollar they spend are never seen in the bankruptcy courts.

An Ode to an Abstract

You are very interesting
  Little Abstract, unto me,
For you bring to mind the labor
  Of the friends who used to be
Seated all about the office
  Of the dear old "Guarantee."

In the morning we would gather,
  From our homes so far apart,
To our desks within the Courthouse,
  Thinking we were very smart,
To be at our post of duty
  When the signal came to start.

For we surely had to hustle
  If we got our breakfasts ate,
Dressed ourselves in silks and satins,
  Reached the office not too late
To put on our rouge and powder
  E'er the clock was striking eight.

To the public, Little Abstract,
  You are just an endless chain
Of a complicated title,
  Wrecking pocketbook and brain,
Of the owners and the lawyers,
  And we hear them cry "For Shame!"

But to us who sit and ponder
  O'er the intricacies of you,
And to all who use due caution
  That each item may be true,
You are not just sheets of paper
  In your cover neat and blue.

For you represent the effort
  Of our thought as well as hand,
And in order to produce you
  We must be a working band,
Should we fail to fill the orders
  Our customers might lose their land.

—Ruby Reed, Emmons Abstract Co., St. Charles, Mo.

You gotta be serious about some'n if you wanna keep on bein' amused in life the same as you gotta be sick once in a while to really appreciate feelin' well.

LAW QUESTIONS AND THE COURTS' ANSWERS

Compiled from Recent Court Decisions by

McCUNE GILL,

Vice-President and Attorney
Title Insurance Corporation of St. Louis,
St. Louis, Mo.

In descent, does it make a difference as to how deceased acquired the property?

It does in some States; thus, in Ohio, land inherited by the wife from the husband descends equally to heirs of wife and heirs of husband. Guear v. Steckschulte, 162 N. E. 46.

Is child of bigamous marriage legitimate?

Court can declare child legitimate in New York, if father and mother thought a previous divorce from another in other State was legal. Beischer v. Meischer, 230 N. Y. S. 278.

Is devise of residence in trust, the trustee to pay income to widow, considered to be in lieu of dower?

Yes; in re Reese, 230 N. Y. S. 174.

Must common law trust of another State, be licensed under foreign corporation law?

It must in some States, as in Michigan, even though statute does not mention trusts. Hemphill v. Orloff, 48, U. S. Sup. Ct. Rep. 577.

Can owner of oil rights prevent owner of surface from subdividing the property?

Yes; because subdividing and selling lots would interfere with rights to drill for oil. Kinney v. Kieffer, 48 U. S. Sup. Ct. 580 (Virginia).

Are large road district bills constitutional?

Not if they are so large as to be confiscatory (as a bill against pipe line company amounting to half the cost of the pipe line). Standard v. Miller, 48 U. S. Sup. Ct. Rep 441 (Arkansas).

Is apartment more than "one residence or dwelling house"?

Held not, in North Carolina, Charlotte v. Cobb, 143 S. E. 522.

Is restraint on alienation, for 99 years, of land devised to Blind asylum, good?

Held that restraint is void, and Asylum can convey indefeasible fee. Hass v. Hass, 143 S. E. 541, North Carolina.

Are payments on mortgage for future advances, subject to grantor's deed to other person?

This differs in different State. In Georgia the mortgagee is protected if he had no actual knowledge of the deed (even though it was recorded). Hurst vs. Flynn, 143 S. E. 503. Rule in other States discussed in Annotated Cases 1913 C. 555.

Must contingent remaindermen be made parties to suit to terminate trust?

Yes; and statutory representatives must be brought in for possible future born remaindermen. In re Gill's Estate, 142 Atl. 207 (Pennsylvania).

Can foreclosure of $3,000 mortgage for $1,000 be set aside?

Held that it can be set aside in Georgia, if sheriff promised to delay sale until mortgagor appeared. Interstate Co. v. Bank, 143 S. E. 577.

How wide is railroad right of way if no width is mentioned in deed?

The width mentioned in railroad company's charter; as 200 feet. Heaton v. Kilpatrick 143 S. E. 644 (North Carolina).

Is judgment good if service is had in another state?

A personal or money judgment is void, but a judgment as to property may be good. Hess v. Pawloski, 47 U. S. Supt. Ct. 632 (Massachusetts).

What is effect of devise to son for life—then to his heirs?

Gives son fee in Pennsylvania because rule in Shelley's case is still in force there. Lyman v. Lyman, 143 Atl. 200.

Is affidavit good if venue is omitted?

Yes. Georgia v. Marrs, 9 S. W. 2nd 785 (Arkansas).

Is construction mortgage superior to materialman's lien?

Held superior in Arkansas where material delivered two days after recording of mortgage. Duncan v. Travelers, 9 S. W. 2nd 773.

Is homestead exempt from all executions?

Usually not exempt if debt was incurred before homestead was acquired. Mullins v. Robinson, 9 S. W. 2nd 988 (Kentucky).

Are rights of public in street barred by thirty years' private possession?

Held not barred in Kentucky even though dedication was only by reference to street in deed, and street was never used as such by the public. City v. Mallory, 9 S. W. 2nd 1015.

Is $1.00 a valid consideration?

Yes. Lindsay v. Texas, 9 S. W. 2nd 287 (Texas).

The American Title Association

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