
TITLE NEWS
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No. 11
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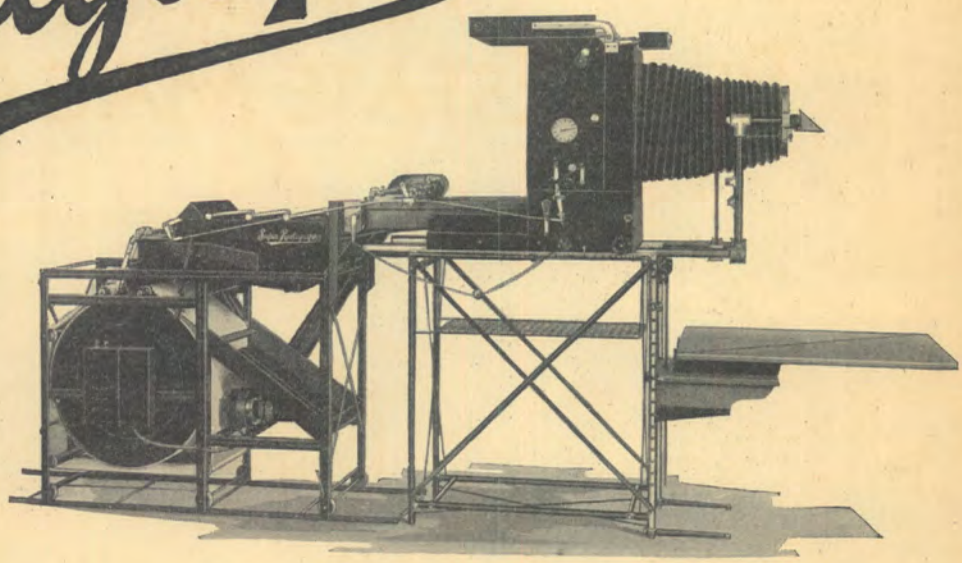

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THE
Annual Mid-Winter Meeting
OF THE

American Title Association and
Conference of State Association Officers

will be held in

CHICAGO

FEBRUARY 6-7, 1931

HEADQUARTERS—MEDINAH ATHLETIC CLUB

This is going to be the most important meeting ever held by those in the title business.

It will present the new structure of the national association, putting it upon a definite basis, and organized for constructive accomplishment.

There will be announced a practical, formulated program of activities for the national and state associations which will advance and prosper the title business.

IT IS DESIRED THAT EVERY MEMBER OF THE ASSOCIATION ATTEND

IT IS IMPERATIVE THAT EVERY STATE OFFICIAL BE PRESENT

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Editor's Page

SNAP OUT OF IT!

(B. C. Forbes in Forbes Magazine)

Snap out of it! Gloom has reigned long enough. It is time to drop cowardice and exercise courage. Deflation has run an ample course—to carry it much further would mean needless destruction, criminal destruction. The country is sound at the core, sound politically, sound financially, sound industrially, sound commercially. Agricultural prices, too, have been thoroughly deflated, even over-depressed. The nation has its health. It has lost little or none of its real wealth. It is living saner than when everyone was unrestrainedly optimistic. The time has come to cast off our doubts and fears, our hesitancy and timidity, our spasm of "nerves." Summer, the season for holiday-making is over. The season for fresh planning, new enterprise, hard work, driving force, initiative, concentration on business is here. Let's go.

Snap out of it.

WORK

Work is the grand cure for all the maladies and miseries that ever beset mankind,—honest work, which you intend getting done.

—Carlyle.

"Ideas are born; they have their infancy, their youth—their time of stress and struggle—they succeed, they grow senile, they nod, they sleep, they die; they are buried and remain in their graves for ages. And then they come again in the garb of youth, to slaughter and to slay—and inspire and liberate. And this death and resurrection goes on forever. In time, there is nothing either new or old: there is only the rising and falling of the Infinite Tide."

—Elbert Hubbard.

HOOVER BEATS SMITH IN VIRGINIA ON LINKS

Richmond, Va., Oct. 11 (A.P.).—"Wuxtry!" "Wuxtry!" Hoover defeats Smith in Virginia!

This isn't a political story, but a tale of the golf links. It seems that Hoover had all of the luck in the annual tournament of the American Title Association, which adjourned its annual convention here yesterday. When the strokes were counted, Elwood C. Smith, of Newburg, N. Y., and A. W. Hoover, of Coral Gables, Fla., were tied with a low net of 71. Mr. Hoover won the draw and took the trophy back to the Sunshine State.

The above appeared in many newspapers over the country immediately following the Richmond convention. It shows how some human interest happening or coincidence can become news. This occasioned a great deal of publicity for the American Title Association, and the title business, more so than any of the prepared news releases or serious parts of the convention.

Our clipping service sent in a great number of clippings showing the publicity given the convention. There were enough to constitute three full pages of a metropolitan size paper, none of them more than a few inches in length but from papers all over the country, showing the territory covered.

At regular advertising rates it would have cost thousands of dollars to get this.

It was interesting too, to see how many clippings were from the home town papers of many of those who attended the meeting, and who were getting worth while publicity from the fact.

The best verse hasn't been rhymed yet,
The best house hasn't been planned,
The highest peak hasn't been climbed yet,
The mightiest rivers aren't spanned;
Don't worry and fret, faint-hearted,
The chances have just begun,
For the best jobs haven't been started,
The best work hasn't been done.

HE'S MY FRIEND

He may be six kinds of a liar,
He may be ten kinds of a fool;
He may be a blooming high flyer
Without any reason or rule.
There may be a shadow above him
Of ruin and woes that impend;
I may not respect—but I love him—
I love him, because he's my friend.

I know he has faults by the billion
But his faults are a portion of him,
I know that his record's vermillion,
He's far from a sweet seraphim.
But he's always been square with "Yours Truly."
Ever ready to give or to lend,
And though he is wild and unruly
I love him, because he's my friend.

I knock him, I know, but I do it
The same to his face as away;
And if other folks knock—well, they rue it,
And wish they'd had nothing to say.
I never make diagrams of him,
No maps of his soul have I penned;
For I don't analyze—I just love him,
Because—well, because he's my friend.

—Selected.

PLAN AHEAD—

begin making plans NOW to attend the

Silver Anniversary Convention

of the

American Title Association

to be held in the Fall (October) 1931 in

TULSA, OKLAHOMA

Our Hosts—The Oklahoma Title Association—

are going to entertain us with an abundance of that genuine Oklahoma hospitality and the unique facilities of the community.

The convention program is all arranged and will soon be announced. It will be totally different from any other—designed to be a real, informal conference, **ONLY.**

A feature will be the

First Annual Abstract Contest

Details will be announced later

Abstracts Versus Record Searches

By F. C. HACKMAN, of the Seattle, Washington, Bar

PREFACE

Several times in the past the matter of statutory regulation of abstracters has attracted my attention and excited my interest. It was not, however, until a few years ago that I put into execution a plan I had formed, to write a review and analysis of existing laws on that matter. During that year I gathered the necessary material,—copies of the statutes of the states having such,—made the search for decisions in respect of such laws; and by correspondence with abstracters doing business in the states where such laws were in force, secured expressions of opinion as to their practical effect.

The fruit of my labors was an article on the subject printed in pamphlet form, quite extensively circulated, and in a magazine. As a result of the publication of the article, I received many letters from abstracters and title men doing business in various sections of the United States. Requests were made by divers of these parties that I write an article on this or that subject. Quite a number happened to ask if I could or would write something about "curbstoners" and the hazards of making abstracts from public records only. Because not a few made this request, and because it happened I had given the subject some thought, and had become interested in it, I wrote this present article. I know of no similar presentation of the subject-matter. I have written it impartially, and stated the principles I have deemed applicable to be as I found them. If the article affords to readers a degree of interest approximating the interest I experienced in writing it, I shall be repaid.—The Author.

THE word "abstract" used as a noun is synonymous with abridgment, compendium, epitome, synopsis, brief. As a verb it means the act of separating, abridging or briefing. And the word "abstracter" means one who makes, or is engaged generally in the business of making abridgments, synopses, briefs or abstracts. On account of the fact that land is everywhere in the United States so commonly bought and sold in units or parcels, as town lots, farms, homes, stores, etc., and the recording system makes it necessary for a purchaser, a mortgagee, or other party dealing in land, to inform himself as to his title, as shown by the records thereof, everywhere the searching of these records has become a special business. The men engaged in it, because they make briefs or short copies of the records, otherwise called abstracts, are everywhere called "abstracters." So widespread is this business, so common and so well-known, that the word "abstracter" has no other application or meaning than as applied to this class of men, in the common understanding of a community. This general and customary usage and understanding of the word "abstracter," therefore, give to the public generally, no understanding of any differentiation between an abstracter who makes abstracts in reliance upon tract indices, and one who makes abstracts in reliance upon searches he makes of statutory or official indices to public records. Both of such are in truth abstracters. Both make abstracts of title to land. But they differ in the respective methods by which they obtain their information as to what instruments of all that are of record are the particular instruments they must make abstracts of, to put in an abstract of title to a particular lot, home, store, factory or farm, or other parcel of land.

This mentioned lack of differentiation in common understanding is very readily understood when it is borne in mind that tract indices are a quite modern development, not used and almost, if not wholly, unknown in a very large number of the units of an abstracter's area of activity, namely, the counties within the various states.

One difficulty that confronts one trying to make a comparison between official indices and tract indices is the lack of definite meaning of the latter, as compared to the former, which is fixed and definite by statutory provision. What is meant by tract indices? It is well to bear in mind this term has no generally understood meaning, is a colloquialism of abstracters. For some purposes in this and other states tract indices are, by statute, required to be kept, but such statutory provisions specify the form and scope thereof, and quite often in these cases are called "numerical indices." I think the term may be defined as a system that points out or indicates the instruments or other matters constituting muniments or evidences of title to specific lots, tracts or parcels of land. Their scope varies in practical use. Some abstracters keep tract indices only of matters that are filed or recorded in one public office; others also include all matters describing property filed or recorded in the other offices, and yet others include any and all quasi-public or public records affecting real estate titles. Just so far as any abstracter's tract indices are so incomplete as to matters describing land that are consequently indexable that he must rely on searches of official or statutory indices for the ascertainment of matters he does not keep tract indices of, just so far is he on a parity with one who has no tract indices, or with, as they are called in trade vernacular, "curbstoners." Tract indices as kept by abstracters vary also in form or detail. Thus some open an account, as it were, captioned for a described parcel, and index thereunder any and all matters affecting title to any part of that parcel, howsoever numerously subdivided the caption may be. Others specialize such accounts more in detail, so that each parcel, the smallest segregatable, has its particular index. What I mean may be thus illustrated: some abstracters open an index account for a whole block, and index thereunder all matters describing any lot in such block. Others keep a separate index to each lot.

When an abstract is ordered of one who has tract indices, all the latter need do to get a list of matters required for such abstract is to turn to the page of his index set apart for the particular parcel and copy the list as there noted. A simple and accurate system. A list or chain is thereby easily and quickly made. It will contain a reference to all matters whether in or out of a chain of

title, irrespective of names of parties, and whether or not such matters, in the purview of the recording acts, import constructive notice or not. A property description is the key to this system.

Distinct and different in detail, form and theory are statutory or official indices. Abstracters are, of course, familiar with them as they exist in their respective spheres of activity. I need not, therefore, particularize as to their form and the theory of their use. I will emphasize the fact, however, that one can only use them to search for clues to recorded matters therein indexed affecting title to a particular parcel of land by tracing such by and through names of parties to the muniments. Names of parties are the keys to this system. In the days of our forefathers, who established this system, when few persons owned or had an interest in land, and transactions in land were infrequent compared to the present day volume thereof, this system, logically deduced from the way or manner in which titles are deraigned and traced, was quite excellent and practical.

Before proceeding let me here note that this article omits consideration of statutory indices to general lien judgments, which under any system require name searches, and also that I shall, for brevity, hereinafter refer to indices kept by public officials as official or statutory indices, call one who uses such a searcher, and one who uses tract indices an abstracter.

It is interesting to observe that when the recording system was first established indices thereto were not provided. Indices were a later statutory development. It is important to note that there is no unformity of form of these indices among the various states, except in one particular, and that is all are based on the name system. Otherwise the memorandum entries required by law to be made in these indices vary greatly among the states. Not only is there variation in contents and form, but there is also great variation among the several states as to the purport or dependability of these indices. In this respect the states may be grouped in two main divisions. In one group it is held that though these indices are required by statute to be kept, they nevertheless constitute no part of the record. In the other group embracing only our own states of Washington, Iowa, and I believe Wisconsin and Pennsylvania,—a few only you observe of all the states,—these indices are held to be a part of the record. In the former group it is the view that the claimant under a recordable instrument does all he is required to do for his protection when he leaves his instrument with the proper officer for record. If such officer fails to index such instrument or erroneously indexes it, nevertheless it imports constructive notice, and that if by reason of such failure to index correctly or at all, a subsequent party dealing with the record is damaged he has a right of recovery against the recording officer. In the latter group it is the view that the index is a part of the record, and that to import constructive notice a recordable instrument must be correctly indexed as well as transcribed in the proper book. In this group it is held that it is the duty of a claimant under a recordable instrument to see that his instrument is properly indexed and transcribed in the proper book, and that for failure so to do, he must be the loser, with right of recovery against the recorder. In other words, in this latter group a bona fide purchaser may rely on the statutory indices which he cannot do in the other states. Hence in the states last referred to, it logically follows, a searcher, not being able under the law to absolutely depend upon the official indices, cannot be expected to make an absolutely reliable abstract, as could an abstracter who, using tract indices, does not depend on the official indices at all, but is independent thereof. He would show all instruments whether officially indexed or not.

Mr. Hackman is one of the best known authorities and writers on legal and title matters. In the present article he deals with a subject little of which has been known or studied.

Not only does he compare and consider the work involved and the application of their respective principles, but the hazards and legal liability as well.

This article emphasizes the liability and responsibility of those doing title work. After reading it one has a greater realization of its importance and that it truly is a vocation and requiring skill, training and equipment—that those in it should be responsible and established, respected in return.

The Editor.

The whole system of recording is of statutory origin, unknown to the common law, and the statutory provisions must be observed.

Now the law imports constructive notice to the records we have under consideration. Much as statutory indices vary among the states, and much as statutes vary as to what matters are required to be recorded, and as to the time within which they must be filed for record, the purpose of the recording system is uniform, and this is to protect purchasers or incumbrancers of the legal title, for value, without notice and in good faith, or as it is usually expressed, bona fide purchasers. Those who take as volunteers, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, and in some jurisdictions, as in Washington, judgment creditors, are not bona fide purchasers, and are not protected by the recording acts.

Another fact is to be observed. The very theory upon which statutory indices are based, namely, that a title is thereby traced by name from grantor to grantee, mortgagor to mortgagee, etc., places a limitation upon what is ascertainable as to any particular title. One cannot be expected thereby to find instruments not in a particular chain or claim of title. Hence one is a bona fide purchaser as to that chain of title only through which he claims. There can exist two or more chains of title to a given parcel of land, and, as between the several claimants under these, that claimant prevails whose title has the superior equities. A bona fide purchaser acquires a defense as such, and not an unassailable title.

Herein lies one great difference between searchers and abstracters. A searcher can be expected to find but one line or chain of title. Whereas an abstracter will furnish in an abstract every instrument of record that affects title to the land. In case of two or more chains of title a searcher, ignorant of such fact, would trace that chain only as to which he has a clue. And that clue will most likely be that afforded by the name of the claimant ordering the abstract. In no case can it be possible for a searcher to guarantee or certify that he does, as a matter of fact, show all instruments that affect a title.

One chain of title may be traced from a patentee to some last successor. Yet another chain of title may originate with some instrument not in such chain, but which is good in fact and in law as a source of title, or good as color of title upon which to found a subsequently perfected claim of title, or ownership as we ordinarily say.

And breaks in a chain of title when traced by name presents difficulties a searcher cannot overcome. For example, John Lane owning property in County A, died in County B, where his estate was probated. Two married daughters succeeded to his estate, each of whom conveyed their respective interests to the property in County A, by deeds there duly recorded, and where there was no record of Lane's death or of the probate of such estate. The deeds of the daughters, by their marital names, would not connect by name with decedent, and could not be found by a forward search. Without information

outside of the record no backward search would avail. And now can dehors information be conclusively assumed to impart absolute and complete information of what is of record? The records alone can give that. Now in the case mentioned title would be good in fact, and defective only by reason of its defective record connection. An abstracter would, of course, show the deeds.

In all cases of disconnected chains of record title an abstracter is able to show all and each of these chains. One can thereby get correct information as to the exact points of breakage, affording suggestion of the cause, and of the form of the remedy, as well as thereby acquiring knowledge of the record status of the rights of claimants. I know of no sure and certain way by which a searcher can find chains of title of this kind, except by examining every recorded instrument in the county. Any other way would be haphazard. Who would undertake to do so cheaply enough to make the expense thereof reasonable? To the abstracter it would be a simple problem, or no problem at all, by the use of his tract indices.

Now searchers of official indices depend upon name runs. As between parties to an instrument, such for example as a deed, a grantor need not be correctly named if his identity is a certainty. When, therefore, the name of a grantor in a recorded deed differs from the name under which he acquired title, the effect thereof as constructive notice arises, and the rule of idem sonans applies. Names spelled differently but sounding alike, and different forms of the same name are within the rule. "A variance of name is not fatal," does not deprive a record of constructive notice, "if the similarity is sufficient to put a reasonably careful searcher of the record on inquiry * * * ." (23 R. C. L. p. 202, Sec. 59). "While it is true that record notice is principally a matter of sight and not sound, yet it is, above all, a matter for consideration of the mind, and if the record of a name spelled in one way should directly suggest to the ordinary mind that it is also commonly spelled another way, the searcher should be charged with whatever the record showed in some other spelling under the same capital letter." (23 R. C. L. p. 202, Sec. 59). When the difference in the sound of names is slight the matter of idem sonans is one of law for the court; but if there is doubt as to similarity it becomes a question of fact for the jury. It seems, therefore, a "reasonably careful searcher" is under the necessity of conceiving in his own mind with reference to any name he is searching, of all names idem sonans. And also that such searcher is under the necessity of examining all names with the same capital letter appearing in the record, so that he may not overlook one that is idem sonans he might not otherwise think of. As illustrating how many variations of one name may be idem sonans, note this illustration, all the variations appearing in respect to the same person's title to the same tract of land: Kealiher, Keoliher, Kelliher, Kellier, Keolhier, Kealhier, Kelhier. (Millet vs. Blake, 81 Me. 531, 18 Atl. 203).

Title was in Willis A. Forris and claimed through estate of Willis A. Farris; held the names were idem sonans. (Lyne vs. Sanford, 82 Tex. 58, 19 S. W. 847). John Blunt was grantor of property acquired in name John Blount; held idem sonans. (Howard vs. Twibill, 179 Ind. 67, 100 N. E. 372). Other names that have been held idem sonans are Josef Maier and Joseph Meyer, (Maier vs. Brook, 120 S. W. 1167); Belton and Beton, Japheth and Japhath, Woolley and Wolley, Hudson and Hutson, Corn and Conn, and Penneyrun, Penyrun, Penryn, Pennyrine, (13 Amer. Dec. 232 and note); Pillsbury and Pillsby, (34 Amer. Dec. 427); Tilter and Tiller, (51 Wash. 193).

Now it has been said, as a mere expression of opinion, that the rule of idem sonans will not be so broadly applied where the statutory indices are kept on the vowel system. But authority is to the contrary. Thus Seibert and Sibert have been held idem sonans, and the fact the official indices were kept on the vowel system, and thereby that names beginning with the letters "Si" were found several places further on in the index than those beginning "Se" made no difference. (72 S. W. 128).

Besides variations in spelling of family names a searcher must take note of, or bear in mind, abbreviations and corruptions of Christian names. As to Christian names the rule of idem sonans has a wider scope, for identity of the initial letter of a Christian name is not essential. Thus Serelda has been held idem sonans with Zerelday. (12 N. E. 737). As illustrative of abbreviations and corruptions we may note, Elizabeth, Liza, Eliza, Lizzie, Liz, Lizbeth, Betty, Bess, Lizia; as to Katherine, Catherine, Kitty, Kate, Catrina, Katrina; Jack for John, Joe for Joseph, Thos, or Tom for Thomas. But to show the uncertainty of the application of this rule it is interesting to observe, Mike has been held not to be in law the equivalent of Michael, nor would the court judicially take notice of it as an abbreviation. (120 S. W. 1155). Purchasers from the heirs of Francis Ross were held bound to look for judgments against Frank Ross, in his lifetime, the court saying: "It is a matter of common knowledge that seldom is one bearing the Christian name Francis, known by any other name than Frank." (64 Atl. 526). And it has also been held that Fanny is a corruption of Frances, a searcher is charged to know. But Waltimore Arens is not idem sonans with Waldimar Arens.

As to foreign names a court has said: "When we consider the great influx of foreign population into our country, and the great difficulty existing on the part of the courts as well as the people generally, who are not familiar with the language of the country from which it comes, to understand the names, whether written or spoken, by which they are severally distinguished, we should be slow to pronounce a variance in the name of any one of them, unless it is palpable, which may be only a misspelling or a mispronunciation of it, and that by persons ignorant of the language in which the name is written." (41 Ill. 148). And in this case, Mitchell Allen, in which name title was taken, was held idem sonans with Michael Allaine, named as grantee; and Otaine Allaine idem sonans with Antoine Allain.

There is another name with reference to names being idem sonans frequently applied. That is that where names may be spelled in different ways, but pronounced alike according to the mode of pronunciation prevailing in a community, such anomalies, it has been held, cannot be disregarded by those having relations with the people in such communities, and they are bound to take notice of them. So in a county in Pennsylvania settled originally by Germans, where Bobb and Bubb were pronounced alike, a searcher would be obliged to search both names. (80 Amer. Dec. 534). Heckman and Hackman have been held idem sonans.

A man named McKenzie with equally well-known given names in his community of R. C. and W. A., mortgaged certain property as R. C. McMenzie, and subsequently mortgaged the same land to a third party as W. A. McKenzie, such third party not knowing of the prior mortgage. It was held such third party had constructive notice of such prior mortgage, for, as it appeared the mortgagor was equally well known in his community by the name of R. C. McKenzie, as well as by the name of W. A. McKenzie, it was manifest that had the second mortgagee exercised ordinary diligence in ascertaining the name of the party with whom he was dealing, he would have found the mortgagor was known by either name. (53 S. E. 641).

At this point in connection with names let this be noted: In Iowa, as in this state, the law creating statutory indices provides that, among other entries besides the names of grantors and grantees, a description of the property shall be noted in a column therefor in such indices. This entry of property

description helps a searcher pick out from among all instruments a given named person may be a party to, those that affect a particular tract. But it also complicates the name search. For in Iowa it has been held such index system serves as a double check through tracing names and description of property, and so if a searcher finds an entry indicating that some one has attempted to deal with the same property he is searching, especially if the name of the party so disclosed be such as to suggest any reasonable possibility of his identity with the person whose name is being searched, he cannot ignore such transaction. Thus where one J. W. McGregor mortgaged under the name of William McGregor, and later as J. W. McGregor, it was held the record of the former mortgage was constructive notice to the latter mortgagee. It was the view that in searching the name McGregor on the index one could not ignore any instrument executed by a McGregor touching the property. The court said further, in substance, that as to the name J. W. McGregor, the initials may stand for James William, John Wesley, Joseph West or any other infinite variety of names beginning with the letters J. W. Therefore, one searching the indices could not pass by any named McGregor whose given name began with *either* of such initials. (149 Iowa 672, 128 N. W. 1101).

So in another case property was owned of record by Almira J. Stringham, who executed a trust deed thereon as J. A. Stringham, and later mortgaged as Almira J. Stringham. It was shown she wrote her name variously as Almira J., Jane A., J. A. or Jane. Held, index entry of trust deed was notice to mortgagee. (27 Iowa 183, cited in 149 Iowa, 672, 128 N. W. 1101).

Also a mortgage by the owner, W. *T.* Berkshire was indexed W. *H.* Berkshire, the name of the mortgagor's husband, was held notice. (15 Iowa 248).

Just one other illustration. Land was held in the name of John Jacob Frederick Zehnder. When spoken of by his friends he was called "Fred." He generally signed his name "Frederick," or "Fr.," but in executing legal documents wrote out his name in full or at times as "J. J. Zehnder." When he transferred title there was a judgment against "F. Zehnder," and this under the circumstances related was held sufficient to give the purchaser constructive notice of it as a lien. (Jenny v. Zehnder, 101 Pa. 296).

Illustrations of the application of the rule of idem sonans could be extended indefinitely. But those I have given will be sufficient to show the scope of the rule, and give insight into the necessities that occasion application of the rule to statutory indices. However efficiently such indices may be kept, a search of them is fraught with perils, for the keeper canot remedy problems arising from the rule. A searcher may forget to search as to some idem sonans name, or he may fail to have in mind all idem sonans names, and omit to search as to all such. It is certainly elementary that as names idem sonans do not vitiate constructive notice, one cannot overlook search of all such. To neglect making such search means one of three things on the part of a searcher: ignorance of the rule; or knowing the rule, an unwarranted disregard of all the possibilities flowing from the rule; or an assumption that there is no need to apply the rule to the name of any party in the title, an acceptance of the consequence. Now a party does not order an abstract for the purpose of assuming risks, or because he knows a title is good. If there were no risks he could not avoid by use of the abstract, or, if he knew the title was good, he would not require an abstract. So, any one or all of the three reasons for neglecting a search of names idem sonans impairs the value of an abstract for the very purpose it is required.

But another peculiar risk arises from the relationship of a searcher and his employer by reason of the rule of idem sonans, and of identity of person. As heretofore stated a purchaser or mortgagee is bound to inquire or to know the identity of his grantor or mortgagor. Now a purchaser or mortgagee may know the grantor or mortgagor in his home town; may know he uses or is commonly known by variant names. Such purchaser or mortgagee would, therefore, be charged to bear such fact in mind and search the records as to such variant names. But such purchaser or mortgagee employs a searcher to examine the records. The searcher may not live in such home town, but at the county seat of the county wherein lies the land; or if in such home town, it may be one of large size, and the searcher may, in either case, be ignorant of such variance of such owner's name. Does it usually occur to such purchaser or mortgagee to advise the searcher of such variances in the owner's name known by such purchaser or mortgagee. Where, as in this state, the use of tract indices is so common such necessity would not, it seems reasonable, be thought of. The searcher's ignorance would not excuse the employer, for the latter's knowledge would charge him with inquiry.

Contrarily, such risks are eliminated when an abstracter uses tract indices. All instruments would be shown. The searcher of official indices might exercise care and skill, but not even then exercise that measure of due care and skill the law would require, or that upon a trial on the issues involved would be found and held to be in the particular case the requisite measure of due care and skill. Due care and skill are a defense and a relative defense only. measured by the facts in the case.

A searcher, it will be observed, has to bear in mind a horde of names and also a description of the property involved, while making a search; whereas one who uses tract indices needs but mechanically to make his list from his tract index.

In connection with what has been said about the index being a part of the record, and the application of the rule of idem sonans, I will read an excerpt from a very early decision holding the index not a part of the record, as a curiosity that may be interesting.

"There are many practical difficulties in the way of making an index to the record an assential to the validity of the title. The statute provides for an 'index or alphabet.' Are the two words used synonymously. Or have they here, as they often have, different meanings. Is it indispensible that the index should be in alphabetical order. If so, shall the name of the grantor or the grantee be alphabetical. Or shall there be two indices, one to each. Must the Christian name be written at length. Or will the initials be sufficient. It is obvious that if an index is held to be an essential part of the record, the way will at once be opened for a serious and embarrassing cause of litigation in settling by judicial construction what shall constitute a sufficient index, and what departures from a prescribed form shall render the record invalid. And all this perhaps when there has been no real injury to any one in consequence of a defective index." (Curtis v. Lyman, 58 Amer. Dec. 174, Vermont 1852).

Now another point, I have said that in Washington and Iowa an instrument must be correctly indexed to import constructive notice, and that among other notations in the index a correct description of the property is required. Now in Iowa when a mortgage covered two lots, but the description of only one was entered in the Index, such record was not held constructive notice as to the lot omitted from the index. (13 Iowa 570). What would happen if such instance as between two purchasers of such omitted lot, where one relied upon an abstract made by a searcher, and the other on an abstract made by an abstracter? A searcher would fail to find such mortgage. It would not create a break in the chain of title suggesting particular investigation. The purchaser would buy, get into a law suit with the mortgagee, have to rely on his bona fides and lack of notice for his defense, and proving such be accorded a judgment in his favor with, perhaps, uncollectable costs against the

mortgagee. But the purchaser relying on an abstract made by an abstracter which would of course show such mortgage, would thereby be informed of its existence, and having such knowledge, could claim no priority over the same, and the situation would naturally be adjusted to the satisfaction of all parties.

Now another point. I may safely say it is the practice of searchers founded on what seems to be their conception of what the law requires when making a forward search, to begin an examination of the indices as to any and every person's name in the chain of title at the several dates of the respective deeds by which they acquired title. To be more explicit and clear let me express the idea in other words. In making a forward search, title is traced from the government to the patentee. From the time such patentee obtained title his name is searched in the alphabetical list of grantors for any instrument executed by him. When a conveyance from him to A is found, such patentee is considered a stranger to the title, his name is dropped, and the search is continued as to A beginning with the date of the deed to A, until a deed is found from A to B, then A is dropped. A search is then begun from date of the deed to B, as to B, until a deed from B to C is found, and all names in the chain of title are searched in this manner down to an owner by whom no deed will be found to have been executed, and who will be, therefore, shown as the present owner. Now let us emphasize the fact that, under this system, search as to any party is abandoned as soon as the indices disclose a deed executed by him,—as soon as he becomes a grantor.

Now does this question fulfill all requirements? Can a purchaser rely on an abstract based on such a search? Let us see.

It is a fundamental rule or principle of law in many jurisdictions that priority of record does not alone give priority of right or paramount title. (41 Wash. 361). In other words, one whose deed or mortgage is first of record does not thereby acquire necesarily the superior title over one whose deed or mortgage is subsequently recorded. Thus, for example, A deeds to B, who does not for a while put his deed of record. While B's deed is unrecorded A deeds to C, for value, in good faith, without knowledge or notice of B's deed. Now as against C, B's deed will not prevail even if it is recorded thereafter prior to the record of C's deed. Following out the theory of making a search mentioned, this would happen. If in the supposed case B should record his deed, and then later C his, the searcher would drop A on finding A's deed to B, and therefore not show C's deed. Yet C's deed would be constructive notice to any purchaser from B, and give C paramount title.

This same principle applies to other cases. For examples: A deeds to B who does not record his deed. A then deeds to C who is not a purchaser for value, or who has knowledge of B's deed. Prior to the record of B's deed, C records his deed, later B records his. B's deed is notice to a purchaser from C, even though, as stated, it is recorded subsequent to the record of C's deed. And this matter can be further illustrated thus: A conveys to B, a bona fide purchaser, who does not for a time put his deed of record. A then conveys to C, who does not pay value, or who has knowledge of B's deed. C conveys to D, D to E, and so on through any number of grantors and grantees, all of whom do not pay value, or have knowledge of B's unrecorded deed. Then B records his deed. It imports constructive notice thereafter, and no purchaser may fail to take notice save at his peril. This is true by overwhelming weight of authority. (Pomeroy's Eq. 4ed. Sec. 760, Van Rensselaer v. Clarke, 17 Wend. [N. Y.] 25). The principle is in harmony with the theory of the recording system. And that theory is that a bona fide purchaser need only record his deed or other instrument to protect himself against bona fide purchasers, and not others. So in this state, as in some other jurisdictions, of two mortgages given to secure pre-existing debts, that which is first executed and delivered takes priority, even though the other mortgage is first recorded. (McDonald & Co. v. Johns, 62 Wash. 521).

It is obvious, therefore, one cannot run indices from the date of a grantee's deed until he finds a deed from such party as grantor of record to some grantee; then trace title from such grantee until he also as grantor conveys and so on. To guard against the possibility of such cases as these I have illustrated, to be sure and certain of showing the true record title a searcher should trace all names down or forward to the end of the indices. And a backward search back of the time a grantee becomes grantor.

It may be said that the principle I have asserted is not supported by authority, and that it requires too extensive a search to be sustained as practical and necessary. To the assertion that it is not supported by authority I reply it is supported by overwhelming authority, and that this is so may be observed by reference to that masterly work on equity by Pomeroy (4 ed. sec. 760, and other sections) and by that other masterpiece of legal literature, Jones on Mortgages, (7 ed. Sec. 541). To the objection that it requires too extensive a search I reply by quotation from a decision wherein this objection was considered. Said the court: "It is no answer to say that it is inconvenient to the purchaser to examine a long and voluminous record of the title of his grantor. To this the sufficient reply is that, but for the registry acts, he would have even the protection which such records afford, but would deal at his peril with his grantor, and secure only such title as he might assert. If that grantor had good title because a purchaser for value, without notice, that is a defense to his vendee, but if such grantor was not such purchaser, then the validity of the title which he conveys must depend upon the character of the vendee; and if such vendee is not a bona fide purchaser under the common law or statute, we cannot perceive from what source a principle can be deduced which will afford him protection. It seems clear to us that one who buys an estate cannot invoke the protection of the registry act as against a deed recorded under such act at the time of his purchase." (Woods v. Garnett, 16 So. 390). "To say one should not search so far and run the risk of notice, is simply to say one should not have that element of good faith the law requires." (Idem).

Another point. Whenever a party, otherwise not in the chain of title, is brought in as a grantor prior to or contemporaneously with the acquisition of title of the record owner, such party is within the chain of title thereafter, and the records must be searched to ascertain if such party had previously dealt with the property. Thus if a chain of title be from A to B, B to C, C to D, and D gets also a deed from X, X is brought into the chain of title, and the records must be searched to ascertain what, if any, transactions were had by him affecting the land, prior to his conveyance. (63 Southern 1007, and cases there cited). Here is evidenced a search one may readily conceive not made by a searcher, but covered by tract indices.

Another point. It is commonly considered no search need be made of the statutory indices to ascertain whether or not any given owner had any recorded transactions with the land prior to the date of the deed by which he acquired title. It would seem reasonable, therefore, no such search would be made. And that no such search need be made is the general rule in law. But there are exceptions. A purchaser or incumbrancer may be bound to make such a search. Thus if an owner had any estate in the land, legal or equitable, prior to the date of his recorded deed search as to transactions therewith are necessary. Thus the equitable estate of a vendee in possession under an executory contract for sale, even in states where the contract is not recordable, and even when it is

verbal, is a mortgageable interest, and if the vendee gives a mortgage which is recorded before he obtains a conveyance of the fee, a purchaser who has notice of his prior equity must search for such mortgage. This principle, you will observe, makes such an antecedent mortgage which is recorded before he obtains a conveyance of the fee, a purchaser who has notice of his prior equitable interest must search for the mortgage; it would take precedence over his own conveyance or encumbrance. The notice of such mortgageable interest might be actual or constructive; and an example of the latter kind would be that given by recitals in a deed through which the subsequent purchaser must derive his title. (Pomeroy's Eq. J 4th ed. page 1575 et seq. Sec. 761). This principle, you will observe, makes such antecedent search necessary when a purchaser or encumbrancer has knowledge of such antecedent interest. The trouble, however, that arises from its application lies in this, that rarely, one may safely say, would such latter parties think to advise the searcher employed of their knowledge, and such searcher having no knowledge himself unless by recital in a deed would make no such search.

There is no unanimity of decisions among the courts of the states as to whether or not an instrument, such as a deed or mortgage, executed by one prior to the time he acquires title, imports constructive notice to bona fide purchasers or incumbrancers dealing with such person after he acquires title. In some states such antecedent conveyances or mortgages are held to import constructive notice, in others the contrary doctrine is maintained. Some hold that inasmuch as a grantor's or a mortgagor's after-acquired title inures to the benefit of the grantee, the estoppel arising binds privies of the grantor, and charges inquiry as to the fact of whether or not such an antecedent deed or mortgage is of record.

In the State of Washington it has been held that, where one has applied to purchase certain state lands to which he had a preference right of purchase, he acquires a vested right thereto which subsequent parties are bound to take notice of and to search as to acts of such applicant with reference thereto prior to his acquisition of the legal title. This requires a search antedating the acquirement of the legal title. (Pioneer S. & G. Co. v. Seattle C. & D. Co., 102 Wash. 608). Not to make the search I am discussing in the absence of a decision holding it unnecessary is to assume an unwarranted risk. What searcher makes it? This presents no problem to an abstracter because he would show all instruments, whether executed before or after title is acquired, and properly leave to the examiner determination of the issues arising, not deciding them himself.

I could indulge discussion of a host of other matters involved in the comparison I have been making. But to do so would unduly lengthen this article.

In conclusion I will remark, the use of tract indices has extended a larger measure of protection to those who deal in land than the law contemplates the recording system avails to give. It affords, as I have stated, full information as to all recorded matters whether in or out of a chain of title. One who relies on statutory indices is necessarily limited to ascertainment of those instruments only in a chain of title. He is restricted by the limitations of the statutory index system. And as heretofore stated, in nearly all the states,—all save four—he cannot depend on the official indices as being complete and dependable indices of all recorded instruments. Tract indices afford a greater assurance.

I would also venture the opinion based upon observations of conditions that many questions are raised about some titles—even serious litigation arises between parties since all matters of record have not been found because public indices were depended upon. Proper tract indices would have disclosed all the record information.

Why Should You Be Concerned?

An old man, going a lone highway
Came at the evening, cold and gray,
To a chasm vast and deep and wide.
The old man crossed in the twilight dim,
The sullen stream had no fear for him.
But he turned when safe on the other side
And built a bridge to span the tide.
"Old Man" said a fellow pilgrim near,
"You are wasting your strength with building here;
Your journey will end with the ending day,
You never again will pass this way;
You've crossed the chasm deep and wide,
Why build you this bridge at evening tide?"
The builder lifted his old gray head,
"Good friend, in the path I've come," he said,
"There followeth after me today,
A youth whose feet must pass this way;
This chasm that has been as naught to me,
To that fair-haired youth may a pitfall be;
He, too, must cross in the twilight dim—
Good friend, I'm building this bridge for him."

LAW QUESTIONS AND THE COURTS' ANSWERS

Compiled from Recent Court Decisions by

McCUNE GILL

Vice-President and Attorney

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Is separate character of wife's property always determined by law of state where land lies?

No; if land was bought with proceeds of property in other state the laws of such other state will govern. Cox v. McClave, 22 S. W. 2nd 961 (Texas).

Is special tax title on homestead property good?

Not in Texas, City v. Loden, 22 S. W. 2nd 969.

Does "rear 90 feet" mean including or excluding alley?

Excluding alley; grantee gets 50 feet and all rights in alley besides. Gilcrease v. Anderson, 22 S. W. 2nd 981 (Texas).

Should title through will be passed without inquiring as to date of marriage?

No; the marriage or birth of children might have acted as a revocation of the will. Ward v. Pipkin, 22 S. W. 2nd 1011 (Arkansas).

Where husband has power to devise the entire community property can it be done by ordinary will?

If there is any doubt the courts will construe the will as devising the husband's interest in the community only. Sailer v. Furche, 22 S. W. 2nd 1065 (Texas).

What is construction of devise to testator's "wife and children"?

Ordinarily it gives life estate to wife with remainder to children, but held tenancy in common if there is a provision forbidding partition until children are of age. Hatcher v. Pruitt, 22 S. W. 2nd 133 (Kentucky).

When does extension of mortgage extinguish mortgagor's liability on note?

Only when property has been sold and purchaser assumed liability. Mayers v. Groves, 22 S. W. 2nd 174 (Missouri).

What is meaning of "legal representatives?

Its strict meaning is administrators and executors, but it is frequently construed as heirs and devisees if context shows that intention. Long v. Montgomery, 22 S. W. 2nd 206 (Missouri).

Is father an "heir of body" of son leaving no children?

No, this phrase includes only lineal descendants, not ascendants. Crawley v. Crawley, 22 S. W. 2nd 268 (Kentucky).

Does defect in election imposing school taxes affect validity of tax title?

It is void in Arkansas. Thomas v. Spiers 22 S. W. 2nd 553.

Does conveyance of "minerals and mineral products" carry oil and gas?

Held not in Kentucky. 22 S. W. 2nd 580.

Devise to son but if he dies childless then to others; does this mean die during testator's life or afterwards?

At any time. Littell v. Littell, 22 S. W. 2nd 612 (Kentucky).

Is execution sale good if sheriff's return is defective?

Yes; it would be good without any return. Griggs v. Montgomery 22 S. W. 2nd 688 (Texas).

Is tax suit against "unknown owners" good?

Not good against owners of record or in possession. Dulin v. Fain, 22 S. W. 2nd 707 (Texas).

When can broker collect commission from both seller and buyer?

Only when both know of the arrangement. Thompson v. Caldwell, 22 S. W. 2nd 721 (Texas).

Do directory or locative calls govern in a description?

Locative calls; thus the location of an iron pipe governs over a beginning point described as so many feet from another survey. Kyle v. Clinkscales 22 S. W. 2nd 729 (Texas).

Can written exchange contract be modified by later oral agreement?

No; the modification is void under the statute of Frauds. 22 S. W. 2nd 741 (Texas).

Is limitation title merchantable?

Probably is, even in a suerte, but possession must be shown by decree and not merely by affidavits. Friederich v. Seligman, 22 S. W. 2nd 749 (Texas).

There is a distinct joy in owning a piece of land unlike that which you have in money, in houses, in books, in pictures, or in anything which men have devised.

Personal property brings you into society with men. But land is God's estate in the world; and when a parcel of ground is deeded to you, and you walk over it, and call it your own, it seems as if you had come into partnership with the original proprietor of the Earth.—Beecher.

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