TITLE NEWS

Official Publication

THE AMERICAN TITLE ASSOCIATION

TITLES TO REAL PROPERTY

by

JAMES E. SHERIDAN

Excerpt from "Handbook of Real Estate," Prentice-Hall, Inc., Publishers

VOL. 26 SEPTEMBER, 1947 NO. 5

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By permission of the publishers, Prentice-Hall, Inc. we reprint the chapter "Titles to Real Property" in "Handbook of Real Estate." This chapter was written by Mr. James E. Sheridan, our Executive Secretary.

On behalf of our organization, I express our thanks to Prentice-Hall, Inc., for granting permission to reprint this chapter.

J. J. O'DOWD, *President,*
The American Title Association

TITLES TO REAL PROPERTY

BY JAMES E. SHERIDAN

Associate Editor "Handbook of Real Estate"
a Prentice-Hall Publication

INTRODUCTORY

America is blessed in many respects. One of its greatest is the individual right of ownership of land, of ownership of title to land. In the hope its contents will give the real estate operator a little of the background, an acquaintance with procedure, and an awareness of the need for certainty of safety in titles to land, these chapters have been written. For both the safety of the client and the continuous good name and reputation of the real estate operator are involved in this matter of titles and of evidences of titles to land.

JAMES E. SHERIDAN

It is the desire of his client that his possession of the land shall be tranquil and undisturbed. It is his expectation that he shall not be disturbed by litigation. But over and above these two important points, it becomes the duty of the real estate operator that his client shall acquire a title of such character that he shall be able to sell, to lease and to mortgage the property secure in the knowledge of the exact extent of his ownership interest.

"Title,"—defined

According to decisions of the Courts, "Title is ownership," and "A Title means Ownership." Judge Walker in his "American Law" says "The truth is, title means the same thing as ownership."

Historical

Peculiar to America and more specifically to our own country is that which we know as the Recording System.

Many of our practices and customs in the handling of title to real property come to us from the English. Even to this day, there is no general law in England for the recording of deeds and other evidences of ownership in or claim upon land. In many parts of the British Isles it is still the custom that the grantor shall pass to the grantee his original title deeds and other muniments of title.

Land throughout most of Europe in medieval times was under a system of tenure called feudalism. For all practical purposes, it may here be stated with reasonable accuracy that the crown, the sovereign, held actual title to the land. Although largely extinct, its effects may yet be found in the forms of land tenure in some European countries.

Against this, the United States, almost from the very beginning of colonization in the Western Hemisphere embarked upon and has consistently and faithfully held to a policy of free alienability of land—that is, the right of freely holding the title to land and freely disposing, by sale or otherwise, of title to land. The Land Act of 1785 stated that lands of the Public Domain shall be freely alienable. It is probably completely without the province of the writer of this chapter to "preach" Americanism, but he cannot refrain from offering the comment that for so long a time as our present social order is accepted, and for so long a time as we shall have Free Enterprise in Free America, the private ownership of real estate must ever be observed. It would be well that we in that section of the business world whose activities touch land never lose sight of that significant and highly important part in our edifice of freedom.

The Recording System

A Distinctive Feature of the American System

In October of 1640, the General Court of Massachusetts passed a general ordinance as follows:

> "For avoiding all fraudulent conveyances, and that every man shall know what estate or interest other men may have in any houses, lands, or other hereditaments they are to deale in, it is therefore ordered, that after the end of this month no mortgage, bargaine, sale or graunt hereafter to bee made of any houses, lands, rents or other hereditaments shallbee of force against any other person except the graunter & his heires, unless the same bee recorded, as is hereafter expressed."

No particular point is served in attempting to trace the origin of this idea. But it would be well to emphasize the point that the most distinctive feature of the American system gives priority to the earliest recorded deed. It appears nowhere among foreign systems. The general rule is that an instrument, when filed for record with the proper official, at once becomes effective, and imparts constructive notice of title, liens, etc., to all the public.

THE TITLE—Conveyance of

In olden days under the feudal system, it was the custom that publicly in the presence of witnesses, the seller (called the donor) handed over to the buyer (called the donee), while both were standing upon the land involved, a twig or stone or clod of earth in token of the transfer of title and ownership.

With the passing of time, a statement of the events of the transaction, or let us say, the terms of the transaction were reduced to manuscript. In a warlike era, the language adopted was military, just as it is today. Then, the fortification par excellance was the "Great Wall," which walls, in Latin, were called "Moenia." The verb "Munio" meant "to fortify." Thus, we get the word "Muniment," and into land titles go the words "Muniments of Title."

MUNIMENTS OF TITLE

Judge J. C. Ruppenthal of the Kansas Bench divides Muniments of Title into about seven classes:

1. Patent by the executive.
2. Grant by legislature.
3. Deeds of conveyance.
4. Will.
5. Descent.
6. Possession.
7. Boundary, stakes, stones, streams, trees, water, etc.

The distinguished Judge also points out that title shall include three things:

1. Possession, with
2. Right of possession
3. Right of property.

—16 Inc. Encyc. 767

and that unless all three are united, title is not complete and absolute.

EVIDENCES (ABSTRACTS) OF TITLE—England

As the feudal system wore away and the rights of tenants became more and more pronounced in England, abstracts of title were made in England. The type of title ordinarily held was that of a leasehold. The leasehold estate of the tenant was evidenced by a written instrument, usually consisting of two copies of the instrument written on the same paper. The paper then was torn in irregular fashion so that the indentations of each torn part would fit the other. Thus it acquired the name "Indenture," by reason of the irregular tearing or tending of the paper into two parts.

The English abstract is made of the original unrecorded instruments and from family history and pedigrees. It is invariably made by the seller's attorney. The material usable by him to make up the abstract necessarily can be only those instruments filed away in his own law office. Hence, the coverage afforded by that abstract is limited to the data contained in the conveyances held by that attorney, and cannot reflect anything on the general condition of the title.

This abstract, so-called, is then tendered to the counsellor for the buyer of the property for examination by him.

THE RECORDING SYSTEM (American Improvements)

In Massachusetts, after the formation of counties, an ordinance was passed making the Clerk of the County Court also the Recorder (now known under various names, among them the Registrar, the Prothonotary, etc., in addition to Recorder), and directing him to enter all grants and sales of land with the names of the grantors and grantees, the estate granted and the date. This applied to all sales and mortgages of land.

This practice gradually spread throughout the 13 original colonies and later through the States of the Union.

THE OFFICE OF THE RECORDER—
Procedure

When an instrument affecting title to land has been submitted to be recorded, the routine procedure is that the Recorder shall stamp the time of recordation of the document and make memorandum of it in that which is generally described as the Entry Book. The instrument is copied (photostated in some jurisdictions) and the transcript or photostat bound in a book labeled according to the nature of the instrument—i.e. Book of Deeds, Book of Mortgages, Miscellaneous, etc.

On the instrument itself are endorsed the book and page number in which the transcript or photostat of the instrument has been entered. The original instrument is returned to the owner for his permanent files.

Thus the transcript of the instrument becomes a matter of public property and thus public notice. Entry of the time it has been recorded establishes its priority—which is a basic fundamental of the Recording System.

SURVEYS

All evidences of title, as established in the United States, and all opinions on title by attorneys have to do with the Legal title. None has to do with sufficiency or insufficiency, with shortages or surplusages of land. The Legal title covers that title which is evidenced by the various recordings, beginning normally with the grant or patent from the United States of America or, under certain circumstances, from the State.

As an adjunct, there has developed the practice of employing an engineer or surveyor to make a survey of the property, showing the lands by their physical boundaries and giving their dimensions. This practice received impetus in the 20's and 30's by reason of the spread of mortgage funds of capital, notably the life insurance companies seeking investments in mortgage paper in all sections of the country, through the rapid expansion of the chain stores and other large users of land for merchandising purposes, and through desires on the part of these investors to protect themselves in all respects.

THE EVOLUTION OF TITLE EVIDENCING

Charles C. White, of Ohio, one of the great legal lights of his State in real property law, has defined the business or profession of furnishing evidences of title to land in America as having gone through or now going through four states:

A—The "Pre-Abstract" stage
B—The "Abstract and Attorney" stage
C—The 'Certificate of Title,' (Guaranteed Title) stage
D—The "Title Insurance" (or Title Guaranty) stage

THE PRE-ABSTRACT STAGE

In the early days of our country, land values were not great. Travel was light. Families located in one area and remained there. In a community where values were not high, where everybody knew everybody else, where the salient points of title were a matter of common knowledge, it was the practice that the attorney should make a search (cursory, it is feared) of the public records. He reported his findings to his client, frequently by word of mouth at the barber shop or the general store, and he handled the details of the sale and purchase of the property.

We are all creatures of habit, of custom. In certain localities of our country, New England and certain of the Old South to mention two, it became the custom that the task of search of the public records should be performed by lawyers who, to a greater or less degree, specialized in real property law. A specialized group of these, and of law clerks some of whom were not admitted to practice, came to be known as conveyancers. They prepared papers transferring title to, interest in and encumbrances upon, land. They searched the public records, weighed the facts developed in these searches, and gave their opinion on the condition of the title.

Not infrequently, for self-protection and also probably to indicate in graphic fashion to his client that he had earned his fee, the conveyancer gave his client this written evidence of his searches in the various public offices. And he thus protected himself, to a degree at least, from criticism in transfers of the same title at a later date. Thus, we see once again the worth-whileness of written evidence, and the opening of the next stage, the production of an abstract of title and the examination of that title evidence, the abstract turned out by one skilled in abstracting, with responsibility behind him, or his firm; and the examination thereof by an attorney admitted to the practice of law.

THE "ABSTRACT AND ATTORNEY" STAGE

The years passed, and our villages became towns and then great cities. Recordings became more numerous as our people acquired more real property, and as capital sought investments in land and mortgages upon land not in their city of domicile, but in dozens, in hundreds of our cities and upon our farm lands. It became necessary to review titles not in the town where the property was located and by one acquainted with local conditions, local titles and customs, but by an examiner of titles in the home office of the investor, hundreds of miles away.

The task of searching the public records became more lengthy, and more involved. The requirements of the examining attorney became more exacting. The tremendous increase in recordings meant huge increases in costs to deter-

mine titles from a search of the grantor-grantee indexes in public offices. The picture was further complicated, especially in our larger cities, by ownership of land in the same community by many people with identical names, or with similar names, as, for instance, Smith, Schmit, Schmidt, Smythe, etc.

Obviously, the law office of that community which had worked on real property titles and on real property as questions became known as one having acquired, over the years, a vast fund of evidence needed to correct or to cure defects in title. In these collections throughout the country is found one of the principal reasons that a well organized abstract and title company is of value and assistance to the real estate man and the attorney in closing a real property transaction.

THE ABSTRACT PLANT

Thus another step in the evolution of titles and evidencing of titles came to pass—the Abstract Plant. Men skilled in title evidencing and aware of the ever-increasing number of recordings in public offices evolved the idea of making a transcript of the salient points in all papers affecting title to land as they were recorded each day. This became known as the "Take Off."

These abbreviated transcripts of the daily recordings were brought to the office and there posted or indexed in books geographically arranged so that at one point in the book there would be shown information regarding all of the recorded instruments affecting any given piece of property; information setting forth references to all the items that had been spread in the public offices affecting that particular parcel.

Many types of records are kept in a well ordered abstract office. There are two main types. The first is the tract book or lot book. In these are carried, geographically arranged, countless items relating to the title and specifically reciting in their body legal descriptions to land. The second main type is the Miscellaneous record, under which system of name segregation are carried references to ownership of land, or to its handling, or having effects upon title to land. Many instruments of miscellaneous character, not necessarily containing on their face, specific land descriptions, are indexed in these miscellaneous records. Among these are:

Judgments for Labor and Material.
Legal Proceedings.
Adoption Actions.
Guardianship Actions.
Divorce Actions.
Affidavits.
Nuptial and Pre-nuptial Agreements.

Carried in the plant will be references to assure the abstract shall contain an abstract of proceedings affecting titles coming out of or through the Probate Court (or Orphans Court as it is also designated), Recorder's or Common Pleas Courts and the higher courts on real property litigation.

Whether the product of the issuing title company be abstracts, guarantees of title, title insurance or title guaranty policies, the well organized and prudent title company will always hold as the basis for the title evidence it delivers to the public a correct reflection of the public records affecting that particular title.

There has never been and never can be a completed title plant. For it is an unending daily task. The recordings in the public offices of each day must be posted to the tract books and other records of the plant in the title company.

A valuable addition in an abstract plant consists of reproductions of the many plats and replats of recorded subdivisions, of rights of way, highways, streets and alleys and changes therein, of easements of the public utilities and numerous other types of maps and plats. A most worthwhile creation, completely American in its character, has been the building of those which are known as "Arbitraries." By a system laboriously worked out involving complicated descriptions of land titles, among them metes and bounds descriptions and descriptions of indefinite character, these have been reduced to maps. By the expenditure of thousands of dollars and many gray hairs, the title companies in various localities have made exhaustive sets of maps covering these descriptions so that these titles can be produced in abstract form. One such description actually appeared in a recorded deed; it contained the words, "And thence to a point where you and I stood talking yesterday afternoon."

Under our Federal Constitution, each state retains control of procedure and recording transactions in real estate. Hence, we have forty-eight varying statutory requirements and variances according to local practices, custom and nomenclature in real estate. Yet our property rights have been well guarded. True, real property law is a law unto itself apart from other types of the law and naturally legislation on titles to land changes as to the use, ownership and protection of land and land rights. While no one claims it to be perfect, our present land title system under our Recordation Laws and the established means of title evidencing are the best system on earth, —the most liberal, broad and free. The principal faults are those which arise from the abuse and ignorance of those using the systems and through the occasional "sharp shooter" who tries his "get-rich-quick" schemes with land as the basis. Due recognition may well be given to the efforts of organizations and departments of state such as the Securities Commissions, Real Estate Division, the Better Business Bureaus, and the co-operative work of trade organizations. Their labors have kept the machinations of these rascals at a minimum.

The Abstract of Title

The Abstract of Title has been variously described and defined. Thompson, in "Title to Real Property" describes it as follows:

> "A methodically written or printed history of the title transactions to a designated tract of land, from some original source to the present, and consists of a summary of the essential parts of every recorded instrument of conveyance and a brief statement of all liens and encumbrances affecting the said tract of land."

It also is described:

> "A brief and orderly statement of the original grant and all subsequent conveyances and encumbrances relating to the title and ownership of real estate." (Standard Dictionary).

Usually these instruments are publicly recorded, but another definition is:

> "A brief and orderly statement in writing of the successive conveyances and other events through which a person claiming to own a parcel of land derives his title." (1 Int. Enc. 47). "This definition needs be explained by including all instruments that assail, encumber, cloud, question or weaken the title of claimant. An abstract shows chiefly the record, but is not so limited." —1 Int. Enc. 47.

It is said comparisons are odious. Nevertheless, it is perhaps proper to set forth how carefully drawn have been the statutes and how ably worked out have been the customs and practices to assure the ultimate of protection to the buyer of or encumbrancer upon land in the United States.

Under the English system, as has been stated, the vendor's attorney makes up his own abstract from instruments retained in his possession. It will be observed the attorney for the buyer has only an index as a guide. He must pass his opinion on that English abstract, skeletonized as it is, or upon the instruments themselves if made available to him; but always without knowledge of other transactions which may have taken place and which affect the title.

In the United States, two things happened to make the lot of the buyer more secure. First, there has been constant refinement in the Recording statutes. In the course of time, this has become, for all practical purposes, a universal statutory requirement. In the various public offices are to be found not only the deeds and mortgages, but also the dozen and one other types of recordings and filings which, in one way or another, adversely may effect the title.

The second development is a correlary. The plant department of the abstract and title companies of the United States have been developed to the point that through a systematic arrangement of track books and miscellaneous records, an abstract of the complete history of the title under consideration can be and is assembled.

THE ABSTRACT OF TITLE

Contents

The duties of the Abstracter are many and varied. His searchings of the public records will carry him into many offices thus to assure he shall incorporate into his abstract, all material which has been recorded and entered for filing and which affects the title he is abstracting.

As between states, (1) by reason of the statutes, (2) because of local practices and customs and requirements of his local bar, and (3) by operation of economic laws, the items for which he shall make a search may vary.

Illustration—(1) In Michigan, a judgment is not a lien upon real estate until the judgment creditor shall take certain statutory steps, including the filing of Notice of Lis Pendens (Notice of Suit Pending), reciting the correct legal description of the land, and levy and take execution. As against this, in practically all other of the states, a judgment is a blanket lien upon all real estate owned by the judgment debtor upon its filing; and in some jurisdictions upon rendition by the proper judicial authority.

Taxes, of course, are a lien upon real estate. Some special assessments become a lien even before entered in the books of the Township and/or Township Treasurer; they become a lien upon rendition; that is to say, upon approval by the governing body of the intention to carry out certain improvements (as, for instance, street paving), and these taxes, payable at some future date, perhaps in an amount not yet determined, become a lien against real estate.

Still another illustration of this is the Old Age Pension Lien, or the Old Age Assistance Lien. Here, the state having rendered aid to the aged, holds a lien against real estate owned or acquired by said individual.

Illustration (2): Under local practice and custom, in some localities, certain proceedings are not shown in the abstract of title; for instance, in one of the mid-western states, it is not customary that the abstracter shall search the records of the Clerk of the Probate Court, nor of the Superior Courts for litigation involving land.

Illustration (3): Unfortunately, every county in the United States is not wealthy. In some counties, private capital is not warranted in building a tract index of the recorded instruments, geographically arranged, for the simple reason a yield on the invested capital cannot be

earned. Perhaps the county never had wealth—or population. Perhaps, both are gone. An illustration of this would be to cite some of the abandoned gold and silver mine areas of the western states, now abandoned; or some of the cut-over timber lands in Northern Michigan, Wisconsin and Minnesota.

Subject to the above, the contents of an abstract of title may be said to consist of any or all of the following:

Patents
Maps
Plats
Conveyances
Deeds
Trust Deeds
Recorded Land Contracts
Encumbrances
Mortgages
Releases (Satisfactions) of Mortgages
Recorded Leases
Attachments
Notices of Lis Pendens
Notices of Levy of Execution
Foreign Executions
Powers of Attorney
Federal Tax Liens Transcribed to the State Records
Tax Sales
Tax Deeds
Tax Forfeitures
Redemptions from sales for Taxes and Special Assessments
Proceedings of Probate Court, including Wills
- Orders Admitting Will to Probate
- Letters of Administration
- Letters Testamentary
- Guardianship, Orders of
- Orders of License to Sell or Mortgage
- Orders Confirming Sales
- Final Decrees
- Decrees of Descent
- Orders for Conveyances

Special Proceedings
Proceedings in the Matter of Insane or Incompetent Persons and Minors
Judgments
Transcription of Judgments
Mechanics' Liens
Material Liens
Sales Tax Liens
Income (State) Tax Liens
Old Age Assistance Liens
State Pension Liens
Liens of Drainage and Irrigation Districts
Bankruptcy Actions, Transcribed to County Records
Insolvency Proceedings
Debtor's Relief Petitions
Foreclosure Actions, beginning with Filing of Petition, including all intermediate steps taken in compliance with the statute, and including the Final Decree
Suits to Quiet Title Actions, including the Petition, all intermediate steps, and Final Decree
Suits Pending
Divorce Actions Involving Land
Superior Court Actions Involving Land, as references thereto appear in his searches in the Office of the Register of Deeds may disclose
Taxes:
- General Taxes—Due or Delinquent
- Special Assessments—Due or Delinquent —and including future installments not presently due.

An Abstract of Title, to be satisfactory to the prudent real estate operator and an attorney safeguarding the interests of his client, should begin with some undisputed source of title. In our Country, this ordinarily is the Patent or Grant from the United States, although it may be a grant from the state, or even some early basis of title recognized by the Sovereign. Illustrations of these are the so-called French Claims, of Michigan, recognized and accepted by the United States in its early days in compensation to the French for their assistance to our Country; the school lands of Texas, etc.

(Note: In some jurisdictions, all early title records have been destroyed. In such instances, an established beginning point is generally accepted by competent attorneys in the community. Illustration: The San Francisco earthquake and fire, the so-called 10,000 Acre Tract in Detroit following its great fire, the Chicago fire of 1871, etc.) In such instances, the abstract usually contains in its opening pages references to these disasters, consequent inability to furnish "early" title, and remedial legislation if any.

MAPS AND PLATS

A service of great value is rendered by the abstracter in including always more and still more and never less maps and plats. A well organized and well ordered abstract company will show a plat of the land, and maps thereof, beginning with the patent and carrying down into subdivisions of the original grants, including recorded plats and re-plats.

In some instances, his records will permit (and the requirements of the transaction will be such as to warrant the expense of hand drawn maps) that he show much in maps, as, for instance, a (1) map drawn to scale showing a metes and bounds description;

(2) showing rights of way over the land being abstracted;
(3) easements upon the lands;
(4) its boundaries defined by courses, dis-

tances and monuments, natural or otherwise;

(5) ownership and certain of the boundaries of adjoining lands;

(6) names of abutting streets, highways, etc.

DETAILED SHOWING OF INSTRUMENTS ABSTRACTED

It is not possible in this paper even to attempt to describe, state by state, the requirements of the Bar and the practices and customs of the area on the manner in which deeds and other conveyances, encumbrances, trust deeds and mortgages, and other material are abstracted. However, a brief and general statement on certain of these, being a reflection of the ordinary and usual transaction, may be in order:

Deeds and mortgages show the marital status of all grantors as shown by the public records, the date of execution, acknowledgement and recordation, together with the Liber (Book) and page in which recorded, description of the land, the type of instrument it is, and specific coverage of material contained in the body of the deed of exceptional or unusual character (not routine) as, for instance, assumption of mortgage, reversionary clauses, and restrictive covenants.

Mortgages, in the main, are shown in the same general style, plus, of course, references to the face amount of the mortgage, its terms, rate of interest, and due date.

If there be discrepancy between spellings or writings of names, as a difference in the manner in which it is typed, and signed, or as acknowledged, these are noted. Illustration: "James" in body, "Jas." in acknowledgement.

WILLS

Wills are shown in full, except as to personal property.

FORECLOSURES

The original petition, amended petition, if any, and the decree are shown in full.

SUITS TO QUIET TITLE

Likewise in these, the original petition and the decree are shown in full in an abstract.

As to the three items next above mentioned, these are shown in full by reason of the fact that it is the duty of the abstracter to give the salient points of instruments and entries taken from the public records to attorneys for legal determination by the latter. It is not the duty or the privilege of the abstracter per se to interpret the will. Hence, he transcribes it in full in his abstract.

LEGAL DESCRIPTIONS OF LAND

Descriptions in all abstracts are carefully checked to assure they conform to the description set forth in the caption, or starting sheet, of the abstract. Discrepancies in descriptions are noted by under-lining or by foot note—or both.

BREAKS IN TITLE

Frequently, where there is a "break" in title, reference to this point is made by a parenthetical reference to this fact. An illustration of "break" in title would be the instance of title being in Smith, according to a certain instrument, and the next conveyance is from Jones to Johnson, leaving open the question whether or not title went from Smith into Jones and if so, how.

POWERS OF ATTORNEY

A Power of Attorney sets forth the exact nature of the power, including limitations and restrictions.

THE ABSTRACTER'S CERTIFICATE

The abstracter closes his work with an instrument labeled "The Abstracter's Certificate." Upon his certificate he rests his case. It is his most important asset—and always his greatest liability.

It has been said by a distinguished authority that a qualified abstracter should possess these qualifications and assets:

Experience and training
Organization and Adequacy of records
A Good System of Abstracting Titles
Financial Responsibility
A good reputation in his community

The Certificates of the Abstracters vary in the respective states by reason of local terminology; the statutes of his state, the decisions of the Courts of his State, the requirements of the members of the Bar not only of his own community but also the requirements of attorneys of corporations and agencies located elsewhere; and, at all times, subject to local conditions, customs and practices.

If interested in determining exactly the form of Abstracter's Certificate used in the reader's community, it is suggested he make inquiry of any of his local abstracters, not only for a copy but also for an interpretation of the various clauses in said certificate.

In the main, the Abstracter's Certificate runs along the following general lines:

First, the Abstracter certifies as to his coverage. This reads substantially:

"The undersigned hereby certifies that the foregoing entries, numbered to , both inclusive, contain a true and correct abstract of title of all instruments filed for record or recorded in the office of the Register of Deeds of said County, including (Here follows an itemization of the types of instruments, encumbrances, releases, etc., for which search in the public records has been made.)

"The undersigned further certifies that this Abstract includes: (Then follow a statement of the other public offices, such as the

Probate Court, Chancery Court, etc., and, in some instances, a brief summary of the types of instruments or such recordings for which searches have been made in these public offices named.)

"The undersigned further certifies that examination of the records in the office of the Clerk of the Circuit Court (or Courts under other names in certain jurisdictions) and that there are no suits pending—other than noted herein—, no judgments, decrees, mechanic's liens, material liens, foreign executions or attachments filed therein, within the last . . . years which are liens on the title against:

(Then follow the names for which search in the miscellaneous records in the plant of the abstract office and/or in the public records have been made for these items.)

"The undersigned further certifies that the records in the Office of the . . . . . Treasurer (Here follows a listing of the tax offices in which searches for taxes have been made) have been searched and that, as of the date of this Certificate, there are no General Taxes now due except the following:

("Then follows an itemization of such taxes which are due or delinquent.)

"After this may come, as a separate paragraph, references to special assessments, including future installments."

THE ABSTRACTER'S CERTIFICATE

(Additional Searches)

It may become his duty, pursuant to special order from his customer, to make searches for liens of the United States against certain parties now holding title or who have previously held or been interested in title, in whole or in part. In such cases, the Abstracter covers these items in another paragraph in his standard certificate, or by a separate certificate.

Taxes frequently are covered by a separate Abstracter's Certificate.

THE LIABILITY OF THE ABSTRACTER

In its solicitation of business from the public, the abstract firm holds itself before the citizen as an enterprise possessing the requisite knowledge and skill to turn out such a type of abstract that he who relies upon such shall sustain no loss by reason of errors of commission or omission.

An error of commission would be, notwithstanding the coverage of the Abstracter's Certificate, to show material incorrectly in the abstract and thus cause loss to the taker of the abstract.

An error of omission would be, notwithstanding the coverage of the Abstracter's Certificate, to omit an item in the public records adversely affecting the title, which omission caused loss to the taker of the abstract.

The liability of the abstracter is legal. It is moral. He is under moral obligation to make a good abstract in the first instance, and to rectify mistakes within his power; and, under the statutes of his state and subject to the terms of his Certificate, to hold his customer harmless from loss.

We have said he has a moral as well as legal obligation. We make that statement because of a firm conviction that no abstracter will avoid liability on a strict technicality. Such a policy would redound against him in thus losing the confidence of the buying public.

THE ABSTRACTER'S CODE OF ETHICS

Most legitimate abstracters of the country have cheerfully subscribed to the Code of Ethics adopted by the American Title Association. It's high purposes are comparable to those of the Bar Association, the Real Estate Boards and like organizations.

CONFIDENTIAL RELATIONSHIP

The reputable abstracter ever keeps before his eyes the knowledge that a confidential relation exists between him and his customer; and also between him and the representative of his customer, such as the attorney, the real estate broker and the mortgage broker. The relationship is comparable to that which exists between an attorney and his client. No abstracter, honest in his own conscience, would use the knowledge he gains to speculate in real estate, directly or indirectly.

Naturally, the abstract firm handles private papers, and, in delving into real property transactions, gains considerable information on titles, particularly on their defects. The firm is held by its Code of Ethics, and, under some Court decisions, to a strict confidence in the exercise of its trust. For trust it is that the abstracter should be authorized to make an abstract of title upon a parcel of property shortly to be sold or mortgaged.

THE OBLIGATION OF THE ABSTRACTER

Counsel for one of the larger life insurance companies aptly describes this obligation:

"The first and most essential requisite in establishing that basis of mutual confidence and respect, so desirable between the abstracter and the examiner, is that the abstract show on its face and bear in each entry intrinsic evidence that it has been carefully prepared by one who knows what it ought to contain and where to find it and also knows when he has found it. The examiner wants to know that everything of record affecting the title is before him; he wants to know that every avenue of information has been explored; that each of the numerous side-

pockets, which the ingenuity of the legislatures of the different states has invented for the apparent purpose of complicating the record and increasing the labor of abstracters, has been looked into, and that every office where liens may lurk or court proceedings weave their webs of entanglement, has been carefully investigated."

THE ABSTRACTER'S LEGAL LIABILITY

The liability is a contract liability.

Under the statutes of his state, and subject to the terms of his Abstracter's Certificate, the abstracter is liable shall loss result to his customer. This is well established. It is not necessary to cite cases in support of this. There are many.

Abstracter's losses, in the main, fall into three general classifications.

The first probably is by reason of the human element. We are all human and prone to err. But all too frequently, when the abstracter errs, it is (for him) an expensive error.

1. The principal losses seem to occur in failure properly to note items of taxes, tax liens, special assessments, lis pendens notices and judgments. Here the loss is nearly always held the responsibility of the abstracter. However, accurately speaking, it is a divided responsibility. For the abstracter must rely upon the work of public officials, frequently new in office and unacquainted with the proper keeping of their books.

2. Through failure to show mortgages or deeds of trust, or failure to show the correct figures in these instruments, with loss resulting to the customer—and then to the abstracter.

3. Material which is frequently obscurely set forth in the body of recorded instruments.

The general rule on the matter of liability of an abstracter is that the Statute of Limitations covering contract actions shall apply, and it is ordinarily held that the statute begins to run from the time the abstract was furnished.

The Common Law rule is that the liability of the abstracter runs only to the person with whom he has contracted to furnish an abstract. Except where changed by statute of the state, or by liberalizing by the abstracter himself of the terms of his Abstracter's Certificate, the Common Law rule of Privity of Contract obtains.

It is believed by many abstracters this Common Law rule, or Privity of Contract, gradually will be abrogated, in large measure by the willingness and desire of the abstracter himself to furnish the ultimate of protection to the public investing in and handling real property.

It bears recording in this memorandum that a real estate transaction whose size warrants safeguards of all types should be protected by having the abstract re-certified or rechecked before the transaction is closed. The real estate operator will experience cases where, in handling a deal, he has to arrange that the abstract be brought to date. The old portion of the abstract may have been made by an individual or abstract firm perfectly competent to make abstracts. Nevertheless, assuming it was an individual abstracter who did the former work, and if by now he has been taken to that land "from which there is no return," this writer knows of no method by which anybody on this earth can invoke the statute against him. For his individual liability has now been ceased and determined. And, in passing, let us hope he is helping St. Peter keep the books of the Pearly Gates.

So it would be advisable that the prudent real estate operator arrange not only to have the old abstract brought to date, but also to have the contents theretofore shown re-checked and re-certified.

THE ABSTRACTER AND THE REAL ESTATE OPERATOR

Both have to do with land. It is to the advantage of both that there shall be united efforts to place and to keep more and more of our citizens in ownership of land. The owner of a home is poor material for the rantings of the demagogue in Union Square. Accordingly, it is to be desired that there shall always be the warmest type of cooperative enterprise between the two. Thus shall each do his part in building Free Enterprise in a Better America.

Certificates of Title

The Certificate of Title is a combination of the content material which is contained in an abstract of title, plus the equivalent of an attorney's interpretation of the contents of such abstract. The resultant Certificate gives the conclusions of that examination of title, but without showing the recorded evidences upon which it has been based. In some few areas, Ohio for one, this same form is entitled a Guarantee (Record) of Title.

The Certificate of Title should not be confused with the Abstracter's Certificate. The latter is a statement by the abstracter of the ground he has covered in showings of material recorded and/or filed in the public offices.

Nor should it be confused with the extremely short and abbreviated form of statement by the abstracter, showing the name of the grantee found in the last recorded deed in any given chain of title.

The Certificate of Title goes much further. It (1) contemplates the assemblage of the material ordinarily found in an abstract of title and (2) includes a study, examination and interpretation of those filings and recordings.

While its use as an evidence of title is somewhat restricted because of patent and latent weaknesses, and because of the public demand for other types, it has its advantages. To some extent, it brings about a standardization on questions on marketability of title. For in communities where the Certificate of Title is ordinarily used, it has been observed that, over the years, the opinion of the title company delivering its Certificate to the real estate investor tends to become the standard of marketability of title.

The Certificate of Title is not a Title Insurance or Title Guaranty policy. Rather it is a statement based completely and wholly upon the public records. On its face, in fact, it predicates its assumption of liability upon the public records. It does not go behind or beyond the recordings, as, for instance, in the matter of forged deeds or conveyances by minors, etc. It does not purport to warrant that the record reveals the truth. It is only a statement of the condition of the record title.

LIABILITY OF TITLE COMPANY UNDER CERTIFICATE OF TITLE

1. In his research, Charles C. White, for many years Chief Title Officer of a Cleveland (Ohio) title company, states a Certificate of Title is not a guarantee that the opinion is absolutely correct. It is his conclusion, to illustrate this point, that if, in a chain of title, there is a will admitting of more than one interpretation, the Courts probably would no more hold the title company responsible than it would an individual attorney who had examined the same chain of title.

2. The liability of the title company under a Certificate of Title is a contract liability. It is not a bond of indemnity.

3. Being a contract of employment, with Privity of Contract, the liability of the issuing title company is subject to the Statute of Limitations of the State. And the statute begins to run upon delivery of the Certificate.

4. In furnishing a Certificate of Title, the issuing company is liable for errors and omissions in substantially the same degree as an attorney for gross negligence in interpreting the facts—and always subject to the Statute of Limitations.

The maximum liability of the title company under a Certificate is usually shown on the face of said Certificate.

Title Insurance

Nomenclature

In this resume, the words "Title Insurance Policy," "Title Guaranty Policy," and "Guaranty Title Policy" are synonymous. They are all one and the same thing, being named differently in different communities. For purposes of this discussion, we shall call all of them a "Title Insurance Policy."

The application of the theory of insurance to titles to land is a natural step in the evolution of titles and handling thereof.

The Abstract of Title, coupled with the opinion on title of an attorney, no matter how skilled, necessarily must depend upon the record.

In a Certificate of Title, the issuing title company combines the functions of the abstracter and the attorney.

Title Insurance goes several steps further and combines the functions of the abstracter, the attorney, and insurer. It places an absolute guaranty behind the work of the title company. Title Insurance guarantees the genuineness of every recorded instrument.

The Supreme Court of Pennsylvania in Foehrenbach vs. German American Title and Trust Company, 217 Penna. State, page 331, defines title insurance in the following language:

> "The sole object of title insurance is to cover possibilities of loss through defects that may cloud or invalidate titles. It is for the assumption of whatever risk there may be, in such connection that the premium is paid to, and accepted by, the company which issues the policy. Title insurance is not mere guess work, nor is it a wager. It is based upon careful examination by skilled conveyancers. The quality of a title is a matter of opinion, as to which even men learned in the law of real estate may differ. A policy of title insurance means the opinion of the company which issues it as to the validity of the title, backed by an agreement to make that opinion good in case it should prove to be mistaken, and loss should result in consequence to the insured."

A Title Insurance policy recognizes the possibility of loss, but throws the risk of loss upon the company issuing it instead of upon the property owner. That, in fact, is the reason it maintains reserves. It is a contract of specific indemnity entered into by the insuring title company and the beneficiary.

TYPES OF POLICY

There are three types, one termed an Owner's or Fee Policy, one termed a Mortgagee or Loan Policy, and, third, a Leasehold policy.

THE AGREEMENT TO INSURE

While naturally there is a variation in the exact forms used in different sections of the country, the policy, on its face, contains an agreement to insure, sets the total amount of liability assumed, the name of the beneficiary, and the nature of the loss guaranteed against. *It may or it may not (varying with localities) insure against loss by reason of unmarketability of title. All insure against loss by reason of failure of title.* In some jurisdictions by reasons of great disasters, such as fire, a title policy form cannot insure against loss by reason of unmarketability for the simple reason that the destruction of the public records makes it impossible for any one to determine that the title ever was or was not marketable.

SCHEDULE A

Here are set forth the interests or estate of the insured. If it be an owner's form, it may contain references to the deed or other means by which the fee estate is vested in the insured. If the policy is a mortgagee form, there is reference to the mortgage or deed of trust representing the interest protected.

Schedule A also contains the legal description of the land.

SCHEDULE B

Exceptions and Objections

Here are set forth those items against which the Company does not, or cannot, insure. Certain of these are "stock" objections, as, for instance, "Rights of Parties in Possession." That is a matter for investigation and determination (in an Owner's Policy form) by the purchaser of the property or his agent; or, "Subject to Questions which an accurate survey will disclose." A title policy covers the legal title. It does not cover, nor can it attempt to cover, questions of sufficiency or insufficiency of ground. The purchaser or mortgagee can have this point covered by securing an engineer's survey of the property. If acceptable to the title insurance company in all respects, then this sentence can be deleted from the policy form.

CONDITIONS AND STIPULATIONS

Here are set forth Conditions and Stipulations under which and subject to which the Company issues its policy. In general, these may be summarized as follows:

Exercise of Eminent Domain by the United States Government or any of the divisions or subdivisions of the State Government.

Notification to the Company of claims made against title or litigation involving title.

Settlement of all such by the Insurer.

Warranties by the Insured.

Date of Origin of Loss. A title company cannot insure against defects and encumbrances which may be placed upon the property subsequent to the date of the policy. A title policy is not a promise of indemnity against something which may happen in the future but rather against already existing defects in the title to real property, the existence of which may not be discovered until at some future date. Or, stated another way, it puts the financial resources of the title company behind the Warranty of Title.

Payment of Loss—Right by the company to appeal to the higher Courts.

Subrogation.

Reduction of liability pro tanto by reason of payments of losses upon established claims.

Special Conditions and Reservations according to local searching conditions and the statutes of the state.

OWNER'S OR FEE POLICY

The Owner's or Fee Policy runs in favor of the owner or owners of the property according to the interest he or they have therein.

THE MORTGAGE POLICY

This form runs in favor of the lender against real property, according to the status of the lien of his mortgage or trust deed.

THE LEASE-HOLD POLICY

The lease-hold policy runs in favor of the lessee showing his interest in the property as a lease-hold interest.

PREMIUM CHARGE

Vary with the community, length of search, economic conditions and state statutes and decisions of the court of the State. There is no annual premium charge.

TITLE INSURANCE COVERAGE

Title insurance contemplates (1) the abstract of title or its equivalent through the minute or search sheet of the examiner of the public records, with all its manifold showings of recordings and filings affecting the title to be insured; (2) a careful and methodical examination by one skilled in the law of real property; (3) insurance to the beneficiary, or a bond of indemnity agreeing to save him from loss or damage, under the terms of the policy, by reason of failure of title (and, in numerous jurisdictions, by reason of unmarketability of title).

PROCEDURE

Material Covered

To avoid repetition of the types of recordings and filings of documents and instruments affecting title to real property, reference is hereby made to the tabulation of such items shown on pages 7 and 8.

All these are carefully assembled and studied by the examiner of the title insurance company.

In nearly all title companies, all objections to tile are set forth by the original examiner. Some, of minor character, are waived by him. Others, of more grave character, are considered by a senior officer of the legal division of the company. Obviously no title company can insure against known serious defects in title whether they appear of record or not. But there are many objections to title which, with reasonable safety, can be waived (or removed by the senior examiner.)

On objections to title of greater complexity, research work can be and is performed by the title company in an effort to arrive at a means to remove these from the company's Preliminary Report and policy.

Here the practices of the title insurance company over the years in having adhered to definite and fixed principles of interpretation on the point of marketability of title (and yet with due consideration of the statutes and court decisions) bear fruit.

CURATIVE MATERIAL

Obviously, with the passing of the years, the title company will accumulate an immense amount of data, of instruments—many not recorded—which go far toward the establishment of marketable titles. Most title companies have in their files, for instance, hundreds of affidavits with regard to the marital status of grantors in old conveyances; affidavits of identity, quitclaim deeds, and many other types of curative instruments. The responsible title company employs a staff of efficient employees in all its departments for the purpose of making thorough and exhaustive examinations of title and to best use the accumulated curative material.

The Superior Court, of the State of Washington, evidenced its feeling on the matter of determination of marketability (or unmarketability) of title in the case of Flood vs. Von Marcard, 102nd Washington, page 146.

Flood paid $500 down on a $10,000 deal. The seller claimed title was good. A prominent Washington title company declined to insure it. Flood demanded his money back. It was refused and he sued. The Superior Court held the title was not merchantable, or marketable. The Court stated:

> "That it was not such a title as a buyer would take in exercising ordinary prudence in the conduct of his affairs, which is sufficiently evidenced by the refusal of the title insurance company to guarantee it and the refusal of its General Counsel, whose learning and skill in the law cannot be questioned, to approve the title."

INSURANCE OF BAD TITLES

The answer is definitely, No. Manifestly, no title company will knowingly insure a title which is defective. No company deliberately buys a law suit.

However, as stated by Lloyd L. Axford, in his lifetime the dean of real property lawyers of Michigan, "He who submits a title for examination desires to buy. He requires no assistance to decline to purchase." The responsible title company seeks for ways and means to approve, not to decline, a title.

It thus becomes the duty as well as the privilege of the title company to have made a comprehensive legal examination of the title, to waive objections which are frivolous and inconsequential, but to require clearance of valid objections to title. As to the last named point, this may be done by the procurement of curative material, such as affidavits and quit-claim deeds; sometimes by a suit to quiet title, even sometimes by the passing of time and thus the extinguishment of a cloud upon title—as, for instance, the termination of a reciprocal easement through the death of the party in whose lifetime the easement remained in existence.

The procedure in the average title insurance company might otherwise be described in this fashion:

1. The original examination of the chain of title by a member of its legal staff.

2. Consideration by a senior officer of the department—perhaps at a staff conference—of all objections to title, and the waiving of various objections to title, based in large measure upon knowledge by the company of decisions of the court supporting the company's position.

3. As to any remaining objections to title, consideration by the senior officers of the company on the point of waiving or passing certain of these as a "business risk."

KNOWN AND VALID OBJECTIONS TO TITLE

A title insurance company, whether or not it insures against loss by reason of unmarketability of title, is not in the business of buying law suits. Hence, it must set up objections to title which, on their face, are dangerous, which make the title unmarketable.

There are, however, certain of these matters which can be eliminated from the preliminary title report and the policy. Among these, under certain conditions, to which careful study is given with a view to waiving, are:

Old, unsettled estates.

Lack of publication of notice by administrators and executors; nor formal election by widow or widower to take under the will;

Ancient mortgages, either uncancelled or improperly cancelled of record;

Imperfect, indefinite and ambiguous descriptions;

Tax titles, the vadility of which depend upon the regularity of the proceedings upon which they are based;

The regularity of judicial proceedings appearing in the chain of title;

The rights of children born after the execution of a will;

The question as to whether a will contains apt words to dispose of property acquired after its execution;

The validity of deeds executed under power of attorney.

As to any and all of these cited, and numerous others, there is no one statement which can be made applicable to the forty-eight states of the Union. In some, the title company might pass or waive certain of these; in others, it would be perilous to the reserve account of the insuring company and to its prestige and standing, and thus eventually perilous to its policy holders. Yet, in the main, title companies endeavor to waive these, or certain of these, as a business risk; or sometimes with an understanding there will be a suit to quiet title brought. Ordinarily, such decree will judicially determine the title to be vested in the present title holder without regard to these apparent outstanding interests in or claims upon or against the title. By insuring the title, the company has aided in the closing of still another real estate transaction.

Or, by means of the posting of indemnity, sometimes a bond, (surety bond), or cash, or securities satisfactory to it, the title company may be able to write its preliminary title report and policy free of these objections to title, the securities or their equivalent to be held by the title company until later clearances of these objections to title by the passage of time, by a suit to quiet title, or by the later delivery of curative material.

TITLES TEMPORARILY UNMARKETABLE

Items which make a title at least temporarily unmarketable are these:

Estates in the process of determination;

Pending suits for money;

Disputed mechanics' liens;

Titles in process of being quieted by suit.

Under certain circumstances—perhaps by the creation of an Escrow Agreement and the depositing of securities with the title company—the title policy can be written free of references to items such as are noted next above—and thus another real estate transaction is closed.

MARKETABILITY

Its Meaning

Insurance of title against loss by reason of unmarketability means in effect that the company has stated to the policy holder he has a title which any later buyer is bound to accept; that, failing such acceptance, the title company will respond in court costs and counsel fees to procure a judicial determination that the title IS marketable, or in money damages or otherwise in the event the court holds the title is NOT marketable.

In some of our cities and towns, the public records have been destroyed by fire or other disaster, carrying down with them all records on land titles. In such localities, it is not possible to PROVE good and marketable title from an examination of the public records, for there are no public records left to examine. Professor Henry W. Ballentine, in an article in 32 Harvard Law Review 135, says:

> "It is one thing to have the rightful ownership and just title to land; it is another thing to have the proof of that right which can be laid before a purchaser or before a jury. Suppose a landowner is ejected from his land and seeks to be reinstated. The deed under which plaintiff acquired title, without evidence of possession by the grantor of the premises conveyed, is not even prima facie proof of title such as to warrant recovery in ejectment. Nor is a connected chain of deeds, which does not reach back to the government or to some grantor in possession, sufficient, unless it reaches back to some common source of title, or to some source acknowledged to be genuine and valid, or unless there is some estoppel to deny title. The proof of a paper title sufficient to make out a prima facie right to possession of land may, therefore, be exceedingly difficult. It involves proving the signature and delivery of every deed; the corporate existence of every corporation in the chain of title; the execution of all powers of attorneys; all the statutory notices and formalities in execution, tax and probate sales; all the descents and probate proceedings; in short, every legal step of the transfer of the title, voluntary and involuntary, simple and complex, from a recognized source down must be shown by proper evidence."

Or, quoting another authority:

> "A title is marketable if it is a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept." 39 Cyc. 1456.

However, in many jurisdictions of the country, the title insurance company policy insures against loss by reason of failure and unmarketability. Marketability of title is a question on which those learned in the law have differed over the years and will continue to differ. Nor are the courts of the several states in any great harmony. We cite a few instances, for the research work on which we are indebted to Stewart O'Melveny,

President of a Los Angeles title company and a distinguished member of the California bar:

> A title subject to the condition that no mill, factory, brewery or distillery shall be erected on the land is not marketable. Batley v. Foerderer, 162 Pa. 460.
>
> A title is not marketable where it is subject to an easement. McPherson v. Schade 149 N.Y. 16.
>
> If the land is encumbered with the right of a railroad company to pass over it and across it for the purpose of prosecting and mining minerals, other than coal, such title is not marketable. Adams v. Henderson 168 U.S. 573.

COSTS OF LITIGATION

As a general proposition, it may be stated that monies paid by the title companies covering claims involving the question of marketability do not run into tremendous figures, that is, insofar as indemnification to the insured be concerned. But the costs of prosecution of litigation, sometimes in defense of title, sometimes in a suit for specific performance of contract, are heavy. Counsel fees and court costs, when cases are carried to the superior courts, dig heavily into the reserves of the company.

But, on questions of marketability, most companies prefer to assume these expenses and to carry the cases to the higher courts in order to secure judicial determinations on the marketability points involved.

It thus will be readily seen that, on questions involving marketability of title, there are pitfalls, many of them, into which the unwary may fall. And the prudent investor is desirous of title protection for the same reason he should carry his own life, fire, accident and automobile insurance.

It is true that ordinarily, title do not fail. But it is slight or no comfort to him who does have a title loss to be told that 800 others escaped with no loss.

UNKNOWN DANGERS COVERED BY TITLE INSURANCE

We have seen that title insurance embraces a compilation of the recordings and filings against the title, a careful interpretation of these by one skilled in the law of real property, and insurance. But title insurance goes further. There are many things beyond and behind the record which adversely may affect the title, which may destroy, in whole or in part, the title; many things which, like Banquo's ghost, may rise to haunt the unhappy title holder—and secondarily haunt the real estate operator who caused him to purchase that title.

Title may be perfect "of record," and yet fail, this by reason of hazards which are termed Unknown Dangers. Against these perils, beyond the public records, and wholly beyond the capacity of the examiner to detect, the title insurance policy furnishes coverage. In point of fact, there is no way except through the medium of insurance that coverage against these unknown dangers could be procured. Hence, there is full warrant under the law of economics that the theory of insurance should thus apply to land titles.

Among these unknown hazards and perils, against which the holder of a title policy is protected, are these:

Forged Deeds;

Enumerated Frauds in General;

False Personations;

Wrong Identity of Persons;

Want of Legal Delivery—instruments improperly or prematurely delivered:

Copyists' and Recorders' Errors;

Wills void as to afterborn child or pretermitted heir;

Decrees and judgments void for want of jurisdiction;

Invalidity of mortgage or other liens, charges or encumbrances by reason of violation of usury laws;

Title or priority of mortgages or other liens, charges or encumbrances as affected by Mechanics' Lien Law;

Identity of Persons;

False Affidavits;

Undiscovered Heirs;

Unknown parties may be interested in the property;

Secret Marriages;

Inchoate Dower;

Flaws in Probate Proceedings—Fraudulent or Defective Probating of Estates;

Old Tax Titles outstanding;

Unheralded Divorces;

Deeds given by Minors;

Deeds by parties under disability to own real property by reason of alien birth and descent from certain Asiatic races;

Mechanics' Liens;

Powers of Attorney which have expired by reason of death of the principal;

Liability for Inheritance Taxes;

Claims of the Rightful Owner where an instrument in the chain of title was delivered by one impersonating the true owner.

Deeds given by persons under disability or wanting in mental capacity to contract, either from degrees of insanity, old age, or extreme intoxication where the grantee has taken an unfair advantage of his condition;

And, for all practical purposes, any other matter or fact not disclosed by the public records, which in law or equity would render void or invalid any transfer of title, proceeding or encumbrance in the chain of record

title, recording and registration acts and the law of constructive notice notwithstanding.

Title Insurance guarantees the genuineness of every recorded instrument.

TITLE INSURANCE AND THE ATTORNEY

A word or two on this is not amiss. It would be well that the purchaser of realty and his real estate agent favorably accept this injunction to use the services of an attorney informed on real property law. He can have much to do for his client in inspection of the preliminary title report, on curative material called for, on the final policy, as to form, and as to stock conditions and exceptions; and as to unusual conditions needed to be inserted; and finally to see that the transaction is closed properly and with safety to his client.

The Torrens System of Registration of Titles of Land

The writer of these chapters has been informed this is not a medium for academic discussion; rather that it is to be a manual in the hope it will be of practical help, and ready reference, to the reader. Since but a small fraction of 1 percent of the real estate transactions of the United States are evidenced under the system described hereinbelow, and since this system is in operation in only a few isolated spots of the country, the writer has reduced his discussion to a minimum.

The Recording System and the processes of evidencing titles by abstracts of title and by title insurance and title guaranty policies, heretofore discussed, are strictly American in their origination and development.

The other system of making a public record, the so-called Torrens System, was named after an Australian officer. About 75 years ago, he applied the idea of registration from the Shipping Acts to the registration of real property in Australia.

Beginning about the turn of the present century, some 18 or 19 states created a Torrens Law. Some half dozen of these have since repealed the statute. It is non-functioning in practically all of the states.

The theory of registration of title is a court action, contemplating a tremendous number of steps, ranging from the filing of the petition, the assemblage of the title in great detail, notices by advertising and otherwise, posting of and upon the property, service upon all parties having interest in the title affected, and a trial, or judicial determination of the issues.

The Torrens Statutes of most of the states have been drawn with extreme exactitude. There must be meticulous compliance with each provision of the statute in order to assure the issuance of the Torrens Certificate in the form desired by the applicant. In this requirement that there be strict compliance with the provisions of the act, it is not unlike an action to foreclose a mortgage or an action to establish good title through the vehicle of a tax deed.

When issued, the Torrens certificate is inconclusive in that it is binding only upon those made parties and served. Upon a transfer of the registered title, mortgagees, contractors, material and other lienors may lose their lien if, by reason of error, fraud or collusion, they should be omitted from the new certificate. In fact, insofar as transfer of title to an innocent taker for value be concerned, there may be actual forgery in a deed and yet the holder of a reissued Torrens certificate holds the title. This is repugnant to American ideas and ideals.

Eliason, the legal owner of a certain parcel, made a land contract to sell to Kennedy. Eliason decided to sell his equity and interested one Napleton in it. Napleton forged an assignment of the contract to himself and forged a deed from Eliason to himself. He then secured a new Torrens certificate, based upon the old certificate which Eliason had entrusted to him and upon the forged assignment and deed. Napleton then sold the property to Wilborn, who subsequently registered the title in his name.

Discovering what had happened, Eliason brought suit to cancel the forged assignment and deed, but the Court held he had lost his title. Eliason v. Wilborn—281 U.S. 457.

TORRENS ASSURANCE FUND

Under the Torrens Title theory, there is created a so-called Assurance Fund consisting of payments made into the fund at the time the registration of title takes place. One might describe it as a premium charge, being a percent of the valuation of the property.

RECOUPMENT OF LOSS

Practically all the Torrens statutes require that, before a claim may be recovered from the Fund, the property owner must exhaust (and at his own expense) all legal remedies against all persons who may be legally liable for the loss suffered.

Recovery from the Fund itself must be by legal action against the Fund, and there must be a final judgment against the Fund (or the County or the State in isolated instances) before the property owner is entitled to indemnity—this by reason of the fact that it probably is necessary he have the highest court in the state construe

the act and whether, in his particular case, he is entitled to indemnity.

Its repeal in some of the states and the fact that it is a dead letter law in others may be traced to several factors. To mention a few, the established systems are satisfactorily protecting the investor. The public always will seek improvements in any established systems. Yet the public has indicated clearly it does not favor substituting our present established systems with a public registration system.

Land is not as liquid as stock and never will be. Under the Recording System, land is transferred by deed. The deed may even be lost. But if he has had it recorded, the owner cannot be divested of his recorded title.

Buying Real Estate

1. Record the deed promptly. Put your return address on it.
2. Don't rely on tax deeds or tax receipts for correct descriptions. Consult the abstract and title company.
3. Names of grantors and grantees should always be written in full, and legibly.
4. Remember: A warranty deed does not correct a bad title; it does not cure defects or mistakes in former deeds.
5. Possession for fifteen years does not in itself make a title good; there are many circumstances against which possession does not operate.
6. Descriptions of irregularly described tracts should refer to some recorded corner for a beginning.
7. Don't pay over the consideration until you have secured an evidence of title satisfactory to your attorney and until it has been approved.
8. When tendered an abstract of title, assure yourself it is complete to source of title or some well established unquestioned basis of title, and that it has been made by an individual or firm whose competence and financial responsibility are well established.
9. Have that abstract examined by a competent attorney. Rely on him. Follow his counsel.
10. Or have the title insured by a responsible title insurance/title guaranty company.
11. Title to land does not pass until the deed is delivered and accepted. These steps must be taken during the life time of the parties.
12. A deed from the Court is no better than any other deed. Purchasers at judicial sales must assure themselves the title is good.
13. Inquiry should be made of any and all parties in possession. Assure yourself of their interest. One in possession may have rights which the records do not disclose.
14. Have a careful check made of taxes, in cluding special assessments both presently due and due in future installments.

When You Buy Real Estate

The United States Department of Commerce, in its pamphlet "Home Ownership" lists factors to be considered by the real estate investor and his agent. They are worth reproducing as a memorandum to the painstaking realty operator desirous of serving his client:

A. General Location:
   1. Low or high land values.
   2. Transportation facilities:
      a. To place of work,
      b. To shopping centers.
   3. Protection offered to home:
      a. Private restrictions;
      b. Zoning ordinances and city planning;
      c. Fire and police protection.

B. Specific location of lot:
   1. Character of neighborhood.
   2. Location with reference to schools and playgrounds for children.
   3. Desirable points for the lot:
      a. Shade trees, shrub and planting;
      b. Set of house with reference to sunlight and prevailing winds;
      c. Character of soil and necessity for grading, filling or draining.

C. Other Safeguards:
   1. Danger in buying a lot too long before building.
   2. Extent of street and public utility improvements (paving, sidewalks, water supply, sewerage, electricity, gas.)
   3. Possible assessments.
   4. Proportion of lot value to total outlay.
   5. Checking property values:
      a. Land and (b) house.
   6. Plan of house and quality of construction.
   7. Steps taken in buying.
   8. Last, but not least (in fact, most important) examination of title.

Nomenclature

Legal Definitions

To William B. Clarke, President, Custer Abstract Company, Miles City, Montana, we are indebted to his research work in Black's Law Dictionary and furnishing the following definitions on terms ordinarily used in real property law transactions:

APPURTENANCE

That which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land; an out-house, barn, garden, or orchard, to a house or messauge.

BARGAIN

A mutual undertaking, contract, or agreement. A contract or agreement between two parties, the one to sell goods or lands, and the other to buy them.

CONFIRM

To complete or establish that which was imperfect or uncertain; to ratify what has been done without authority or insufficiently.

CONVEY

To pass or transmit the title to property from one to another; to transfer property by deed or instrument under seal.

COVENANT

In the law of contracts. An agreement, convention or promise of two or more parties, by deed in writing, signed, sealed and delivered, by which either of the parties pledges himself to the other that something is either done or shall be done, or stipulates for the truth of certain facts.

An agreement between two or more parties, reduced to writing and executed by a sealing and delivery thereof, whereby some of the parties named therein engage, or one of them engages, with the other, or others, or some of them, therein also named, that some act hath or hath not already been done, or for the performance or nonperformance of some specified duty.

Express or implied; the former being those which are created by the express words of the parties to the deed declaratory of their intention, while implied covenants are those which are inferred by the law from certain words in a deed which imply (though they do not express) them. Express covenants are also called covenants "in deed" as distinguished from covenants "in law."

DEDICATE

To appropriate and set apart one's private property to some public use; as to make a private way public by acts evincing an intention to do so.

DEFEND

In covenants of warranty in deeds, it means to protect, to maintain or keep secure, to guaranty, to agree to indemnify.

DEMISE

In conveyancing. A conveyance of an estate to another for life, for years, or at will; most commonly for years; a lease.

DISTURBANCE

A wrong done to an incorporeal hereditament by hindering or disquieting the owner in the enjoyment of it.

ENCUMBRANCE

Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee.

A claim, lien, charge, or liability attached to and binding real property; as, a mortgage, judgment-lien, attachment, right of dower, right of way or other easement, unpaid water rent, lease, unpaid taxes or special assessment.

ESTATE

The interest which any one has in land, or in any other subject of property.

EVICTION

Dispossession by process of law; the act of depriving a person of the possession of lands which he has held, in pursuance of the judgment of a court.

FEE-SIMPLE

An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate.

GIVE

To transfer or yield to, or bestow upon, another. One of the operative words in deeds of conveyance of real property, importing at common law, a warranty or covenant for quiet enjoyment during the lifetime of the grantor.

GRANT

A generic term applicable to all transfers of real property.

A technical term made use of in deeds of conveyance of land to import a transfer.

HEREDITAMENTS

Things capable of being inherited, be it corporeal, or incorporeal, real, personal, or mixed, and including not only lands and everything thereon, but also heir-looms, and certain furniture which, by custom, may descend to the heir together with the land.

The term includes a few rights unconnected with land, but it is generally used as the widest expression for real property of all kinds and is therefore employed in conveyances after the words "lands" and "Tenements" to include everything of the nature of realty which they do not cover.

HOMESTEAD

The home place, the place where the home is. It is the home, the house and the adjoining land, where the head of the family dwells; the home farm. The fixed residence of the head of a family, with the land and buildings surrounding the main house.

Technically, however, and under the modern homestead laws, a homestead is an artificial estate in land, devised to protect the possession and enjoyment of the owner against the claims of his creditors, by withdrawing the property from execution and forced sale, so long as the land is occupied as a home.

INDENTURE

A deed to which two or more persons are parties, and in which these enter into reciprocal and corresponding grants or obligations toward each other; whereas a deed-poll is properly one in which only the party making it executes it, or binds himself by it as a deed, though the grantors or grantees therein may be several in number.

INTEREST

In property. The most general term that can be employed to denote a property in lands or chattels. In its application to lands or things real, it is frequently used in connection with the terms "estate," "right," and "title," and, according to Lord Coke, it properly includes them all.

LEASE

A conveyance of lands or tenements to a person for life, for a term of years, or at will, in consideration of a return of rent or some other recompense.

LET

In conveyancing. To demise or lease. "To let and set" is an old expression.

MORTGAGE

An estate created by a conveyance absolute in its form but intended to secure the performance of some act, such as the payment of money, and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyances.

PROFITS

The benefit, advantage, or pecuniary gain accruing to the owner or occupant of land from its actual use; as in the familiar phrase "rents, issues, and profits," or in the expression "mesne profits."

QUITCLAIM

In conveyancing. To release or relinquish a claim; to execute a deed of quitclaim.

RELEASE

The relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced.

REMAINDER

The remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgement of it.

REMISE

To remit or give up. A formal word in deeds of release and quitclaim; the usual phrase being "remise, release, and forever quitclaim."

RENT

The compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof.

REVERSIONS

In real property law. A reversion is the residue of an estate left by operation of law in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

RIGHT

The word devotes an interest or title in an object of property; a just and legal claim to hold, use, or enjoy it or to convey or donate it, as he may please.

SEISIN

Possession with an intent on the part of him who holds it to claim a freehold interest.

SELL

To dispose of by sale.

TENEMENT

This term, in its vulgar acceptances, is only applied to houses and other buildings, but in its original proper, and legal sense it signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal, kind.

"Tenement" is a word of greated extent than "land," including not only land, but rents, commons, and several other rights and interests issuing out of or concerning land.

TITLE

In real property law. Title is the means whereby the owner of lands has the just possession of his property.

Title is the means whereby a person's right to property is established.

WARRANT

In conveyancing. To assure the title to the property sold, by an express covenant to that effect in the deed of conveyance. To stipulate by an express covenant that the title of a grantee shall be good, and his possession undisturbed.

In contracts. To engage or promise that a certain fact or state of facts, in relation to the subject matter, is, or shall be, as it is represented to be.

(It may be that some of these words are defined differently by our statutes. If anyone is in doubt, it would be well to refer to the statutes.)

OUR THANKS

For much of the material in this resume we are indebted to skilled title lawyers and others from whose writings we have frequently quoted. To these gentlemen and/or to their memory (as to those who have been gathered to their Fathers), we express our appreciation. Among these are Charles C. White of Ohio, Lloyd L. Axford of Michigan, Stuart O'Melveny of California, Dr. Daniel D. Gage, Jr., of California, W. B. Clarke of Montana, V. E. Phillips of Missouri, T. W. Haymond of California, E. J. Stason of Iowa, Hight-Eidson Title Company of Missouri, and Judge J. C. Ruppenthal of Kansas.