TITLE NEWS

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Proceedings of 1951 Convention

(Part Two)

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Volume XXXI March, 1952 Number 2

In Volume XXXI, No. 1, March, 1952, we carried all addresses delivered at the 1951 Convention of American Title Association in General Sessions, and a portion of those used in the meetings of the Title Insurance, National Title Underwriters and Legal Sections.

In this issue are carried the remainder of the excellent papers delivered in the joint sessions named above, and in the Abstracters Section. — Ed.

TITLE INSURANCE – LEGAL

Proceedings in Meetings of Title Insurance, National Title Underwriters and Legal Sections—Joint Sessions

(Continued from Vol. XXXI, No. 1)

Title Insurance Upon Contractual and Leasehold Interests

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Let us first consider the matter of title insurance upon the interest in real property acquired by the purchaser under a contract of sale wherein A, owner of Blackacre, agrees to sell Blackacre to B for a specified purchase price payable in installments over a period of time and to execute a sufficient conveyance to B upon full performance of the contract. Such contracts are referred to variously as "contracts of sale," "contracts of sale and purchase," "agreements for purchase and sale," "installment sales contracts," or "agreements to convey." Certain legal incidents of contracts of this nature should be considered in determining the insurability of contract interests. These incidents, according to the general rules followed in most jurisdictions, are as follows:

Equitable Title

(1) The contract passes to the purchaser the equitable ownership of the land, leaving the naked legal title in the seller for the purpose of securing the payments due and other obligations of the purchaser under the contract.

Purchaser May Sell

(2) The purchaser's interest (ie., the equitable title) may be conveyed by him either by an assignment of

the contract or by a conveyance of the land. If the contract contains a covenant against assignment without the vendor's consent, the assignment still is valid as between the parties; the vendor may treat the assignment without consent as a breach of the contract or he may either expressly or by conduct waive the benefit of the covenant.

Purchaser May Mortgage

(3) The purchaser may mortgage or otherwise encumber his contract interest as an interest in real property. A mortgage on the land executed by the purchaser is a sufficient security instrument without need for an assignment of the contract.

Subject to Liens

(4) The extent to which the purchaser's interest is subject to money judgments, attachment, or execution depends upon the statutes in each state. In California, a judgment is not a lien on the purchaser's interest. In any state, it may be assumed, such interest would be subject to federal tax liens.

Vendor May Sell

(5) The seller or vendor may likewise convey the land which is the subject of the contract of sale, and such conveyance passes all of the vendor's rights, which include the legal title to the land and the right to receive the unpaid purchase money. The vendor may also assign only the vendor's interest under the contract, retaining in himself the legal title to the land, in which case the assignee of the vendor's interest collects the future installments of the purchase price, but when the contract is performed the original vendor who retained legal title must convey title to the purchaser.

Vendor May Mortgage

(6) The vendor (seller) may also mortgage or otherwise create liens on his interest. A deed of trust, for instance, executed by the vendor on the land which is the subject of the contract operates to transfer as security the vendor's legal title and right to receive payments under the contract. Occasionally we find in California that one making a loan on the security of the vendor's interest will take only an assignment of the vendor's interest under the contract as collateral security to be foreclosed as a pledge, thus treating the vendor's interest as personal property only (a chose in action). This view of the vendor's interest disregards the fact that the vendor has the legal title. It is submitted that the proper procedure for encumbering the vendor's interest would contemplate a mortgage or deed of trust (where allowed in the particular state) on the land, supplemented by an assignment of the vendor's contract interest for the purpose of enabling the lender to collect payments due under the contract and apply such payments on the mortgage indebtedness.

Subject of Leins

(7) As to involuntary liens (e.g., a money judgment) against the vendor's interest, here again state law controls. In California, a money judgment, abstract of which has been recorded, is a lien on the legal title and rights of the vendor. Upon execution sale under the judgment, an execution purchaser with notice of the contract stands in the place of the original vendor, subject, of course, to the obligation to convey title to the vendee upon full performance of the contract.

In connection with such money judgments against the vendor, what would you do in this case? The events, in chronological order, occur as follows:

Contract of sale executed and recorded.

Judgment for money against vendor.

Vendee completes payments under contract to vendor and receives deed in fulfillment of the contract.

Vendee asks that his title be insured free of the judgment against the vendor, contending that the conveyance related back to the execution of the contract and passed title clear of any intervening liens.

With Knowledge

We refused to ignore the judgment, relying upon a well reasoned Oregon decision (May vs. Emerson, 96 Pac.

454) to the effect that payments made by the purchaser to the vendor with actual knowledge of the judgment against the vendor were at the purchaser's peril and in such case the creditor's lien binds the land to the extent of the unpaid purchase money.

Entitled to Deed

(8) When the purchaser has fulfilled his obligations, he is entitled to a conveyance sufficient to pass the title free from encumbrances other than those specified in the contract. In the absence of any provision for title, there is an implied condition that the title must be marketable. Most contracts, of course, contain stipulations as to the condition and proof of title. In California, the usual contract form utilized, one printed by the real estate association, calls for the vendor to furnish a policy of title insurance showing title in him subject only to encumbrances specified in the contract; however, and this is significant, there is no provision obligating the seller to produce any evidence of title when the contract is executed.

Breach of Contract

(9) Upon a purchaser's breach of the contract of sale, the vendor has his election to pursue one of a number of legal remedies given by law (e.g., specific performance, stand on the contract and sue for damages, quiet title) or he may elect to declare a forfeiture of the purchaser's interest. Forfeitures are usually covered by contract provisions for notice of intention to forfeit and a declaration of forfeiture if the purchaser fails to remedy the breach after a prescribed period. This aspect of contracts is outside the scope of our subject and will not be considered further; however, you may be interested to know that our Supreme Court in California has recently seemingly repudiated a line of earlier decisions by holding forfeiture would not be decreed when it was not equitable to do so, regardless of the fact of an actual breach of the contract In the case referred to, the vendee made a payment by a check which was returned because of insufficient funds. The court apparently assumed that the vendee's unfamiliarity with the condition of his bank account was just an innocent mistake which would not justify forfeiture This decision has fortified the position of those title insurers in California who will not ignore a contract of record on the basis of forfeiture unless title is cleared by an appropriate relinquishment or judicial proceedings (e.g., quiet title decree).

Insuring Contractual Interests

With these preliminary observations, we come now to the question of title insurance upon such contractual interest. Suppose, for example, a contract sufficient in form and execution appears of record, the purchaser is transferring his equitable ownership by a sufficient deed or assignment, and the new purchaser requests title insurance upon the contract interest he is acquiring.

We will concede that this equitable interest of the purchaser is a proper subject of title insurance. Our main concern is as to the form of the policy and the exception to be shown.

At this point, I shall make what may seem to you to be an extraordinary confession. It is this: In California we have at present no form of title policy expressly designed to insure the purchaser under contract nor have we attempted to adapt standard forms to give such insurance. However, title insurance upon transfers of a purchaser's interest is rarely asked for.

Let me describe briefly the circumstances which give rise to this situation. Some twenty-five years ago a substantial volume of title transfers were made under contracts of sale. A subdivider would convey his entire tract to a corporate trustee by a deed absolute in form but actually under a trust not disclosed of record. The subdivider would then find purchasers for the unimproved lots; a contract of sale was executed by the trustee and the purchaser; the contract was not recorded; the purchaser was given a standard form policy issued for his benefit showing title vested in the corporate trustee; payments on the contract were made to the trustee; when the contract was fulfilled, the purchaser was given a deed from the

trustee and could, if he wished, obtain a policy, at his expense, showing title in his name. If, prior to performance of the contract, the purchaser wished to assign his contract interest, an assignment would be executed and deposited with the trustee but not recorded; and, so far as I am aware, it was never the practice to obtain a tile report to see whether there were liens or encumbrances suffered or created by the purchaser making the assignment, though it would seem that such information would be important to the new purchaser. If a purchaser defaulted under a contract, his interest was forfeited by notice pursuant to the terms of the contract, but no notice of such forfeiture was recorded. You can see how desirable this arrangement was to the subdivider; only rarely did evidence of the contract get of record; record title was maintained in a marketable condition.

This method of selling land is seldom seen in California today. In modern subdivisions, the tract owner is a speculative builder who obtains construction loans, constructs improvements, and conveys fee title by deed, subject to the existing mortgage or deed of trust.

Deed and Mortgage Back

You might ask "How about individual owners who sell land—is it not the custom, especially where the down payment is small, to sell on contract?" The answer is that, subject to some exceptions, title transfers on credit are effected by a deed of the fee title and the taking back by the seller of a purchase money deed of trust. I would estimate that, selecting at random 1,000 title transfers in Los Angeles County, not more than five of such transactions would involve an installment contract of sale or an assignment of a contract interest.

With this understanding of local conditions in California, you can appreciate readily why title insurers in that state have not heretofore attempted to devise any special form of title policy which would provide proper protection for contract purchasers who, as stated, appear in only ½ of 1% of title transactions. This does not mean, of course, that no title services are available for such purchasers under contract; a purchaser could gain reasonable assurance of the vendor's title by obtaining a letter title report or, better still, a policy issued for the purchaser's benefit showing the vendor's title. Or, the assignee of a contract interest could order a title report or policy and, upon his request, the name of the assignor could be run for federal tax liens, competency, and like matters not shown by the property accounts.

New Form

In the last thirty days, however, a situation arose which suggested to title insurers in California the desirability of drafting either a new policy form or expanding present forms by indorsement to meet the needs of purchasers of contract interests. In California we have a state agency, the Department of Veterans' Affairs, which is authorized to purchase homes and farms, within designated value limitations, and sell the property to veterans under a contract of sale. When the department acquires the fee title, it obtains a policy insuring title in the department; the contract to sell to the veteran is usually recorded after issuance of the policy. Thereafter, suppose the purchaser desired to assign his contract interest to a new veteran purchaser who was acceptable to the department. An attorney for the department wrote to the California Land Title Association pointing out that the department desired to protect the new purchaser against possible encumbrances upon the assignor's interest by securing some form of title insurance—what was available?

The Standard Forms Committee of the C.L.T.A. is presently considering ways of giving the title coverage requested. Several suggestions have been made which may be of interest to you:

Method

First, issue a Standard Coverage Owner's policy for the benefit of the department and the new contract purchaser, vesting title in the department and showing the contract and assignment thereof in Schedule B.

Then, add an indorsement to the policy insuring against loss by reason of (1) any defect in the execution of the contract or assignment of contract shown in Schedule B, (2) any defect in, or lien or encumbrance on, the equitable title created by the contract.

Second, issue the Standard Coverage Owner's policy for the benefit of the department and the new purchaser, showing title vested in the department as to the legal title and in the new purchaser as to the equitable title; show in Schedule B the terms, covenants, and provisions of the contract and the effect of any failure to comply therewith.

These are just tentative proposals; our thoughts on the matter are not wholly clarified.

Cumbersome

Before leaving this subject of contracts, I wish to make one further comment. In my opinion, the installment real estate contract is a cumbersome and hazardous mechanism for effecting title transfers, at least under the law and practice in California, and it is wholly unnecessary in view of the simple alternative of a deed and purchase money mortgage or deed of trust. There is no conceivable advantage in such contract method to the purchaser and there are numerous disadvantages which he suffers; for example: (1) The interest of a contract purchaser is not readily salable or marketable; the contract may restrict against assignments without the vendor's consent; an assignment for a consideration greater than the original contract price may require the use of a subcontract, awkward and dangerous; the purchaser's interest, being subject to forfeiture for breach, is not an attractive security to lenders. (2) The possibility that the purchaser who completes his payments may get no title at all, or a title subject to defects and encumbrances not contemplated. Even if the purchaser is sufficiently prudent to obtain title insurance before entering into the contract, he has no assurance that he will be able to acquire good title upon completion of the contract without involved court proceedings, e.g., the vendor may be incompetent, missing, deceased, bankrupt; or there may be federal tax liens or other liens against the vendor which, though created after execution of the contract, must be cleared.

Leaseholds

This brings us to the second phase of our subject: Title insurance on leasehold interests. In this field we find that title insurance processes and coverage are fairly well developed. In California we have three types of leasehold coverage:

Leasehold Form

(1) C.L.T.A. Standard Coverage Leasehold Policy Form, which is issued for the benefit of the lessee or the mortgagee under a mortgage or deed of trust on a leasehold, or both, and insures any kind of valid lease other than an oil lease; (2) C.L.T.A. Leasehold Policy—A.T.A. Coverage, which policy, as the name indicates, gives a lender on the security of a leasehold the same coverage provided in the American Title Association Loan Policy—Additional Coverage; (3) C.L.T.A. Oil Leasehold Form, designed for insurance of rights under oil leases. In addition, there are various indorsements under which the coverage of these policies can be expanded as required.

The title processes involved in the issuance of leasehold policies can be illustrated by considering two hypothetical cases, one concerning a commercial lease, the other an oil lease.

Illustration

Suppose that the fee owner of a store building enters into a lease with a corporate lessee in which he demises the property for a term of fifty years for the rental and upon the terms and conditions specified in the lease. The lessee executes a mortgage or deed of trust upon the leasehold estate in favor of an institutional lender as security for a loan. The title insurer is requested to issue a C.L.T.A. Standard Coverage Leasehold Policy for the benefit of the lessee and lender. The title search is completed, examined, and title found to vest in the lessor subject only to matters acceptable to the in-

sured. The lease is then examined as to execution and validity. The essentials of a lease are found to be present: Names of contracting parties, operative words of transfer, sufficient description of premises leased, and agreement for rental to be paid at particular times during a term which is specified. The term of 50 years is within the 99-year period allowed by statute for leases on town and city lots. The mortgage or deed of trust which describes the leasehold interest of the lessee is likewise examined and found sufficient. It may be noted here that the leasehold, although for a fixed term of years and hence a chattel real, is an interest in real property, so that the leasehold can be encumbered in the same manner and by the same form of security instrument as for a fee interest.

Parenthetically, it may be noted that there is a growing practice in California to record only a skeleton or short form lease which contains the essentials of a valid lease (i.e., parties, operative words of leasing, description, and term), but refers to the provisions of an unrecorded instrument between the parties of specified date for further particulars as to rents, etc. We regard such skeleton leases as sufficient to create a leasehold, though usually the unrecorded instrument is also examined.

Terms of Policy

Let us now consider the terms of the policy which is issued after recording of the papers. It should be observed at this point that the title examination for issuance of the C.L.T.A. Standard Coverage Leasehold policy does not include a survey or inspection of the land or inquiry of parties in possession. By affirmative insurance provisions on the first page of the policy, the company insures the lessee against any loss which the insured shall sustain by reason of:

"1. Title to the leasehold described in Schedule A being vested, at the date hereof, otherwise than as herein stated; or

2. Any defect in, or lien or encumbrance on, the title to said leasehold existing at the date hereof, not shown or referred to in Schedule B; or

3. Priority, at the date hereof, over said leasehold, of any lien or encumbrance upon the land described in Schedule A, except as shown or referred to in Schedule B; or

4. Unmarketability, at the date of recordation of the lease described in Schedule A, of the title of the lessor to said land, unless such unmarketability exists because of defects, liens, encumbrances, or other matters shown or referred to in Schedule B; or

5. Any defect in the execution of any mortgage or deed of trust shown in Part Two of Schedule B securing an indebtedness, the owner of which is insured by this policy, but only insofar as such defect affects the lien or charge of such mortgage or deed of trust upon said leasehold; or

6. Priority, at the date hereof, over any such mortgage or deed of trust, of any lien or encumbrance upon said leasehold, except as shown or referred to in Schedule B, such mortgage or deed of trust being shown in order of its priority in Part Two of Schedule B;

all subject, however, to Schedules A and B and the Stipulations herein, all of which schedules and stipulations are hereby made a part of this policy."

Validity of Lease

At this point, it should be noted that no insurance is expressly given that the lease is duly executed or valid. We have had a few attorneys who objected to the absence of such statement. Our answer has been as follows: The lease creates an estate for years; the policy insures the title to such estate to be vested as stated in the policy and that such title is not defective; a policy on a fee title does not expressly insure the "execution and validity" of the deeds which establish the insured title — why should any different approach be used when insuring an estate for years?

Schedule A of the policy describes the leasehold by reference to the lease of record, gives the vesting of the leasehold title, and describes the land.

Sometimes, an attorney for the insured will ask that the policy also state the vesting of the fee title at the date of recordation of the lease; and in such case the vesting of the fee title is added to Schedule A.

Schedule B

Schedule B of the policy provides that the policy does not insure against loss by reason of:

"1. Taxes or assessments which are not shown as existing liens by the records of any taxing agency or by the public records; and easements, liens or encumbrances which are not shown by the public records.
2. Rights or claims of persons in possession of said land which are not shown by the public records.
3. Any facts, rights, interests, or claims which are not shown by the public records, but which could be ascertained by an inspection of said land, or by making inquiry of persons in possession thereof, or by making inquiry of the lessor, or by a correct survey.
4. Mining claims, reservations in patents, water rights, claims or title to water.
5. Any laws, governmental acts or regulations, including but not limited to zoning ordinances, restricting, regulating or prohibiting the occupancy, use or enjoyment of the land or any improvement thereon, or any zoning ordinances prohibiting a reduction in the dimensions or area, or separation in ownership, of any lot or parcel of land; or the effect of any violation of any such restrictions, regulations or prohibitions.
6. The effect of any failure to comply with the terms, covenants, and conditions of the lease described in Schedule A."

Modification by Endorsement

If the insured wishes to have the policy coverage extended by deletion of one or more of the exceptions quoted above, such modification is accomplished by indorsement attached to the policy. For example, if the insured furnishes a sufficient survey, an indorsement can be inserted in the policy deleting from the third exception the words "or by a correct survey."

Suppose in the illustration we are discussing the lender had required title insurance under the "C.L.T.A. Leasehold Policy—A.T.A. Coverage." This type of policy contains no printed exceptions other than as to zoning and other governmental regulations. Here are the additional title processes required to issue such type of policy:

Additional Title Processes

(1) Examination of records of public agencies for any pending proceedings which might result in assessments for public improvements.

(2) A survey of the land, including location of improvements thereon.

(3) An inspection of the land, with special reference to physical aspects indicating possible easements, apparent and otherwise, encroachments, party wall rights, or any work which might result in mechanics' liens.

(4) An inquiry of persons in possession as to their rights. This inquiy is sometimes futile or virtually impossible. Suppose, for example, the improvement consists of an office building or even a super market occupied by numerous concessions. We know that, theoretically at least, the possession of land by a person is notice of his rights and of any adverse claim of the person under whom he holds. We worry about the scrub woman on the tenth floor of the building who holds an unrecorded option to purchase. But, since inquiry of every person in possession is not feasible, we usually follow the practical course of getting statements from the lessee, the rental agent, or building manager, as to rights of parties in possession, and examine the lessee's file of subleases which presumably explains tenancy rights. We are always hopeful, too, that our courts will follow the decision in New Jersey (Feld vs. Kantrowitz, 130 Atl. 6) holding that a purchaser of an office building was not charged with notice of an unrecorded deed in favor of a person occupying an office in the building, apparently in a tenancy status, this modification of the notice by possession rule being regarded by

the court as justified under modern conditions.

(5) An inquiry of the lessor under the lease as to the status of the lease, the existence of modification or other agreements not of record.

Sesume

This, gentlemen, is a brief resume of an exceedingly simple leasehold transaction. It takes no account of complications arising from transfers of the leasehold estate which may be assignments or may be subleases, or the splitting up of the leasehold or the reversion into lesser estates or interests recognized by law and transfers and encumbering of such lesser interests. And, I must add, if I described the most complex commercial or building lease situation within my experience, I am certain that it would seem simple to those title men in Chicago, New York, Miami, and other communities who have to wrestle with second subleases on parcels of air space.

While we title men in California must sit at the feet of our Eastern brethren when speaking of land and building leases generally, we will still insist that in one phase of leasehold insurance—oil leases—we have ventured forth where many wise title men have feared to tread.

Precautions

You might ask what factors must exist in order to justify title insurance upon oil interests and what special precautions must be observed. I will mention five of these factors:

First: the law of oil and gas must have been so firmly established in the state that judicial precedent is found for every rule of title practice you follow. For many years the nature of the ownership of oil and gas was undetermined in California. Did the fee owner of land have absolute title to oil and gas in place as corporeal real property? The decisions in other states were in conflict.

The California courts finally rejected the oil in place theory, holding that what he does own is the exclusive right of his land to drill for oil and gas and to retain as his property all substances brought to the surface of the land.

Real or Personal?

Suppose that the landowner conveys "50% of all oil and gas to be produced from Blackacre." Is the interest so conveyed, referred to as a "landowner's royalty" interest, real or personal property? Would the recording of such conveyance give the grantee of the right the protection of the recording laws? These doubts precluded title insurance upon landowner's royalties until finally our courts held that the interest was a profit a prendre (a right to a part or product of the land) and therefore real property; that when A conveys to B 50% of all oil produced from Blackacre, A and B become tenants in common in the ownership of the oil. With this precedent, we then decided to insure landowner's royalties in proper cases.

Nature of Lessee's Interest

What is the nature of the lessee's interest under an oil and gas lease? The term of the lease is usually expressed as "20 years and so long thereafter as oil is produced." This interest of the lessee for indefinite period is, the courts held, "an interest in real property in the nature of a profit a prendre, which is an incorporeal hereditament." Suppose the lessee assigns the leasehold interest but reserves "10% of the oil produced" under the lease. What is the nature of this reserved interest, called an "overriding royalty?" Is it merely a right to the proceeds of the sale of the oil after it is produced and sold and hence personal property? If so, the recording of an assignment of the royalty would not impart constructive notice to subsequent purchasers of the leasehold. This uncertainty was finally resolved by a holding that such lessee's royalty was a right to receive a share in production of oil and therefore a profit, an incorporeal hereditament, an interest in real property. But, under this reasoning and by analogy to the rule established as to landowner's royalties, would it not follow that if A, lessee under an oil lease, assigns to B "10% of the oil to be produced" under the lease, then A and B are tenants in common in the ownership

of the lessee's rights under the lease. Suppose A had assigned, as often happens, fractional interests in production to perhaps 500 different persons. Could A thereafter surrender the lease without the consent of all of the holders of such fractional interests? Our District Court of Appeals held that a tenancy in common was created and A could not alone surrender the lease. The decision was a blow to the oil industry. Fortunately, a hearing was granted by the State Supreme Court and the district court decision disapproved, the upper court holding that such royalty assignment did not create a tenancy in common where the assignment did not evidence such intent and that the royalty interest was terminated by a surrender of the lease by the lessee alone, made in good faith and under the terms of the lease. With these precedents, lessee's royalty interests have been regarded by some title insurers in California as insurable interests, provided proper precautions are observed, especially with regard to the effect of any surrender of the lease.

A Complete Check

Second: Continuing with our consideration of the factors to be observed in title insurance upon oil lease interests, perhaps the most important rule of title practice is this: Do not insure oil rights unless a complete re-examination of the title is made, back to the source of title or to some point where the insurer is positive as to the condition of title; do not rely upon office abstracts or take-offs, but examine the full context of every instrument in the chain of title; do not assume that any defects in the chain of title are cured necessarily by mere lapse of time; do not assume that "you know all of the law there is to know" or that such and such is the rule because when you started in the title business someone told you that was the rule.

Experiences

Let me recount just a few of our experiences:

(1) We were asked to issue an oil leasehold policy with a liability of two million dollars. The last policy issued was before the true oil value of the land had become known. It vested title in the insured owner as to the land except one-half of the oil. We made a re-examination of the title and found this situation: A, former owner of the entire fee title, conveyed the land to B "excepting ½ of the oil;" B conveyed the land to C, "excepting ½ of the oil." Did the exception in the deed from B to C except the same half which was excepted in the deed from A, thus conveying B's half to C, or did the deed except the half which B owned, or did the deed except one-half of the half which B owned (i.e., ¼)? Apparently the title examiner making the examination for issuance of the last policy assumed that the deed from B did not carve out any additional interest, but after research upon the point we concluded that there was sufficient doubt to require a rule of title practice to the effect that where successive exceptions or reservations of this nature occur, it must be assumed for title insurance purposes that each grantor may have a reserved interest.

Watch Minor Defects

(2) Here is another illustration of what can happen when you undertake to insure oil interests: Oil was discovered upon a certain ranch comprising grazing land formerly of no great value. The last insured owner had been in possession for about 15 years (the statutory period in California for acquisition of adverse title is 5 years). A policy was issued insuring an oil lease executed by this owner. An attack upon the title has been made by a man who claims under a former owner whose title was apparently divested by an order in bankruptcy made in the early 1930's. Our attorneys had examined the bankruptcy proceedings and found them wholly regular except for a technical discrepancy of an obviously minor nature which was passed. The present attack on the title is predicated upon this minor objection, it being asserted that the bankruptcy order was void, that the property is still in the custody of the court, and that, such being the case, no adverse title could be asserted by our insured owner.

Our costs to date for attorneys' fees and expenses in defense against this attack, which we are satisfied is purely abortive, have been substantial.

Apportion Liability

Third: The third factor to consider in insurance of oil interests is this: The value of the insured interest is likely to be far in excess of the policy liability and a loss as to any portion of the land may result in a total loss under the policy. For example, we recently issued a policy with a liability of $5,000,000.00 covering five different leases on five parcels of land title to which was deraigned under different sources and chains of title. In view of the proven oil value of the land, a loss of title as to any one of the five parcels would undoubtedly result in loss to the title insurer of the face amount of the policy. Therefore, we insisted in this case that the policy be issued with an indorsement apportioning liability, e.g., limiting liability to $1,000,000 as to each of the five parcels. This is a general rule of title practice in issuing oil leasehold policies with large liabilities.

Rights of United States

Fourth: The fourth factor to be considered when insuring oil interests may be stated generally as follows: Where title to the land in question is derived through a patent or grant by the United States, it must be determined with certainty that no mineral rights were retained by the United States. Some years ago we became aware of the fact that in 1909 certain public lands were withdrawn from entry; that thereafter some of such lands were restored to entry with the qualification that all minerals were to be excepted in any patent; that some patents were issued without exception of minerals, presumably by oversight; and that certain government officials were contending that the government was not estopped to claim such minerals despite the failure to except them in the patent. We immediately made an examination of the land office records in Los Angeles and Washington with respect to every patent issued upon land in any county where we did business, and this investigation, together with our research as to the public land laws, enabled us to make postings upon the plant accounts as to the sufficiency of each patent and whether it should have contained an exception of minerals. Patents issued since this examination are also given special consideration.

Potential Claims of Government

I might add just one more example of the hazard arising from potential claims of the government to oil under public lands. You will recall the famous case in the 1920's (West vs. Standard Oil Co., 278 U.S. 200, 73 L. Ed. 265) in which the government prevailed against the Standard Oil Co. as to the ownership of land worth many millions of dollars in Kettleman Hills. The title claimed by Standard was derived through patent from the State of California, the title of the state being based upon a grant under an 1853 Act of Congress, which act granted to the state the 16th and 36th sections in each township **not mineral in character.** The United States Supreme Court held that the land was known to be mineral in character on January 16, 1903, the date when the survey of the land was approved by the surveyor general, and at which date such lands, if nonmineral, would vest in the state; that no title passed to the state.

School Lands

As a consequence of this holding, policies on school lands usually carry a special exception as to any claim or title of the United States, the state, or claimants thereunder, based upon the charge that the land was known to be mineral in character at the date of the survey.

Public Lands

Fifth: The fifth and last factor to be discussed is the necessity for special examining processes when insuring an oil leasehold created by a lease from the United States government on public lands. I will cover this point by just mentioning some of the rules of title practice stated in our C.L.T.A. Manual of title practices, as follows: (1) The records in the Bureau of Land Management in Wash-

ington, D.C., and in Sacramento or Los Angeles must be included in the title examination or an appropriate exception made in the policy; (2) An exception must be shown as to the provisions of the Act of Congress approved February 25, 1920 (the so-called oil leasing act of 1920), and rules and regulations thereunder; (3) An exception must be made as to fissionable materials and helium; (4) An exception must be made as to mining claims unless a ground examination and other investigation shows the nonexistence of such claims; (5) consideration must be given to the possibility of preferential rights to a lease existing in favor of patentees of the surface or mining claimants.

Lien of Judgment Against a Joint Tenant

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Vice-President, The Title Guarantee Co., Baltimore, Md.

Mr. Chairman, Ladies, Gentlemen and Guests of the American Title Association.

When Mr. Fairfield asked me to select my own topic for discussion, I accepted his invitation and chose a legal question which rarely arises but which interests me intensely, and upon which I have encountered much difference of opinion and very little legal writing and few court decisions. The subject will be the "Lien of Judgment Against a Joint Tenant."

Before becoming too serious I want to tell you of the Virginia gentleman farmer who had invited Lord Beaconbrook, of the English nobility to visit with him in America.

Upon receipt of his acceptance he busily instructed his servants in their duties and attitudes in the presence of such a distinguished visitor. He especially impressed upon his colored butler, Sam, the importance of this nobleman from the old country. The day of Lord Beaconbrook's arrival at the Virginia estate came, and he was welcomed in a manner befitting his position. Being somewhat worn out from his journey he retired early, and was not heard of until the following morning when he joined his host in the living room for a whiskey sour before breakfast.

After the usual salutations he told his host that, although his room had been superb in every detail, he had been somewhat puzzled as to the number of small earthenware pots that had been in his room, explaining that four were found beneath his bed and four more in other easily accessible parts of the room. His host was at a complete loss to explain this, so inquired of his butler when he brought in the drinks to see if he could supply a reason. Sam replied very nervously, "Why, Mr. Will, I thought for sho that I was following' your orders kase didn't you tell me dat de Lord was de biggest peer in England."

Origination

Now England was the place from which most our laws originated and certainly the laws affecting tenancies of real property come down to us through the common law and various statutes. We at this time are only interested in joint tenancy.

Right of Survivor

The most important feature of a joint tenancy, as distinguished from a tenancy in common, is the right of a surviving joint tenant to acquire the interest of a deceased joint tenant by survivorship. This right cannot be destroyed by the execution of a will, the operation of which would not take effect until death, but can be destroyed by voluntary or involuntary action of the joint tenant.

There is no doubt that a judgment recorded against one joint tenant can be executed upon and the interest of the joint tenant affected can be sold so as to destroy the joint estate.

Judgment Against One Joint Tenant

It seems equally clear that the existence of a recorded judgment against one joint tenant could not affect the right of survivorship in event of his death prior to execution upon the judgment.

Two questions naturally arise which are not simply answered.

1—At what time after the filing of a writ of fieri facies with the sheriff, pursuant to a judgment against one joint tenant, is the joint tenancy severed so as to enable the sheriff to sell the moiety of the judgment debtor after his death?

2—Does the conveyance of the property by all joint tenants prior to the execution and sale under a recorded judgment against one joint tenant destroy the right of the judgment creditor to proceed against the interest of the joint tenant which has passed into the hands of third persons?

Judgment Creditor

It is probably correct to say that in most jurisdictions a judgment creditor is given the right to obtain satisfaction of his debt out of the lands of the debtor by execution; in other words, a judgment is a charge on the lands of the debtor. This being the case it would appear to me that no conveyance by the judgment debtor, either of his interest alone or jointly with his co-tenants, could destroy the charge of the pre-existing judgment upon his interest in the land. In my opinion, the right to follow the interest of the judgment debtor into the hands of a purchaser exists during the lifetime of the judgment debtor, for a purchaser takes title subject to the same conditions upon which the sellers held the same.

It is my belief that the mere issuance of an execution upon property of a joint tenant does not destroy the right of survivorship, so that a sale after the joint tenant's death would not take the interest therein away from the survivor.

By the Ontario Execution Act a writ of execution creates a charge on the land of the judgment debtor from the time of delivery of it to the sheriff. But the problem is, should such a statutory charge be regarded as alienation sufficient to destroy the right of survivorship, or should it be considered a mere burden on the property such as a rent charge or an easement leaving the right of survivorship unaffected. Since no estate in the land is created it has been suggested that the charge created by the filing of the writ falls within the latter class and does not destroy the right of survivorship. Although one American case, Davidson vs. Hughes 2 Yeates (Pa.) 459 desided in 1799 held that the delivery of the fi fa severed the joint tenancy, the present English and American positions tend toward the view that no severance is effected.

Must Be Levy

The only recent pertinent case which I was able to find was the case of "Ziegler vs. Bonnell" 126 Pac 2nd 118 which held that until a levy is made upon a judgment the property is not affected by an execution. The opinion in that case quotes from "Thompson on Real Property (1929) Par 1717 saying, "The mere filing by a creditor of a joint tenant of a memorial of his judgment in the registrar's office prior to the death of a joint tenant, judgment debtor, does not operate as a severance and the survivor takes the whole free from the lien of the judgment," and further "when a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, then the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien."

In view of the above, it is my opinion that until there has been an actual levy made by the sheriff upon the property of one joint tenant there can be no severance of the right of survivorship, but after the levy is

made the death of the joint tenant will not cast the title upon the surviving joint tenant so as to defeat the levy in favor of the judgment creditor, even though the sale by the sheriff had not been consummated at the time of the joint tenant's death.

Reasons for Title Insurance

SAMUEL O. BATES
Vice-President, Commerce Title Guaranty Co., Memphis, Tennessee

Mr. Chairman and Ladies and Gentlemen of the Convention:

There are many types of insurance which are recognized as of real value to the American system of life. While it is a comparatively new form of protection, title insurance has grown rapidly in this country. Today it is considered an economic necessity.

Requirements of Lender

All of the large lending companies require title insurance where their loans are made upon security of real estate. The purchaser of real estate frequently does not recognize the value of title insurance. He is a prospect that deserves the attention of all title companies.

Protection

All of us are familiar with the phrase, "Title insurance gives the only guaranteed protection against real estate losses." It guarantees the ownership of property, regardless of forgeries, unrecorded wills, delinquent taxes and undisclosed heirs. The cost of title insurance is not high. It carries but one premium, and in this respect, it is different from other types of insurance. An owner's policy is effective so long as the person to whom it is issued can be held liable on the chain of warranty back to the effective date of the policy. It guarantees the great lending institutions that their loans are valid liens on the subject property. The mortgagee's policy is binding for the duration of the loan. Every property owner and lender should protect their interest with title insurance.

Strange

It is astonishing that a man will provide a home for his family, insure it against loss by fire, carry life insurance for the protection of his dependents, but completely ignore the possibility that his title to the land is defective.

Moral Obligation

Every title policy carries with it a moral obligation. In the Tennessee case of Shaver vs. Title Company, 163 Tenn., 232 (1931) the liability of a title company was construed to be limited to six years from date of the issuance of the policy. This decision was based upon the section of the statute of limitations which says **"contracts not otherwise specifically set forth."** It held that the right of action began at the date of the negligent performance of the contract, and not when the error was discovered or the damage resulted. In this case there was an incorrect description in the deed with respect to boundaries. None of our title companies ever took advantage of this decision, and in 1947 secured the passage of an amendment to Sec. 8600 of the Code of 1932 by adding "Provided further, that the cause of action on title insurance policies, guaranteeing title to real estate, shall accrue on the date the loss or damage insured or guaranteed against is sustained."

Good Will

Frequently title companies pay damages for which they could not possibly be held legally responsible. Our business is based upon good will and prompt payment of claims is believed to be necessary towards creating confidence of the public. Most of the payments which we make arise as the result of inaccuracy in descrip-

tion, encroachments, mechanic's liens, unsatisfactory judgments, etc.

Restrictive Laws

Existing laws restrict operation of title companies in many of the states to an extent which cannot be justified. We believe that we should be permitted to draw all papers which are essential to the closing of a real estate transaction upon which we issue a policy of title insurance.

Today title insurance companies in Tennessee are between the devil and the deep blue sea: The Insurance Commission says that our losses do not justify the premium which we charge and many lawyers constantly complain that we should charge more for our services, believing that if we did so, they would receive more title business.

Obstacles

All is not sunshine in Tennessee. We have our problems. Legal obstacles stand in the way of our conduct of the title business. A corporation may not lawfully engage in the practice of law. State ex rel. vs. Retail Credit Men's Association, 163 Tenn., 450. We find no fault with this prohibition. But Chapter 30, Sec. 1 of the Public Acts of 1935, Sec. 7116.1 Williams Code, which undertakes to define the practice of law and the law business, has caused a great deal of confusion. The particular provisions of this Act are:

1—"The practice of law is the appearance **as an advocate in a representative capacity; or the drawing of papers, pleadings or documents; or the performance of any act in such capacity in connection with proceedings pending or prospective, before any court, commissioner, referee, or any body, board, committee or commissioner, constituted by law as having authority to settle controversies.**

2—The 'law business' is the advising or counseling **for a valuable consideration** of any person, firm, association or corporation, as to any secular law, or the drawing of, or the assisting in the drawing **for a valuable consideration,** of any paper, document or instrument affecting or relating to secular rights, or the doing of any act, **for a valuable consideration** in a representative capacity, obtaining or tending to secure for any person, firm, association or corporation, any property or property rights whatsoever."

Relief Needed

Lawyers generally are coming to realize the importance of title insurance. They are fast becoming the best customers of the title insurance companies. In some sections of our state, 90% of all real estate transactions are insured. In Memphis we have an understanding Bar Association, and the title companies are permitted to allow their attorneys to draw papers, with the attorney taking the entire proceeds for the work. It is the thought of some of us that the Legislature should so amend the existing statutes as to allow the title companies to prepare deeds and other instruments essential to the transfer of title upon which they are to issue policies of insurance.

Ultra Vires

JOSEPH S. KNAPP, JR.
Vice-President, Maryland Title Guarantee Co., Baltimore, Md.

The subject Ultra Vires selected for me, was born at common law, regulated and interpreted by the Courts with more than usual confusion, enunciated by many jurists after peering into the crystal ball of research and now seems to be interred by the statutes of many states. Some have practically abolished the rule with but enough retention of life blood and sufficient heart beat to continue its bare existence and perpetuate its memory in those jurisdictions.

Trend

This present trend is a victory for

business in overcoming the fear that corporations would usurp too much power and that consequently, the acts of a corporation should be restricted to the powers specifically granted by the state through the charter issued. The trend now however is to grant practically every conceivable power to the corporation by its charter and usually only bad draftsmanship of the charter of a private corporation will subject it to the violation of the ultra vires rule. Many states have statutes which confer practically unlimited powers to a private corporation.

This discussion of the ultra vires rule will be limited to private corporations and those not subject to special legislation.

The term Ultra Vires has been so loosely used in court decisions and text books without regard to the strict meaning of the term that it is usually necessary to examine the facts of a particular case to determine the sense in which the court has used the term in its decision.

An Ultra Vires contract will be used herein in its strict construction as one not within the implied powers of the corporation as fixed by its charter, the statutes or the common law. Stated another way "contracts not positively forbidden but impliedly forbidden, because not expressly or impliedly authorized."[1] The term also includes contracts not within the purpose and scope of the priviliges conferred by the charter and not pertaining to the objects for which the corporation was chartered and also contracts within the purposes contemplated by the articles of incorporation but beyond the limitations of the powers conferred by the charter.[2]

Illegal acts or contracts are not to be confused with Ultra Vires acts as an Ultra Vires act need not be expressly prohibited by the charter or by any statute nor in any sense be immoral or injurious to others or against public policy. An illegal act however may also be ultra vires and an ultra vires act may be an act which could lawfully be done by a natural person and may be even praiseworthy.

Grounds for Doctrine

The grounds for the ultra vires doctrine depending on the views of the particular court are "Want of corporate power to make the contract; illegality; notice of the limitation of the powers of the corporation as set forth in the charter or as fixed by statute; public policy and protection of the right of stockholders." Courts which refuse to recognize the ultra vires doctrine, particularly where one party has performed, usually base their decisions on the principle of estoppel.

The doctrine of ultra vires is not favored by the courts and they have no uniformity in the approach to their decisions or the result.

Lack of Uniformity

"Conflict, or at least confusion, in the decisions often results from (1) the lack of uniformity in the use of the term ultra vires (2) the failure to distinguish between fully and partly executed contracts and (3) the failure to agree on the basis of the doctrine of ultra vires. However, the statement often made, that hopeless confusion is found in the decisions is true only as to certain phases of the law of—ultra vires inasmuch as some of the rules governing ultra vires are well settled and now practically undisputed.

These settled rules include the following: "1. A wholly executory contract, where ultra vires, cannot be enforced, nor can damages be recovered for its breach, unless impliedly authorized by recent statutes abolishing or limiting the doctrine of ultra vires. (2) A contract wholly executed on both sides, even though ultra vires, will not be set aside nor interfered with, as between the parties thereto, or persons whose rights are derived therefrom. (3) Recovery may be had on an implied contract for benefits received, where one party has performed and the other party has received the benefits of such performance but refuses to perform on his or its side on the ground of ultra vires, even though the contract is ultra vires. The disputed questions may be classified as follows: (1) May

an ultra vires contract executed on one side, and the benefits received on the other side, be sued on, or must the action be one on an implied contract, merely to recover to the extent of the benefits receive. (2) When is a contract fully executed and when is it partly executory. (3) Is there a difference between transactions wholly beyond the authority of the corporation under any circumstances and transactions in reference to a matter within the scope of the powers of the corporation but actually in excess of such powers and if so, what is the practical effect thereof." [3]

Varying Principles

Before discussing the application of the Ultra Vires rule as to contracts executed on both sides, contracts executory on both sides and contracts executed on one side and executory on the other side it may be well to briefly consider the varying principles in the application of the rule which may generally be said to be three. **First** the federal rule which held that ultra vires contracts were void. This rule was followed by the federal courts until 1938, when the Supreme Court held in the case of Erie Railroad Co. vs. Tompkins[4] that the federal courts, in cases where jurisdiction was exercised because of diversity of citizenship, . . . must apply the state law as declared by the highest state court because there is no federal common law and Congress has no power to declare substantive rules of common law.[5] Reference herein to the federal rule will apply to the principle or interpretation of the ultra vires rule by the federal courts prior to the Tompkins case and the few states which apply this interpretation of the rule. This rule, however, may also be applied in some cases involving national banks.[6] **Second** the majority rule in which most courts hold that a corporation can do acts beyond its authority, the acts are therefore the act of the corporation and are not void and classify the rights and liabilities of the respective parties according to whether the contract is wholly executory, wholly executed or executed on one side only. **Third** States regulated by special statutes such as Idaho, Louisiana, California, Ohio, Vermont, Alabama, Pennsylvania, Illinois, Maryland and probably other states whose statutes have not come to my attention as time would not permit the examination of the laws of each state. Most of these statutes are comparatively recent and are the result of the maze of conflictingdecisions and the desire to abolish the rule of Ultra Vires as between the parties, as the rule has never been looked upon with favor and the burden of proof always attached to the party advancing or asserting the rule. As an illustration, Maryland by Chapter 135 of the Acts of 1951 repealed its existing corporation statute and enacted a new corporation act, Section 120 of which provides as follows as to defense of Ultra Vires. "No act of any corporation or transfer of real or personal property to or by a corporation shall be deemed invalid or unenforceable by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, unless such lack of capacity or power is asserted.

(1) In a proceeding by a stockholder against the corporation to enjoin the doing of any act or the transfer of real or personal property by or to the corporation. If the unauthorized act or transfer is being, or is to be performed or made pursuant to any contract to which the corporation is a party and if all of the parties to the contract are parties to the proceeding, the court may set aside and enjoin the performance of such contract but in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in enjoining the performance of such contract, provided that anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained.

(2) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other

legal representative, or through stockholders in a representative suit, against the incumbent or former officers or directors of the corporation.

(3) In a proceeding by the Attorney General, as provided by this Article, for forfeiture of the charter of the corporation or in a proceeding by the Attorney General to enjoin the corporation from the transaction of unauthorized business."

No Enforcement

Where a contract is executory on both sides it is well settled that the contract cannot be enforced by either party to the contract nor will damage lie to either party for the failure of the other to perform the contract.[7] The State of Kansas seems to be the only state holding contrary,[8] and it may be possible that the rule may be held to be abolished by the Statutes of some of the states which limit the doctrine of Ultra Vires.[9] The rule applied to a contract to purchase property real or personal on an executory contract is that neither party can enforce the contract or recover damages for its breach. It is immaterial whether the corporation is the Vendor or Vendee.[10]

Conflict of Decision

Contracts executed on one side have the usual conflict of decisions but can be classified as falling within one of three classes of decisions, first, the old federal rule which never precluded one from urging the rule of Ultra Vires and voiding the contract,[11] which however did not prevent the other party from suing on an implied contract. Second, the prevailing rule that such performance precludes the party who has received the benefit of the contract from urging the rule,[12] this is generally known as the estoppel rule, and Third, that if the contract is beyond the authority of the charter as would appear by an inspection of the charter the rule cannot be urged but if it involved misuse of the corporate power the rule can be urged. In the general application of the rule to contracts executed on one side the resulting difference is one of procedure to some extent, under the majority rule the contract can be enforced by under the old federal rule suit must be brought by or against the corporation on an implied contract and while the contract cannot be specifically enforced the corporation or other party cannot retain the benefits which it received. When a plea of Ultra Vires is made restitution must be made.[13]

An Ultra Vires contract which has been fully performed on both sides cannot be set aside by either party to the transaction, nor can an action be maintained to recover that which has been parted with. Neither a court of equity or law will interfere with such a contract. Where title has been taken by a corporation even though the holding is Ultra Vires the title cannot be attacked by the grantor or a person against whom proceeding may be brought in the course of ownership for possession of the title, nor can title be attacked by the state unless specifically provided for by statute for forfeiture, unless by quo warranto proceedings. In cases however where the amount of property which a corporation can hold is limited or where authority must be obtained an ultra vires conveyance passes title to the corporation and no one but the state can object that the transfer was for an unauthorized purpose or that it was in excess of the powers conferred by the Charter to the corporation.[14] It has been held that a transfer of property to a Railroad Company cannot be questioned by persons claiming under the grantor on the ground that the right to operate oil and gas wells is beyond the charter powers.[15]

Corporation Titles

Title acquired by a corporation even if it has exceeded its powers can be conveyed by the Corporation subject to the right of the state, which is forfeiture only if provided by the statute of the state, or proceedings to forfeit the Charter. [16] A conveyance by a Vendor who previously conveyed to a corporation passes no title against the corporation,[17] and a corporation which acquires title under an ultra vires conveyance may pass

title to another, nor does title revert to the grantor of an ultra vires conveyance to a corporation upon dissolution of the corporation.[18] Nor can a creditor of a grantor, subject the property of a corporation purchaser on an ultra vires transfer to the debts of the grantor.[19] Upon transfer of title to a corporation even though ultra vires the corporation has every right of ownership of the land, subject only to the right of the state heretofore stated, it may bring actions of ejectment, trespass or actions for damages for injuries to property in the possession of the corporation, actions to enjoin interference with the use of the land or to protect the enjoyment of an easement in the land by enjoining the disturbance thereof, proceedings to remove a cloud on title, actions for rent where the property has been leased and specific performance proceedings of a contract to purchase the building.[20]

Bequests to Corporations

There is a difference between an ultra vires devise or bequest to a corporation and an ultra vires conveyance. The conveyance places title in the corporation whereas a bequest requires an act to be done by an executor to accomplish the purpose and the courts will not require such act. A devise is void unless authorized by the Statue of Wills and where devise is so authorized but is ultra vires under the powers of the corporation there cannot be said to be a definite rule as the courts of the various states do not agree. Some courts hold that the title vests in the corporation and is valid against every person but the state, other courts have held the conveyance principle does not apply and the divise is void and title to the land vests in the residuary devises.[21]

Contracts partly performed on both sides present difficulty of applying the rule but usually if the contract can be separated that is the part performed by both, from the unperformed portion, this part will be r-e garded as an executory contract and not enforceable. It has been stated that the execution and delivery of a bill of sale and deed where possession has not been surrendered did not constitute an executed contract,[22] and likewise that specific performance of an ultra vires lease would not be enforced for payment of rent by the corporation which acted as lessee without power to do so because it was a continuing contract.[23] However it has been held that the repurchase clause of a contract would be enforced against a corporation which had received and retained the proceeds of an ultra vires sale of land by it.[24]

Mortgages and Leases

Mortgages and leases present the question of whether they are wholly executed or partly executed contracts. Sometimes they have been held to be a fully executed contract and sometimes under the same circumstances they have been held merely a partly executed contract. Where a suit is brought to foreclose a mortgage the question of ultra vires is generally decided according to the rule prevailing on contracts executed on one side only, in which case, the defense of Ultra Vires will not prevail against a mortgage foreclosure brought by the corporation where the defendant has received the benefits of the mortgage or in a case brought against the corporation where it has received the benefits.

Bonds

Bonds secured by an ultra vires mortgage are not necessarily ultra vires.[25] It was also held that although a reservation of a right to charge a greater rate of interest after delinquency than is permitted by the Home Owners Loan Act, may be ultra vires, a mortgage made by Home Owners Loan Corporation with such reservation was enforceable to the extent of the rate of interest permitted by the act.[26]

Mortgages are sometimes considered as conveyances so that an ultra vires mortgage to a corporation comes within the rule as to executed contracts such as deeds and the like so in cases where a national bank has taken real-estate security for a debt simultaneously contracted, in violation of the provision of the fed-

eral statutes, the transaction is not void which would enable the borrower to defeat recovery but the bank is subject to accounting to the government for the violation of the bank powers.[27] In cases of ultra vires mortgages by corporations as mortgagors some courts have held that the mortgage is void and the corporation itself or its receiver or persons claiming under it by a later valid deed or mortgage may set up the invalidity by law or equity.[28] This is the rule where the mortgagor is a quasi public corporation and where the mortgage is not only ultra vires but is against public policy. The accepted opinion is however that if a mortgage is not against public policy, the mortgagor cannot plead ultra vires when it has received the benefit of the mortgage and it cannot defeat foreclosure particularly if it can be said that the mortgage has been fully executed on both sides.[29]

Valid Mortgage

It has been held that a corporation will not be permitted to dispute a mortgage which is otherwise valid but which violated a statute prohibiting mining corporations from encumbering principal machinery without the stockholders approval, and the stockholders alone can avoid such mortgages.[30]

Leases

A lease which has been followed by a transfer of possession to the lessee and payment of rent by the lessee is undoubtedly an executed agreement for the portion of the time covered by the payment of rent but after the expiration of the term for which the rent has been fully paid, it is doubtful if the lease can be considered other than a contract partly performed on both sides and thus be considered as an executory contract for such additional period. The lease for such period as the tennant occupies and the rent thus earned but has not been paid will be considered as a contract fully executed on one side. There are decisions both in the federal and state courts treating the lease as a wholly executed contract.

Jurisdictional

It seems useless to refer to many of the numerous cases involving leases, as the decisions for any practical purpose must be considered in the jurisdiction to which they apply. I believe however that it can be safely said that in most cases, leases will not be disturbed because they are ultra vires unless illegal or against public policy, and the lessee will be liable for the use of the property for the period occupied by it either as rent or for the fair value of occupancy and that a tenant under an ultra vires lease may abandon it at will and the lessee will not be liable for the future rent provided for in the lease.

While this decision may not be followed in other jurisdictions it has been held that under a ten year lease providing for the right of the tenant to renew, the landlord could not set up the defense of ultra vires where the tenant had paid the rent for the ten year period, as this payment constituted the consideration for the renewal and prevented the contract from being executory.[31]

Improvements Pursuant to Terms

In another case the court refused to allow the plea of ultra vires on a lease from a corporation to tenant who made improvements pursuant to option in lease to purchase.[32]

No Rescission

In other cases both the supreme court of the United States and a state court have held that lessors (Railroad Companies in both cases) could not rescind ultra vires leases where the lessee objects after the tenants were in possession and had complied with all the covenants and the lessor had enjoyed benefit.[33]

Only by the State

It has also been held that where a statute requires a corporation to sell property within five years when not used for corporate purposes that a lease of said property for ten years can only be attacked by the state.[34] However where a statute requires the procurement of a license as a condi-

tion to doing business a least taken prior thereto has been held to be void and not capable of ratification by the corporation.[35]

Abuse of Power

In applying the doctrine of ultra vires many courts distinguish between transactions wholly beyond the scope and authority of a corporation and transactions which are within the scope and power of the corporation to perform for some circumstances but which in the particular case under consideration is beyond and in excess of the power of the corporation because of the purpose for which the act is performed. These cases are acts in which there has been an abuse in the use of the power rather than a lack of power to act. As an illustration a corporation authorized by its charter to buy and sell real estate and construct houses and other structures would not have authority to issue policies of title insurance so this act would be beyond the scope and authority and implied powers of the corporation but the same corporation would have authority to buy the necessary office equipment for use in its real estate and building business but the purchase of office equipment for use in the business of title insurance would be an abuse of its power to purchase.

Primary or Secondary

Some references are made as to the distinction between a contract ultra vires in a primary and secondary sense. A contract ultra vires in a primary sense is not within the scope and powers of the corporation for any purposes or circumstances. While a contract which is ultra vires in a secondary sense is one which the corporation has power and authority to do but with respect to the particular transaction under consideration there is some irregularity or defect in the exercise of the power or some undisclosed circumstance affecting the particular transaction under consideration.[36] Usually these contracts are good as between the parties and the plea of ultra vires cannot be set up by the corporation particularly where the contract has been performed by the other party and the corporation has received benefits therunder provided the other party had no knowledge of the misuse of power by the corporation and did not actually participate in such misuse. Likewise the other party cannot set up the misuse or abuse of power by the corporation in making the contract. The decision to the above effect are based on one of two grounds, either that only the state can raise the question or, an estoppel arising from receipt of benefits from the performance of the contract by the other party.[37]

Knowledge

In considering an ultra vires abuse of power the most important fact seems to depend on the participation in the abuse by the other party to the transactions, that is, the extent of notice or knowledge to him of the intended abuse of power by the corporation. Even the federal court prior to Erie R. R.vs. Tomkins had refused to allow the plea of ultra vires by a corporation on an executory contract, where the other contracting party had no knowledge of the intended misuse by the corporation, when the contract was entered into and the action was against the corporation for damages for breach of contract.[38] Knowledge of the abuse of power by the corporation will not be presumed to the party so dealing with it and if there is any possibility that the transaction is within the scope and power of the corporation the party so dealing with the corporation has a right to presume that the transaction is for that purpose. It has been stated that the proper test is whether there is anything in the transaction calculated to excite the suspicion or apprise the party dealing with the corporation that the use was to be for a purpose not connected with the business of the corporation.[39] The burden of proof is on the party alleging the ultra vires use in excess of the corporate powers where the contract on its face appears to be within the powers of the corporation.[40]

No Knowledge

In contract executed on one side, in cases of an abuse of power, the federal courts under its former rule and many jurisdictions applying that rule have held that the plea of ultra vires is not applicable where the other party to the contract had no knowledge of the intended misuse by the corporation[41] because the transaction is neither malum in se nor malum prohibitum.

Wholly executed contracts cannot be rescinded, for instance, if a corporation has power to purchase real estate for specific purposes and it bought real estate and used it for other purposes, the Vendor cannot obtain a rescission of the contract.[42] It has also been held that where a corporation had authority to purchase property but entered into a contract to purchase property for an unauthorized purpose without the knowledge of the sellor that the corporation was liable for the purchase price.[43] It has also been held that a lease may be enforced against a corporation where it had the power to lease property but used the leased property for an ultra vires purpose.[44]

Restoration of Benefits

Even in jurisdictions where the courts favor the rule of ultra vires as a defense there is an implied contract to restore benefits received in the case of an ultra vires contract. This doctrine is not inconsistant with any doctrine which prevents the enforcement of an ultra vires contract. It is well settled that a party to an ultra vires contract cannot repudiate it without making restitution. It has been stated that, "However the contractual power of a corporation may be limited under its charter, there is no limitation of its power to make restitution to the other party whose money or property it has obtained through an unauthorized contract, nor as a corporation, is it exempted from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial." [45]

As an illustration where a corporation uses another's property under an ultra vires lease an action may be maintained to recover the value of the use and occupation on an inplied contract, even in those jurisdictions in which an action cannot be maintained for the rent due under the lease.[46]

Conclusion

In conclusion, I wish to say, that as indicated in the beginning this discussion has been general as to the principles involved in the application of the ultra vires rule without consideration to its application in any particular state or to the statute thereof.

[1]Tourtelot vs. Whitehead 9 N.D. 467, 479—84. N.W. 8.

[2]American Southern Nat Bk. vs. Smith 170 Ky. 512—186 S.W. 482.

[3]Fletcher Cyclopedia Corporations Vol. 7, Sec. 3411 (Permanent Edition).

[4]Erie Railroad Co. vs. Tompkins 304 U.S. 64.

[5]See application of state law by federal court—Herbert vs. Sullivan 123 fed. 477.

[6]Birdstell Mfg. Co. vs. Anderson 104 Fed. (2d) 340.

[7]Fletcher on Corporations Vol. 7 Sec. 3459 and listed cases cited of various states.

[8]Harris vs. Independence Gas Co. 76 Kan. 750, 763—92 Pac. 1123; Tenant vs. Long 138 Kan. 132, 23 P (2d) 477.

[9]See 4 Cinn. L. Rev. 419, 442 and 9 Harvard L. Rev. 255, 166.

[10]Fletcher on Corporations Vol. 7, Section 3463, cases discussed and other cases cited thereunder. Jackson vs. Western U. Tel. Co. 269 Fed. 598; Day vs. Spiral Springs Buggy Co. 57 Mich. 146—23 N.W. 628.

[11]Central Transp. Co. vs. Pullman's Palace Car Co. 139 U.S. 24—11 Sup. Ct. 478 Pittsburgh C & St. L. R. Co. vs. Keokuh and H. Bridge Co. 131 U.S. 371—9 Sup. Ct. 770.

[12]Fletcher on Corporations Vol. 7 Sec. 3473 & 3479 and cases of various states cited thereunder.

[13]Fletcher on Corporations Vol. 7 Sec. 3572 and cases thereunder.

[14]Long vs. George Pac. Ry. Co. 91 Ala. 519—8 So. 706; Benton Harbor Federation of Womens Clubs vs. Nelson 301 Mich. 465—3 N.W. (2d) 844.

[15]Nelson vs. Texas & P. R. Co. 152 La. 117—92 So. 754.

[16]Barron vs. McKinnon 196 Fed. 933; Metropolitan Trust Co. of New York vs. McKinnon 172 Fed. 846—Com. vs. New York

L. E. and W. R. Co. 132 Pa. St. 591—19 Atl. 291—8 Harvard L. Rev. 15.

[17]Fritts vs. Palmer 132 U.S. 282, 286.

[18]Miller vs. Flemingburg and F. Spring Turnpike Co. 109 Ky. 275, 59 S.W. 512.

[19]Edward vs. Fairbanks and Gilman 27 La. Ann. 449—Henry Koehler & Co. vs. G. E. Stanley Co. 214 Ky. 261—283 S.W. 75.

[20]Fletcher on Corporations Vol. 7 Sec. 3505 and cases listed thereunder.

[21]For Maryland cases as to bequests—Curtis vs. Maryland Baptist Union Amo. 176 Md. 430 as to devises see in re: Stickney's Will 85 Md. 79—36 Atl. 654; Little Sisters of Poor of Balto. 79 Md. 434, 32 Atl. 1052 for cases of other states see Fletcher on Corporations Vol. 7 Sec. 3525.

[22]McCutcheon vs. Merz Capsule Co. 71 Fed. 787, 795.

[23]Pennsylvania R. Co. vs. St. Louis A. & T. R. Co. 118 U.S. 290.

[24]Docking vs. Rifs (Kan.) 284 Pac. 391.

[25]Illinois Trust & Savs. Bk. vs. Pacific Ry. Co. 117 Cal. 332—49 Pac. 197.

[26]McConnell vs. Home Owners Loan Corp. 190 Oka. 190—121 P (2d) 1001.

[27]Schuyler Nat. Bk. vs. Gadsden 191 U.S. 451, 458.

[28]Hendee vs. Pinkerton 14 Allen (Mass.) 381—Com. vs. Smith 10 Allen (Mass.) 447.

[29]Dillon vs. Myers 58 Co. 492—146 Pac. 268—Jones vs. Guaranty & Indemnity Co. 101 U.S. 622—Levine vs. Sun Drug Co. ..Inc. 65 Ohio App. 513—30 N.E. (2d) 85—Aiken vs. Stewart 120 Cal. App. 38,—18 (2d) 988.

[30]Gallop vs. Pring 108 Col 277—116 P (2d) 202.

[31]Lemp Hunting & Fishing Club vs. Hackman 172 Mo. App. 549—156 S.W. 791.

[32]Mutual Life Ins. Co. of N.Y. vs. Stephens 214 N.Y. 488—108 N.E. 856.

[33]St. Louis V. and T. H. R. Co. vs. Terre Haute and I. R. Co.—145 U.S. 393; 12 Sup. Ct. 953. This case seems in conflict with decisions of same court in Thomas vs. West Jersey R. Co. 101 U.S. 71 which held an ultra vires lease void—Pittsburgh, J. E. and E. R. Co. vs. Altoona and B. C. R. Company 196 Pa. St. 452—46 Atl. 431.

[34]Dearborn Truck Co. vs. Staver Motor Car Co. 219 Ill. App. 295.

[35]Robinson vs. Contra Costa County B. & L. Assn. Cal. App. 296 Pac. 922.

[36]Mares vs. Janutka 196 Minn. 87—264 N.W. 222.

[37]Hartford Deposit Co. vs. Rector 92 Ill. App. 175, 181—Edkman vs. Chicago B. & O. R. Co. 169 Ill. 312—48 N.E. 496—Harmony Way Bridge Co. vs. Leathers 353 Ill. 378, 394—187 N.E. 432, 438 following Kadesh vs. Garden City Equitable L. & B. Assn. 151 Ill. 531—38 N.E. 236.

[38]Colorado Spring Co. vs. Am. Pub. Co. 97 Fed. 843, 849.

[39]J. P. Morgan & Co. vs. Hall & Lyon Co. 34 R.I. 273—83 Atl. 113.

[40]James Eva Estate vs. Meua Co. 40 Cal. App. 515—181 Pac. 415—Bankers Trust and Audit Ct. vs. Hanover Nat Bk. of N.Y. 35 Ga. App. 619—134 S.E. 195—Todd vs. Temple Hospital Assn. Inc. 96 Cal. App. 42—273 Pac. 595—U.S. Industrial Alcohol Ct. vs. Distilling Co. 89 N.J. Eq. 177—104 Atl. 216.

[41]Standard Furniture Co. vs. Smith 32 Fed. (2d) 176—Gibson vs. Kansas City Refining Co. 32 Fed. (2d) 658—Grand Valley Water User's Assn. vs. Zumbrum 272 Fed. 943, 948.

[42]Barrow vs. Nashville & C. Turnpike Co. 9 Humph (Tenn.) 304.

[43]Chesapeake & O. Ry. Co. vs. McKell 209 Fed. 514, 518—McKell vs. Chesapeake & O. Ry. Co. 186 Fed. 39, 49.

[44]Brewer & Hoffman Brewing Co. vs. Boddie 181 Ill. 622—55 N.E. 49.

[45]Am. U. Tel. Co. vs. Union Pac. Ry. Co. 1 Fed. 745—1 McCrary 188.

[46]Lake Villa Co-op. Assn. vs. Western Dairy Co. 247 Ill. App. 496—Brunswick Gas Light Co. vs. United Gas Fuel & Light Co.—85 Me. 532—27 Atl. 525—Manchester & L. R. Co. vs. Concord R. Co. 66 N.H. 100—20 Atl. 383—Richmond F. & P. & R. Co. vs. Richmond F. & P. & R. & P.R. Connection Co. 145 Va. 266—133 S. E. 888.

Void As Against Voidable

WHARTON T. FUNK
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The decisions of our courts insofar as they attempt to construe the terms "void" and "voidable" are fraught with uncertanties and contaminated with confusion.

When Ed Dwyer first informed me that I was to be on this program he advised that I was to talk on the rule in Shelley's Case. For quite some time he allowed me to labor under the misapprehension that I was to deliver a lecture on that rule. After quite some time, and a considerable amount of kidding, I was advised that the true topic for my discussion was to be **"Void as Against Voidable."** I thought at the time that the change would result in a more interesting and beneficial discussion. But after examining numerous decisions and texts on the question I am not so sure but that we could evolve more useful and definite rules from the decisions pertaining to the rule in Shelley's Case than we could from the decisions concerning the terms "void" and "voidable". Nevertheless, I will try to make the discussion of this topic as interesting as possible by reviewing some of the cases which I have read and perhaps closing with a few general principles which I feel might be useful to us in the examination of titles for title insurance purposes. I am not unmindful, however, of the dangers of using broad, general terms and formulating general rules. As an example of that danger I might cite an occurrence which took place at Fort MacArthur this summer while I was on active duty in the Army, attending a school for military government officers. (There were about five hundred of us there and, of course, there was quite a bit of marching in formation and standing in formation for reveille and retreat. The Commanding Officer was very desirous of having the uniforms worn by all officers as nearly alike as possible.) There were several former paratroop officers attending the school. And, as many of you have probably observed, paratroopers wear the trousers of their uniform tucked into the tops of their boots. They are quite anxious to preserve this custom in order to call public attention to the fact that they are paratroopers, and therefore, more rugged individuals than the average soldier. But paratrooper or no paratrooper, our Commanding Officer wanted to preserve uniformity to the fullest extent in his command, so he announced to the entire formation one morning that:

> "All personnel would wear their pants on the outside of their boots or shoes."

Now that was a very clear, general order, not susceptible of more than one meaning. But, he overlooked the fact that its application might not produce uniform results. He had forgotten that we had about fifteen WAC officers atending the school. So, if I announce any general rules I will be very careful to see that they are not only clear and unambiguous, but that they may be applied equally in all circumstances.

Definition

I think that most of the courts will agree that, strictly construed, the word "void" means:

"without legal efficacy; incapable of being enforced by law; having no legal or binding force." (Kinney vs. Lundy, 89 Pacific, Arizona, 496; Southern Pacific Company vs. Industrial Commission, 91 Pacific 2nd, Arizona, 701).

or, as another court stated it:

"that which is void is without vitality or legal effect."

It is likewise pretty well settled that "voidable" means:

"having some effect, but liable to be made void by one of the parties to the transaction, or a third person."

In connection with a voidable act

perhaps the first question you think of is:

"Is a **voidable act** a valid and subsisting act until it is rendered void by someone entitled to take that action, or, is it a **void** act until some act of ratification on the part of the person entitled to ratify or disaffirm?"

I found an Illinois case in which that very issue was determined; and it was decided that a **voidable act** is a valid and subsisting one until some act is taken by the person entitled to disaffirm. In that particular case, the decree of the court voided the act, but held that it was a valid and subsisting act until the date of the first step taken by the party entitled to disaffirm toward the final adjudication of the invalidity of the act. I think it is quite generally agreed that a thing that is **voidable** continues to subsist until rescinded by one of the parties entitled to rescind. There is not much difficulty in arriving at a definition of the two terms, but the confusion results from both the courts and the legislatures using the "void" when in fact "voidable" was intended, and in the courts attempting to arrive at a decision as to whether the legislature, when it said **void,** meant void in its strict sense or merely voidable.

Intent

An excellent statement of the confusion existing as far back as 1907 on this subject is found in the case of **Kinney vs. Lundy, 89 Pacific, Arizona, 496,** citing cases from New Hampshire, Indiana, New York, Missouri, Wisconsin, Iowa, Kansas, Michigan and the United States Supreme Court, as follows:

"It is the common practice of both legislatures and courts to make use of the word "void" as interchangeable with, and having the same meaning, as "voidable" and with substantially the same force and effect, and it is not only proper but it is the duty of the court to interpret the meaning of the word either strictly or more liberally as the intent shall appear."

Equity

Another good example of the confused state of the law on this subject is a Texas decision construing the effect of a trustee's sale under a deed of trust where there had been no default. The court held that the trustee's deed was **absolutely void,** but notwithstanding that fact, held that those who took title to or liens on land acquired in good faith from the grantee of the trustee acquired good title as against the trustor. The court stated:

"That this is so not on the theory that title actually passed, but rather on the theory that the trustor, by execution of the deed of trust, made it create the appearance of good title, and it would be inequitable to permit the trustor now to show otherwise."
(Slaughter vs. Qualls, 162 Southwest 2nd, (Texas), 672.)

I cite this case as a shining example of the contamination that I mentioned in the beginning, for after holding the deed absolutely void the court went ahead and arrived at a result exactly the same as the result would have been had they declared the deed merely voidable.

Fraud

Now, some instances where the courts have construed the word "void" to mean merely "voidable". I think most of you are familiar with the statute of frauds. In many states the word "void" is used in the statute of frauds in somewhat the following language:

"In the following cases the agreement is **void** unless the same or some note or memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged."

Against Public Policy

An Oregon court, after citing many authorities states that the term "void" is frequently used where "voidable" is intended and held that a contract in respect to real estate is not like a gambling contract or other illegal contracts, **void as against public policy.**

Only as to the State

In our own State of Washington we have a constitutional prohibition against an alien owning land. The clause reads as follows:

"And all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be **void,** etc."

Our courts have held that a conveyance to an alien was void only as to the state, and then only when attacked by the state and that if the alien has conveyed the title to one capable of taking title an indefeasible title passed. It is therefore quite obvious that the net result of the decision is that a deed to an alien is **voidable and not void.** (Oregon Mortgage Company vs. Carstens, 47 Pacific, 421; Abrahams vs. State, 88 Pacific, 327.)

Another example is a sale in violation of the Bulk Sales Law which, under the law is stated to be **void.** The courts hold that this means **void** only as to creditors, and if the vendor's debts are paid, the sale cannot be interfered with. The net effect, of course, is that the sale in violation of the law is merely **voidable.** An early leading case involving contracts in violation of, or prohibited by statute, is the **United States Supreme Court Case of Harris vs. Runnels, 53 U.S., page 79, 13 Law Edition, 901,** which was a case involving the sale of a slave which in some manner violated a State Statute. The Supreme Court said:

"A contract in contravention of statute or forbidden by statute must be examined in its entirety to determine whether the legislature meant void."

Strict Meaning

I tried to see if I could find some cases in which the courts have actually held the word **void** to mean **void** in its strict and narrow meaning. I found very few. I found some cases dealing with the validity of marriages contracted prior to the finality of a prior divorce. Under the statutes declaring such marriage to be **void,** the decisions held that in this instance the legislature meant **"void ab initio" and absolutely void.** I found cases to that effect in Oklahoma, Kansas, Oregon and Washington. See **Hall vs. Baylous, 69 ALR, 527.**

Judicial Sales

I think that the most important aspect of this subject of **"Void as Against Voidable"** is its application to judicial sales of real estate. We, in the title insurance business, are called upon every day to pass upon the validity of judicial sales of real estate; that is, judicial sales of all types, and it is in this field of our endeavor that we most frequently exercise our discretion in determining or deciding whether a sale is **void** in the strict sense or merely **voidable.** And it is in this respect that the most interesting legal problems arise.

Freeman in his book on **"Void Judicial Sales",** says:

"Void sales, whether execution or judicial, may for convenience of treatment be divided into two classes. First, those which are void because the court had no authority to enter the judgment or order of sale. Second, those which, though based upon a valid judgment or order of sale, are invalid from some vice in the subsequent proceedings, or because the judgment or order has lost its original force by appeal, lapse of time, satisfaction, or some other adequate cause. The word "void" though apparently free from ambiguity is employed in various s e n s e s. Accurately speaking, a thing is not void unless it has no force or effect whatever. A conveyance cannot be said to be utterly void unless it is of no effect whatever and is incapable of confirmation or ratification.

Another test of a void act or deed is that every stranger may take advantage of it, but not of a voidable one. Again, a thing may be void in several degrees. **First,** void so as if never done to all purposes, so that all persons may take advantage thereof; **second,** void to some purposes only; **third,** so void by operation of law that he that will have benefit of it may make it good."

To my way of thinking an act which may be ratified or confirmed and thus made good should not be called **"void"** but should be called **"voidable".**

Relatively Void

I found one court case which injected a new idea into this already confused subject. It called the act **relatively void,** meaning that the act was void in relation only to the rights of one particular set of individuals. But of what importance is this matter to the everyday problems we run across in the examination of titles? Well, in a period of a very short time in almost every office where titles are examined, I will venture to say that errors will be discovered in court proceedings running the gamut all the way from those which result in the failure of the court to acquire jurisdiction over the parties or the subject matter down to minor errors in descriptions and other irregularities in published notices. When these errors are discovered, it is highly important that the examiner know which of them can be waived safely and which are fatal to the validity of the proceedings.

Completely Void

I found very few situations which the courts treated as resulting in a **completely void sale construed in its narrow sense.** In other words, one which is a complete nullity. I found that in some states where, at an administrator, guardian or trustee's sale the administrator, guardian or trustee buys the property individually, either directly or indirectly, the courts treat that sale as **wholly void** and one which cannot be ratified. The result is based in those states upon **public policy,** as one court said:

> "The rule rests upon public policy, and such a purchase will not be permitted in any case however honest the circumstances for the general interest of the public requires it to be destroyed in every instance. From general policy and not from any peculiar imputation of fraud, a trustee shall remain a trustee to all intents and purposes."

The leading cases supporting this rule may be found in the State of New York. I found an early case in our own State of Washington which follows this rule. (Dormitzer vs. German Savings & Loan Society, 23 Washington, 133), decided in 1900. But to emphasize the confusion that exists in this subject, even in the decisions within the same state, let me cite the case of **Miller vs. Winslow, 70 Washington, page 401, decided in 1912** which was an action in which the prior owner of a piece of real estate was attempting to set aside an execution sale by a sheriff, at which sale he, the sheriff, in his own individual right, purchased the property, in which the court said:

> "The weight of authority seems to sustain the proposition that a sale to a disqualified person is not, in the absence of a statute, **void,** but is **voidable.** We understand the word **void** when used in connection with judicial sales, prohibited under a statute, to mean a nullity, or something that cannot be ratified. On the other hand, the word **voidable** used in this connection means that it may be avoided at the suit of the interested party, but is nevertheless subject to ratification which may be made to appear by showing the lapse of time or the acceptance of benefits."

The court then held that the sale had been challenged within a reasonable length of time in proper proceedings and set the sale aside.

Sales by Administratrix

In another case which arose in our state over the effect of a sale by an administratrix to herself, the court said:

> "Whether the sale was void or voidable, it is unnecessary to determine as there are no intervening purchasers in good faith for value."

Delapole vs Lindley,, 118 Washington, 393, which is another clear indication that such a sale is not void but merely voidable. In many situations **lapse of time** can be treated as a ratification of a **voidable** act. For instance, the general rule is that failure to appoint a **guardian ad litem**

to represent a minor at some court hearing does not result in a wholly void order, but one that is purely **voidable.** Under these circumstances a minor is allowed a reasonable length of time after attaining the age of majority to ratify or disaffirm what has been done. Generally speaking though, I take a rather dim view of insuring titles where we are compelled to rely upon **estoppel based only upon the passage of time.** There is no proof that the situation had been brought to the attention of the interested parties. I would much prefer to base my action upon some **act performed by the interested parties from which an estoppel can be presumed,** or some **act** which would in effect amount to a ratification.

Property of Minor

An interesting question arises where the property of a minor is sold pursuant to proceedings which may be considered void, but following the sale the proceeds are paid in to the guardianship funds and are used for the benefit of the minor, either for his care and support or for investment in other property. Perhaps the **weight of authority** supports the **denial of the existence of any estoppel** against minors on account of the **use for their support,** or the other application for their benefit of the **proceeds** of a **sale** which **as against them was void when made.** But there are decisions which affirm that under such circumstances the equity of the purchaser is superior to that of the minors, but of course, no title insurance examiner should pass title in the purchaser or his successors-in-interest without either requiring new sale proceedings, or a deed by the minor after attaining majority or unless he has a clear act of ratification by the minor after attaining the age of majority.

Curative Powers

Another interesting question closely related to the topic under discussion is the curative powers of an order of confirmation. In many states where the statute requires that a sale be confirmed by order of court, the statute also provides that the confirmation cures certain defects. It is, of course, elementary that the order of confirmation will not serve to make a void sale valid. It will not cure jurisdictional defects. In our state it cures irregularities, but where the difficulty arises is in determining what is an irregularity. Is the misdescription of the property in the published notice of sale an irregularity? Is the failure to post or publish, for the required statutory period, the notice of sale a mere irregularity? These are all problems which a good title examiner must determine before deciding upon the validity of the sale proceedings. In our office it is our practice to apply the curative elements of an order of confirmation to a very limited extent, applying it purely to minor defects.

Validation of Judicial Sales

Another interesting problem is the effect of the numerous statutes that have been enacted professing to validate judicial sales. Such statutes are clearly retrospective and their effect is to take the legal title away from its owner and vest it in some other person without due process of law, and this raises serious constitutional questions. These statutes, where they do not interfere with vested rights or impair the obligations under contracts, have been declared constitutional, but they certainly cannot make a void act valid. However, the same result has been reached in many states by passing acts which place a time limitation for the commencement of actions to set aside certain deeds such as sheriff's deeds, tax deeds, etc. These statutes have been generally upheld, and in our state the court has repeatedly held that, under the act placing a three year limitation upon the time within which an action may be brought to set aside a tax deed issued pursuant to the foreclosure of general taxes such act is operative even though the **tax deed be void** due to **jurisdictional defects** in the **proceedings.** (White vs. Gehrman, 1 Wn. 2nd, 504).

Limitations

Now, bearing in mind what I have just said about a thing being void due to **jurisdictional defects** in the proceedings, let me call your attention to a case which I think is highly significant. An action was commenced in our state to set aside a tax deed that had been issued many years prior to the commencement of the action on the grounds, however, that the statutes contained no authority to foreclose the particular type of a tax that had been levied in this case. The main issue was, of course, whether or not the action was barred by the three year statute which I just mentioned. The court permitted the action and set aside the tax deed. Some of the wording that the court used is interesting, so I will read a couple of paragraphs:

"The legal signification of the terms 'void' and 'jurisdictional' varies with the circumstances under which they are used, sometimes presenting a question of no little nicety, and failure to keep that in mind often produces confusion and leads to the statement of inaccurate legal propositions. Our precise meaning when we have said that § 162 bars an attack on a void tax foreclosure or that it bars such attack even for jurisdictional defects must be interpreted in connection with the nature of the questions presented in the particular case in which the language was used. Port of Port Angeles v. Davis, supra."

"Our cases in which the bar of § 162 has been upheld despite so-called jurisdictional defects, with one possible exception hereinafter to be discussed, have had to do with failures to give personal notification to property owners, mistakes and defects in the published summons or the affidavit therefor, premature commencement of the foreclosure, procedural irregularities, etc. When the fundamental requisites to which we have referred are absent, we are confronted not with **jurisdictional defects** but with a **complete lack of jurisdiction."** (Sallee vs Bugge Canning Co., 138 Wn., Dec., 699).

Void Proceedings

Insofar as judicial sales are concerned I would say that the **distinction** between one that is **voidable and one that is wholly void,** is that in the **former** the sale results from an **irregular exercise of existing authority,** but the **latter results from a sale where there is a palpable absence of all authority whatsoever.** An example of the latter would be an attempt by a court in the State of California to sell under order of its court property located in the State of Washington; or an attempt by a Justice of the Peace to entertain an action for divorce or to attempt to probate an estate or in criminal cases a sentence of an entirely different character than that authorized by law. **(19 Wn, 2nd, 56).** These would certainly be examples of proceedings that are entirely and wholly void.

On Real Property Titles

It is my belief that in the examination of titles where defects are discovered the first step is to determine, if possible, whether or not the defect is of such a serious nature that it could be considered wholly void in the strict narrow sense. If it is not void in that sense, then the result must be that it is a voidable transaction. In making the decision it would, of course, be necessary to check the statutes and decisions of the state in which the property is located and perhaps the decisions of the United States Supreme Court. If the title still remains in the place where the act in question placed it, there is little need to indulge in long research to determine whether the act was void or voidable. In either event the title is uninsurable and will have to be perfected by proper curative action unless some action of the parties or the passage of time could give rise to an estoppel or ratification. But, if the title has passed beyond the step that is in question, then it becomes important to determine whether the act was one **wholly void in the strict or narrow sense,**

or only **voidable.** Having determined the question in favor of the voidable theory, it then becomes important for the examiner to conclude whether or not the right to have the action declared void still exists. In making this determination he will have to consider a number of factors. **First,** the passage of time. **Second,** whether or not there have been any acts from which a ratification could be presumed. **Third,** whether or not there has been any estoppel. **Fourth,** whether or not the rights of a bona-fide purchaser have entered the picture to the extent that the right to question the transaction may be cut off. There may be others; and certainly from a title insurance examiner's standpoint unless he is reasonably certain that the right to avoid the transaction has ceased to exist he should take the safe course and require necessary curative action.

And now I come to the close of this treatise on contaminated confusion with all the misgivings that beset the attorney who, after examining the abstract of title of one Peter Prolific Parkinson to a tract of land in the great state of Texas, submitted the following opinion:

A SLIGHTLY IMPERFECT TITLE

(The following letter written by a Texas lawyer giving the results of examination of title is reprinted with permission from the March, 1937 issue of "The Lawyer.")

1214 Marcus Bldg.,
Prewitt, Texas,
January 4, 1928.

Dear Sir:

I have examined abstract of title in seven parts covering the South 236½ acres out of Edmondson Survey in .....County which you are preparing to buy and herewith render my opinion.

Don't buy the G..... land. It has been my sorrow and burden to look over several horrible examples of a title examiner's nightmare, but this alleged title takes the cut glass flyswatter. It is my private belief that you couldn't cure the defects in this title if you sued everybody from the Spanish Government (who started this mess) on down to the present possessor of the land, who is in there by virtue of a peculiar instrument optimistically designated by the abstracter as a "General Warranty Deed."

In the first place, the field notes of the Spanish Grant do not close. I don't think it possible to obtain a confirmation grant since the last unpleasantness in 1898. In the second place, there were nineteen heirs of the original grantee, and only three of them joined in the execution of the conveyance unto the next party in this very rusty chain of title, which is a major defect in the first place. We might rely on limitation here, except that I am reliably informed that nobody has succeeded in living on this land for a period of two years before dying of malnutrition. Laches might help out, but anybody who undertakes to buy land under a title acquired by laches is setting out like the man who set out to carry the cat home by the tail—he is going to acquire experience that will be of great value to him and never grow dim or doubtful.

The land has been sold for taxes eight times in the last forty years. The last purchaser sued the tax collector a month after he bought, for cancelation of the sale on the ground of fraud and misrepresentation. He doubtless had grounds, but this incident will give you a rough idea of what kind of muzzle-loading smoothbores have been fritzing the title. Nobody has ever redeemed one of those tax sales—glad to be rid of it, no doubt.

On January 1st, 1908, a gentleman who appears suddenly out of nowhere, by the name of Ellis Gretzberg, executes a quit claim deed, containing a general warranty of title (!!!) to one Peter Parkinson. Parkinson, the prolific old billygoat, dies, leaving two wives and seventeen children, the legitimacy of two of them being severally contested. I am not being funnier than the circumstances indicate. He actually left two wives and it appears never to have been legally adjudicated who he done wrong by. Each one of the ladies passed away in the Fear of God and the Hope of a Glorious Resurrection

and left a will devising this land to her respective brats. A shooting match between the two sets of claimants seems to have assisted the title slightly by reducing their number of six and substituting eleven sets of descendants. One of the prevalent causes of defect in this title seems to be the amorous proclivities and utter disregard of consequences prevailing in this neighborhood.

Your prospective vendor derives title by virtue of an instrument concerning which I have previously remarked. It is executed by a fair majority of one set of the off-spring of Peter (Prolific) Parkinson, and is acknowledged in a manner sufficient to pass a County Clerk with his fee prepaid. Outside of the fact that it does not exactly describe the property under search, the habendum clause is unto the grantors, the covenant of a general warranty does not warrant a thing, and it is acknowledged before it is dated, I suppose it is all right.

I might mention that this land was the subject of trespass to try title suit between two parties who appear in the abstract for the first time and one of them recovered judgment awarding title and possession. We may waive this as a minor defect, comparatively speaking.

I would advise you to keep the abstracts if you can. It is speaking testimonial to the results of notary publics drawing instruments, County Clerks who would put a menu on record if a fee was tendered, and jacklegged jugheads posing as lawyers.

You can buy the land if you wish. There are at least five hundred and seventy-three people who can give you as good title as your prospective vender, not counting the heirs of the illigitimate son of Prather Linkon who died in the penitentiary in 1889.

Yours very truly,

KRES L. CAMPBEL.

P.S.: You owe me $200 for headache powder.

(From Case and Comment, October, 1937, Vol. 43, No. 2.)

Reversionary Restrictions

On the Use of Lands Imposed by the Acts of Private Parties

STEWART MORRIS

Vice-President, Stewart Title Guaranty Co., Houston, Texas

In the examination of land titles one runs into many instances where restrictions have been imposed on land, coupled with the right to revert the title upon a breach. A reversionary restriction may be defined as a condition or qualification annexed to a grant in such a manner that the breach of the condition causes, or may cause, a forfeiture of title.

Special Limitation

First, I think we should distinguish the type of estate which automatically terminates upon the happening of a certain event. This type of a provision is called a special limitation. Where a conveyance is upon a special limitation, then, upon the happening of the event, the estate of the grantee automatically terminates with no action whatsoever upon the part of the grantor. In instances of this character, it would be unsafe for a title company to insure any mortgage given by the grantee, or subsequent vendee of such a title, unless special provisions were made in the title policy protecting the company from liability upon the happening of the named event.

Any Owner's Title Policy written on this type of estate would have to be carefully worded so that the title company would not be liable upon the happening of this event which terminates the title. An illustration of a special limitation is found, for example, where a conveyance is made, "for so long as the land shall be used for school purposes." Upon the land ceasing to be used for school

purposes, the title of the then owner, automatically terminates. The estate which the grantor has is a vested estate, and is not within the rule against perpetuity, and is called a possibility of reverter. The estate created in the grantee and his vendees is a "determinable fee estate."

Oil Lease

A common example of this type of estate is an oil and gas lease which usually provides that the conveyance shall last for the primary term (usually five years), and for so long thereafter as oil, gas and other minerals are produced. Upon a failure to produce oil within the five years, or if production is obtained, but subsequently ceases, the estate automatically terminates and reverts to the grantor. The grantor is not required to re-enter, to bring a suit, declare forfeiture, or do any other thing.

Right of Re-entry

Next, let us look at the type of instrument which provides for, and sets out certain restrictions, but is not one of the "so long as" conveyances, and the instruments provide that upon a breach of these conditions, that the grantor shall have a right of re-entry and a right to forfeit the grantee's estate. A grant is made upon certain conditions, and the grant provides that upon a breach of these conditions, that the title will revert to the grantor, and that the grantor shall have the right to re-enter. This is what is known as a condition subsequent. It is not necessary that the grant expressly provide for the right of re-entry, and it will be implied as an incident to the right of forfeiture. A re-entry is affected by a demand upon the grantee for the surrender of possession, or by bringing an action of ejectment, or to rescind the conveyance.

Weight of Decisions

Normally, the courts abhor a forfeiture, and try to construe a conveyance containing restrictions, as covenant, instead of conditions subsequent, because upon the breach of a covenant is injunction or damages, and not forfeiture of title.

Many times a conveyance will set up certain restrictions, and even provide for a right of re-entry, but the court will seize upon such words as, "covenant" and "agree," and other terminology in the conveyance to hold that the parties really intended a covenant rather than a condition subsequent, and hence, the only remedy is, as aforesaid, an injunction or a suit for damages, and an action to recover the land for the breach of the restriction will not lie; however, there are many situations where, because of the wording of the particular restrictions, the court is required to construe same as a condition subsequent, and upon the breach thereof, to revert the title to the grantor. In the event the restrictions are construed to be conditions subsequent, then, the grantee and anyone claiming under the grantee, whether it is a mortgagee who has advanced money for the building of a house, whether it be a lessee who has erected a building thereon, or any other person, will have his rights cut off and terminated at the insistence of the grantor after the occurrence of a breach.

Cases in Point

Perry v. Smith, Commission of Appeals, Texas, 231 SW 340, is a case where a person by the name of Keith conveys 3 acres to Smith, subject to the condition that 2 acres of the land were to be used by Smith for gin and mill purposes only, that grantee was to erect a mill and gin within a certain time, and providing that if for any cause the gin and mill be not erected or cease operation on said premises, that the land conveyed should revert to Keith. Smith made a contract with Higginbotham Company for the erection of the improvements and gave them a Mechanic's Lien. Later, the gin and mill ceased operation, and after this breach, Keith conveyed this property to Perry, the plaintiff in this case. Perry then brought suit against Smith to recover the property for breach of the conditions subsequent. The Court held that Perry should recover the property, and that the rights of the lienholder, and of Smith should both be terminated. The Court held that the holder of the lien upon

the real estate was charged with knowledge of the conditions in the grant to Smith, and his lien was subject to being defeated by a breach of these conditions. Though this case permits an assignment of the right of re-entry after breach of condition, but before re-entry, it is contra to the prevailing rule.

I also call your attention to the case of the First National Bank of Brockton v. McIntosh, by the Supreme Court of Alabama, 79 Southern 121, where the grantor made a conveyance to his daughter upon the condition that she would support him for life. The daughter then secured a loan from a bank, and gave a mortgage on the property. The father then sued the daughter to cancel the deed, and sued the bank to cancel the mortgage, upon the ground that the condition had been breached. The court allowed the grantor to recover, and cancelled both the deed and the mortgage, stating that the bank was charged with constructive notice of the contents of the deed. Thus, where you have a true condition subsequent, express exceptions should be placed in any Owner's Policy and you should call the assured's attention to this fact.

In connection with Mortgagee's Policies, most mortgagees will not take a title that contains conditions subsequent, and in the event they agree to do so, you should be very careful to place an exception in the Mortgagee's Policy, and have the approval of the mortgagee prior to doing so.

Abandonment and Waiver

Keep in mind that the doctrine of abandonment of the plan and waiver because of breaches on adjoining tracts do not apply to conditions subsequent. They apply to covenants.

Covenants

In some instances where restrictions contain a right of re-entry for the breach thereof, a careful consideration of all the factors involved will lead to the conclusion that the restrictions are, in truth and in fact, covenants, or because of some other factor, that the right of re-entry is unenforceable, and that it would be safe for a title company to issue a title insurance policy even though these restrictions contain a right of re-entry. In the event an Owner's Title Policy is being issued, the assured should be apprised as to this fact, and if a Mortgagee's Policy is being issued, you should definitely advise the loan company of these reversionary restrictions prior to the time their funds are disbursed because the laws of many states will not allow a company to make a loan on a piece of property where the restrictions contain rights of reversion. As you know, a great deal of our business is done with mortgage companies who sell their mortgages to life insurance companies throughout the United States, and even though a reversionary right may be unenforceable, and we are willing to insure the mortgage with no exceptions, the mortgage may not be acceptable to many life insurance companies because of the reversionary conditions contained in the restrictions.

Construction

As stated above, a court will normally try to construe restrictions as being covenants instead of conditions subsequent. In construing the instrument, the court seeks to arrive at the intention of the parties, and this intention is to be gathered from the instrument as a whole. Dunlap vs. Mobley, 71 Ala. 102. This intention, unless it violates public policy or some settled rule of law, must be given effect to. Where the language used is ambiguous, the construction which is most favorable to the grantee will be adopted. Klaer vs. Ridgway, 86 Pa. 528; Stevens vs. GH&SA Ry. Co. (Tex. Comm. App.) 212 SW 639. Where there is doubt whether the condition is a special limitation or condition subsequent, the court will try to construe it to be a condition subsequent because this is less onerous on the grantee. See Stevens vs. GH&SA Ry. Co., supra.

In the same manner, the promise or obligation of the grantee in a case of doubtful intention will be construed as a covenant rather than a condition subsequent or a special limitation. In re Gaffer's Estate, 5 N. Y.

S. (2d) 671, 254 App. Div. 448; McBride v. Freeman, 215 P. 678, 191 Cal. 152.

Cases

Assuming you have a condition subsequent and there has been a breach and the grantor is seeking to revert the title, there are several rules which may be of help in trying to prevent the estate from reverting. As a general rule, the non-performance of a condition can be taken advantage of only by the grantor or his heirs or legal representatives. Baptist Church of Pleasant Grove vs. Parker, 27 NE (2d) 522, 373 Ill. 607; Bangor vs. Warren 34 ME 324, 56 AM. D. 657. Conditions subsequent are usually attached to the title and run with it as against a subsequent grantee with actual or constructive notice. Quatman vs. McCray, 218 Cal. 285, 60 P. 855. But the intention of the parties controls, and if the language shows an intent to create a personal obligation, binding the grantee only, and not his heirs or assigns, it will be so construed. Krahn vs. Goodrich, 160 N.W. 1072, 164 Wis. 600.

More Cases

Sometimes the court will find that the true consideration for a conveyance upon condition subsequent which restricts the use of the property conveyed, is either the appreciation in value of the remaining land of the grantor, or to prevent its depreciation in value, so in the event the grantor has disposed of his remaining land he can no longer enforce the condition. Maddox vs. Adair (Tex. Civ. App.), 66 SW 811; Post vs. Weil (NY) 22 NE 145. It is to be noted that it is not safe to rely upon this doctrine because there is always a question of fact as to whether or not this was the true consideration for the conveyance.

Conditions contained in a deed may be waived or released by the grantor or his heirs, either before or after condition broken. Trustees of Calvary Presbyterian Church vs. Putnam, 162 NE 601, 249 NY 111. The fact that a grantor has imposed a condition does not prevent a subsequent owner and grantor from imposing a like condition for his own benefit, and a release of the first condition by the original grantor leaves the subsequent condition intact. Weinberg vs. Sanders 198 NYS 121. A waiver may result from a failure to demand performance or to enter for condition broken, or neglect for many years to bring an action to enforce the agreement or condition. Hannah vs. Culpepper, 104 So. 751, 213 Ala. 319. Where a grantor's delay in entering to enforce a forfeiture is not aggravated by any element of estoppel, however, a delay of less than the period of limitations at law will not bar his right of entry. Hannah vs. Culpepper, supra.

Equity

Equity may relieve from forfeiture in case of breach of condition in deeds where no willful neglect is shown, but the granting of relief rests in the sound discretion of the court. Holmes vs. Brooks, 80 A. 773 84 Conn. 512. Where, however, the parties themselves have enforced a forfeiture by providing for a re-entry for a breach and re-entry has been made, a court of equity is powerless to relieve. Watzman vs. Unatin, 131 SE 874, 101 W. Va. 41.

No Protection

Again I caution you that where you find rights of re-entry provided for that the matter should be carefully checked because if a condition subsequent is clearly provided for, and the condition is breached, then the grantor has a right to forfeit the title, and cut off any subsequent vendees, and their mortgages. In other words, the holders of mortgages who had lent money to build houses on the property, would not be entitled to any protection, and the grantor would recover back his land with the house thereon. In such instances I cannot see that the grantee or the mortgagee could claim any compensation for the improvements. In such cases, the courts of other states, as well as our Commission of Appeals in Perry vs. Smith, 231 SW 340, have held that the holder of the mortgage is not entitled to protection.

Sale and Conveyance of Properties Seized from Enemy Aliens

PAUL J. WILKINSON
Vice-President, The Title Guarantee Co., Baltimore, Md.

Mr. Chairman and Ladies, Gentlemen and Guests of the American Title Association.

At the last two meetings of this association I was guilty of the error of asking questions about properties seized by the Alien Property Custodian or now the Attorney General of the United States. The error became apparent when Ed Dwyer asked me to prepare a paper upon this subject. The fact that I had already admitted my ignorance of the subject did not deter our genial chairman. He worked on the army principle of assigning a graduate engineer as Judge Advocate of a court martial and a lawyer to supervise a road gang.

A middle-aged Negro, who had never in his life done a stroke of work, had called in the town doctor to assist his wife in the birth of his seventh child. As the doctor had never been paid for the bringing in of the other six children and the whole family was the object of the town's charity, the doctor told Sam that if he ever had another child he ought to hang himself. Sam agreed willingly to this, but at the experation of another year the doctor was again called in for the same ministration. The doctor didn't see Sam for several days after the baby's arrival, but when he did meet him he quizzed Sam about his promise to hang himself. Sam was quick with his explanation. He said, "Doc, I sho membered dat promise. De day dat baby was borned I got me a rope and I found me a tree. I clumb de tree and out on a limb. I tied one end of dat rope to de limb and tied de oder end around my neck and I was jes about to jump when somepin said to me 'Sam, wait a minit, you may be hangin de wrong man'."

Now I am sure that Ed picked the wrong man for this job, but I will do my best. I will say now that I have been unable to find any really satisfactory decisions to provide a complete answer to "Proceedures and Safeguards in handling Alien Property Custodian Titles." In preparing this paper I have changed the title slightly and called it "Sale and Conveyance of Properties Seized from Alien Enemies."

Last winter as Mrs. Wilkinson and I were headed for the beautiful state of Florida, we stopped at an Esso Filling Station in Richmond, the home of our illustrious colleagues, George Rawlings and Buck Jordan. In the men's room of this emporium I noticed a very neat sign on the wall which read, "Our aim is to keep this place clean, your aim will help."

Now ladies and gentlemen my aim will be to give you my ideas on this subject, supported only by reason and judgment. I have very little book support but whether you differ or not with my conclusions, at least this will supply a starting point for discussion and controversy.

The Act

On October 6, 1917, the "Trading with the Enemy Act" became effective under the terms of which the appointment of an Alien Property Custodian was authorized, who was empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned or delivered to said custodian under the provisions of the act. The Act further provides that any property held by an alien may be seized by the custodian and shall be administered and disposed of by him as provided in the Act.

Due Process

It might appear that such an act, authorizing the arbitrary taking of property of an alien would violate the due process clause of the Constitution. Article V of the first ten amendments to the Constitution of the United States provides that "No person shall * * * be deprived of life, liberty or property, without due process of law; nor shall private prop-

erty be taken for public use, without just compensation." But numerous cases have held that Congress has the authority in the exercise of its war powers under the Constitution to enact such legislation. All alien enemy property in the United States during a war, including choses in action as well as tangible property, is subject to seizure and confiscation when so directed by Congress, as in this Act.

The Alien Property Custodian's right to seize property, which may not in the end prove to be of enemy character, depends solely on the right of the United States to attach and impound what might otherwise be removed or dissipated, and the fund may not be retained by virtue of other claims if the capture was unlawful.

Administrative Determination

There must be an administrative determination that certain specific property is owned by, or held for the benefit of, an enemy or ally of an enemy as a prerequisite to the seizure of such property. The Alien Property Custodian, as the representative of the President, has authority to determine, after investigation, whether property is held for or on behalf of an enemy, and to insist that such property be turned over to him, if held for an enemy. A proceeding by custodian to seize enemy property is purely possessory, and in the proceeding custodian's determination that property is held by an enemy is conclusive 10 Fed 2d 606. "Miller vs. Lautenburg" 145 N.E. 907, held that seizure of property of alien enemy divested wife of dower rights, since as law stood at that time a wife took the citizenship of her husband. At common law an alien wife or widow is not entitled to dower rights, and her dower rights do not attach to property of an alien husband, even though she is a citizen.

At common law an alien may take real property and hold against everyone other than the sovereign or state.

Any property sold under the Act, except when sold to the United States shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property, or a major proportion thereof, is situated, unless the President stating the reasons therefor in the public interest shall otherwise determine. The proceeds of sale shall be deposited in the Treasury of the United States.

Under Executive Order 9788 effective October 15, 1946, the Office of Alien Property Custodian was terminated and all rights, powers and duties of the office were vested in, or transferred or delegated to the Attorney General, and all properties held by Alien Property Custodian were transferred to the Attorney General.

Vesting Power

The taking of property of an enemy alien by the Alien Property Custodian, or Attorney General, is by issuance of a vesting order which is filed among the Land Records of the county and state in which the property is located. Upon seizure the Alien Property Custodian or Attorney General holds full and complete title to enemy property on behalf of the United States, without any beneficial interest remaining in the former owner, and he may deal with such property, including the selling of it, in any manner appropriate to the interests of the United States.

The law as it now stands is quite clear that the Attorney General (formerly Alien Property Custodian) has full power to seize, by vesting order, fee simple and leasehold properties of an alien enemy, and that enemy owners are divested of every right in respect of property so taken and held.

Property Wrongfully Seized

Where the property taken is that of an alien enemy who was living at the time of the taking there would seem to be no doubt as to the sufficiency of the title in the Attorney General or Alien Property Custodian. But there exists in my mind a positive doubt as to the right of the Attorney General or Alien Property Custodian to convey a good title to property which was not alien owned at the time of vesting. The government representatives claim that the Attorney General has power to sell property wrongfully seized from an

American citizen or friendly alien and cite several cases, two of which will be referred to below

Cases

In the case of "American Bosch Magneto Corporation vs. Fobert Bosch Magneto Co. 215 N.Y. Supp. 387, decided in the year 1926, the Court stated: "It is perfectly clear that the purpose of Section 7 of the Trading with the Eenemy Act was to give assurance of title to purchasers and to impress these sales with finality; otherwise endless confusion would undoubtedly result in the commercial world from alleged defective title by reason of Acts of Malfeasance of the Alien Property Custodian or possibly from other cause. Accordingly, even where property of American citizens or friendly aliens was wrongfully seized and sold, the persons offended were permitted no redress beyong their recovery as limited by the funds realized upon the sale."

The government also cites from the case of "Sielcken-Schwartz vs. American Factors" 60 Fed. 2d folio 43, decided in the year 1932, quoting Judge Hand as follows: "There is not the slightest reason to suppose that this was intended to apply only to property which was in fact enemy held, and it would have been impossible to execute the purposes of the act if it had been." The government's citation goes no further than as quoted above, but, in my opinion, a reading of the entire paragraph casts a doubt upon the right to sell property which was seized from a citizen. The opinion reads as follows:

"The case at bar involves the question as to what powers were made ancillary to that possession; more exactly whether the custodian might vote to dispose of the property. That he had such power by the terms of the statute admits no doubt; whether if was valid if extended to the property of a citizen is another matter. Section 12, as amended by Act March 28, 1918, paragraph 1 (50 USCA Appendix, paragraph 12)—before the custodian attempted to vote on the shares—not only gave him the powers of 'a common-law trustee', which alone would have been enough, but explicitly provided that he should 'in addition thereto, * * * have power to manage such property and do any act or things in respect thereof * * * by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto * * * in like manner as though he were the absolute owner.' There is not the slightest reason to suppose that this was intended to apply only to property which was in fact enemy held, and it would have been impossible to execute the purposes of the act if it had been. The custodian, having determined that the property was subject to the act, might never discover his mistake; the owner might not apply to any Court, might apparently acquiesce in his decision. The property must meanwhile be protected; good occasions not be let slip; all sorts of action might be essential in the very interest of the owner. As to its validity it is not necessary to say whether Congress could have authorized the sale of a citizen's property, merely by giving him a claim to the proceeds. That might be too far to go merely to avoid difficulties of administration; though even this is perhaps not wholly free from doubt, for much may be done which is in fact in excess of a power, if it be essential to its effective exercise."

Doubtful Insurability

In view of the doubt expressed in the case just cited and the general protection guaranteed to citizens by the due process clause of the Constitution, it is my opinion that title to properties conveyed by the Attorney General, or formerly Alien Property Custodian, is only insurable where the former owner thereof was an alien enemy and alive at the time of the taking. I also believe that a taking under a proper vesting order would be sufficient to divest any dower interest which might be outstanding in a wife or husband of the alien enemy even though such wife or husband was actually an American citizen, although this theory may be debatable.

Where an alien owner dies before an actual vesting order is filed it is my opinion that the Attorney Gen-

eral gets no title. The vesting order to be effective must be against his heirs, and the same rules would apply to them as to their ancestor.

The little experience which I have had with titles on property transferred by the Attorney General has disclosed the use of extremely faulty descriptions. It is my opinion that we should be insistent upon the use of satisfactory descriptions. This should not be too great a requirement to place upon officials of the government.

Administration and Management

J. C. Brand, *Vice Pres., California*

National Title Division, Title Insurance and Trust Company, Los Angeles, Calif.

MURRAY JONES: Here is a question, what experience have we had with music in the office?

J. C. Brand of National Title Division of Title Insurance and Trust Company of Los Angeles has music in his office. Carl, would you tells us your experience and what you think of it?

Music

CARL BRAND: Yes Murray, we have music, we have had music in the office for over three years. It is the Musac System, adapted to our requirements. We have music coming in over a telephone line. It is available continuously, 24 hours a day but by use of a time clock we have it regulated so it is on fifteen minutes and off fifteen minutes. We sometimes vary this, and on rainy days in the winter we sometimes keep it on all day. The especial equipment we have allows us to use it as a public address system, also to cut in the radio for addresses of National interest. An example of this was Mr. Churchill's and General McArthur's addresses to the Senate, and Mr. Truman's report to Congress. We have not used the system to broadcast the World Series although we have been requested to do so. There is no way of **proving** that the use of music increases the efficiency of our people, however, it is my personal opinion that it does. Contrary to what one might think, the office is quieter with music than without. I am definitely sold on music in the office.

MURRAY JONES: Thanks Carl, that is an interesting observation. I have another series of questions. Here's one that might be referred to as "Fringe Benefits."

Again I'll ask Carl to tell what benefits the employees of the Title Insurance and Trust Company of Los Angeles have.

Employee Benefits

CARL BRAND: Murray, your question covers a lot of things that I am no expert in. I'll give a brief report and if anyone is interested in particulars I suggest they write Mr. Don Clarke, head of our Personnel Department.

Pension

We have a Pension Plan, the company and employees contributing. The benefits amount to 1½ percent of average salary times number of years employed. Retirement at 65 is compulsory.

Insurance

Life Insurance is available to all officers and employees, minimum $1,000.00, maximum $5,000.00 depending on salary. This is also a joint contribution.

Profit Sharing

We have a profit sharing plan by which all officers and employees with two or more years full time employment as of January 1st of each year participate in 10 percent of the company's net earnings based on the officer's or employee's earnings. This money is held in trust until termination of employment, retirement or death. The amount received upon termination is based on the length

of service, 5 percent for each year of employment; 20 years being the full service to secure the maximum amount. Upon retirement or death or early retirement on account of disability the full amount is paid.

Vacation

Our vacation plan calls for two weeks paid vacation after one year's service, three weeks, after 20 years.

Sick Leave

For the first three years of employment employees are allowed six days paid sick leave per year. After the third year, 12 days paid sick leave per year are allowed. This is a **sick** leave, no pay or time off is allowed for sick leave not taken.

Bonus

It has been customary in the past to pay a bonus on December 15th. Employees with two or more full years service, getting the full amount. Employees with less service getting purportionately lesser amounts.

The bonus is voted by the Board of Directors. The largest bonus paid was two months. Last year it was one month. The year before it was two weeks.

Medical

If an employee belongs to California Physician's Service and/or Blue Cross or Ross-Loos Medical Group, the company contributes $1.50 per month regardless of the coverage the employee takes.

Emergency Financing

Our employees also have the benefit of the Allen and Brand Trusts, through which an employee may borrow for an emergency brought on by illness.

Credit Union

The employees have a credit union which is employee controlled.

We have eleven paid holidays per year.

Cafeteria

There is a cafeteria at which food is sold to the employees at considerably less than they would pay on the outside.

We have two 15 minute rest periods per day.

MURRAY JONES: Do you believe that these benefits you have mentioned help you to keep your people satisfied and on the job?

CARL BRAND: Our people being good American citizens are never satisfied, but I do believe that these benefits are well worthwhile and have enabled us to surround ourselves with people who have an excellent productive record.

We, at the National are not particularly interested in system, or in type of plant used. We believe good peple interested in their jobs and working in good surroundings will show good production under any system. Our people are our most important asset.

Grover W. Devine, *President,*
Land Title Insurance Company,
St. Louis, Missouri

The following remarks are the result of observations made, during a period of about ten years, as an executive of the Land Title Insurance Company of St. Louis. They deal with what is believed to be the salutary effect of profit-sharing upon the employes of this Company, regarded in the light of an inducement to greater interest in their jobs as manifested in an effort to produce more and better work. All this, of course, is based upon the fundamental assumption that the employes are possessed of the proper natural qualities, and are not the victims of any pernicious habits.

Self Interest

The management of this Company, for many years, has felt that, in dealing with its employes, the principle of self-interest on their part, should never be lost sight of; and the policy, based on this principle, that it has followed for the last ten years, has proved the soundness thereof. It is to be accepted as a fact of human nature, that every human being is primarily interested in himself, and that loyalty, in its final analysis, is very closely bound up with interest. "Never let your employees lose their incen-

tive," might well be the motto of this Company; and we have always believed that, if the employes were always imbued with the proper incentive, we should never experience any difficulty in turning out the work.

Profit Sharing

Our profit-sharing plan, of course, is based upon the amount of business done; and the new employee becomes a beneficiary after he has been employed by the Company for a period of six months. This period of what may be called probation, is short enough to encourage the sincere beginner, and yet long enough to discourage the fly-by-night. The share in the profits which the employee receives, is paid to him on the fifteenth of each month, and varies in amount from eight per cent to twenty per cent of his monthly salary.

Results

The results of this practice have been most gratifying. Its stimulation of the zeal of the employee is easily noticeable; and the fact that they think of it a good deal, is always observable. This last statement is sometimes brought home to the management by the way in which the employees check one another. The tendency of some workers is to stay home as much as possible, and claim that sickness was the cause of their absence. Now, it has been brought to the attention of the management, on several occasions, that perhaps certain individuals who had stayed home too much or for too long a period, in the judgment of others who did not stay home, ought not to share in the profits during the periods they were not on the job. This, of course, was on the theory that the absentees ought not to share in profits that they did not help to produce.

Bonus

The Christmas bonus is another measure used in the Company's system of contentment. This goes back further than the profit-sharing plan. Many years ago a certain sum was given as a Christmas present; and this practice long ago crystalized into what is now called the Christmas bonus. This consists of a month's salary, and is given to employes that have been with the Company for a year or longer. A proportionate amount is given to those who have been with this Company for less than a year.

Report of Committee on Standard Forms and Standardization of Exceptions Under Schedule B

SPEAKERS:

Mr. Benj. J. Henley, *Chairman,* Committee on Standard Forms; *President, California Pacific Title Insurance Company*

Mr. Charles M. Swezey, *Assistant General Counsel, New York Life Insurance Company, New York City*

Mr. Christopher H. Bonnin, *Associate General Counsel, Metropolitan Life Insurance Company, New York City*

Mr. John A. Amerman, *Associate General Solicitor, Prudential Insurance Company of America, Newark, N. J.*

BENJAMIN J. HENLEY

Since the 1950 convention of the association, the Committee has given consideration to suggested changes in the ATA Policy Form and has continued to work on standard exception forms for policies for secondary lenders.

Suggested Changes in ATA Policy Form

The Committee has reaffirmed its conclusion of the previous year that no changes in the ATA Policy Form should be proposed at this time.

While the changes which have been suggested, and have been discussed by the Committee, are most pertinent, it is the view of the Committee that consideration of changes in the policy should be postponed for the present.

Exception Forms for Policies for Secondary Lenders

At last year's convention, the Committee reported that Mr. Charles M. Swezey, Assistant General Counsel of New York Life Insurance Company had suggested that the association formulate and recommend for the use of its members, standard forms for the setting forth of exceptions in title policies issued for secondary lenders.

Some work was done on this subject by the Committee before last year's convention and it has continued since the convention. All of the members of the Committee recognize the difficulty of formulating standard exception forms which can be used in all states. They think, also, that it will not be easy to convince all insurers and all lenders that standard forms are workable. It is the feeling of the members of the Committee that work on the project should continue and that a serious effort should be made to develop such forms as could be adapted to general use.

Following the report of Mr. Swezey's discussion of the subject at the convention last year, there was included in the proceedings of the convention a group of specimen exception forms. These forms were presented to the Committee by its Chairman for discussion purposes only. They were not approved by the Committee nor recommended for use.

While the substance of exception forms used for a given subject is much the same in all parts of the

country, the language used to accomplish the result is extremely varied. For this reason, and for the further reason that so many insurers are involved on the one hand and so many insureds on the other, and also because of the diversity of state law, some difficulty is encountered in finding a satisfactory starting point from which the proposed program can proceed to its conclusion. The necessity of making a start at some point impelled the Chairman of the Committee to prepare and present to the members of the Committee a group of exception forms for their consideration.

It is recognized that the forms under consideration may not adapt themselves to the laws of some states, or to the practice of some insurers, or the practice of some insureds, and it is not expected that they can be accepted as standard forms until they have been carefully considered by both our industry and its clients. The communication of the Chairman of the Committee to its members transmitting these forms was sent to Mr. Swezey and he has now sent it, together with the forms, to counsel for several other life insurance companies for their comments. Therefore, we now have under discussion by the Committee and a group of life insurance company counsel, a group of exception forms and it is hoped that this discussion will provide a basis for further discussion.

A copy of the forms under consideration has been provided for you. We now have a short time for discussion of the project and I am sure that the members of the Committee will be happy to receive the views of anyone who cares to discuss the idea of formulating standard exception forms. Charley Swezey has again consented to appear on our program in the consideration of this project and he will open the discussion.

NEW YORK LIFE INSURANCE COMPANY
New York 10, N. Y.

August 30, 1951

Benjamin J. Henley, Esq.
California Pacific Title Insurance Company
148 Montgomery Street
San Francisco 4, California

Dear Ben: **Title Requirements of Secondary Lenders**

Many thanks for forwarding so promptly additional copies of the California printed forms which I have distributed to the other four life insurance companies. I have also given several copies to Mr. Carl Schlitt, the Solicitor of Home Title Insurance Company of this City, who is Chairman of the Special Committee appointed at the 1950 meeting of the New York State Title Association, for the purpose of formulating recommendations to be submitted to the 1951 meeting of the State Association to be held at Lake Placid, September 14 and 15. Two of our attorneys are planning to attend the meeting and will report to me September 17 the consensus of opinion upon their return after the meeting and I, in turn, will relay it to you. Shall our summary be sent to you at San Francisco or to you at Colorado Springs to be held awaiting your arrival there?

Yesterday Mr. Schlitt had a luncheon conference with us preparatory to meeting with his committee next week. I summarized my views to him, stating I believed the following questions would have to be resolved by the American Title Association:

1. Shall this program be continued?
2. If the answer to 1 is "yes", shall the exceptions to be adopted cover (1) the whole field of policies to be issued or (2) only policies to be issued to or for the use of secondary lenders or those lenders, who although making their residential loans directly as distinguished from the purchase of loans, do so on a nation-wide basis? A

prompt answer to this question is of paramount importance. If the answer is that these exceptions are to be used only for secondary lenders, the solution of the problem should be simplified.

3. Should we adopt nation-wide the California procedures for affirmative insurance by the use of rider indorsements as at present in use? If the answer to question 2 above is "secondary lenders only" then it would seem that the exceptions to be drawn could well contain the affirmative insurance in the language of the exception without utilizing any rider. (See comments on separate sheets enclosed, entitled Comment No. 2.)

With respect to distribution at Colorado Springs, I would suggest that whatever you wish to distribute be handed to each member at the registration desk, in advance of the forum date. If not distributed earlier than the forum, the attention of the audience to the ensuing discussion will be distracted by an effort to read the printed material at the same time. Type in capital letters across the top of the first sheet BRING THE ATTACHED TO MEETING OF TITLE INSURANCE SECTION HELD (Wednesday P.M. or whatever time is set for the forum discussion).

Mr. Schlitt's present reaction to the questions are

1. Continue the program.
2. He believes at least all secondary lenders including savings banks and others should be consulted before the exceptions are finally adopted, in an effort to secure uniformity. (It occurs to me that if we could secure such uniformity now for secondary lenders using earlier numbers in each category for such lenders, additional forms of exceptions could be added later for other classes of assured.)
3. He believes that New York title insurance companies generally would prefer to give affirmative insurance in the exception itself, rather than by use of separate rider indorsements.

I enclose on separate sheets Comments No. 1 and 2; No. 1 by one of my associates who handles Western loans and No. 2 by the undersigned. My comments may seem quite frank but you indicated that it was your desire that I give you a free expression of my views. I trust these may be of assistance to the committee.

Sincerely,

CHARLES M. SWEZEY
Assistant General Counsel

Enclosures
cc James E. Sheridan, Esq.
Carl Schlitt, Esq.
John A. Amerman, Esq.
C. H. Bonnin, Esq.
George D. Ford, Esq.
Vincent Keane, Esq.

TITLE REQUIREMENTS OF SECONDARY LENDERS—Comment No. 1

Based on a preliminary examination of Mr. Henley's letter of August 8th and enclosures forwarded therewith, the following general and specific matters should be considered:

1. The proposed exceptions do not in all cases fulfill our requirements. It would be preferable that they be supplemented in so far as is possible by standard endorsements of the type now used in California, particularly C.L.T.A. Endorsement 100. If this is impractical, an attempt should be made to establish some standard assurance as to present violations of restrictions, rights to drill, etc. These two matters, exceptions and assurances, go hand in hand and standardization of exceptions only, is merely a partial solution.

2. The proposed exceptions reflect California procedures and the C.L.T.A. influences a large portion of the Western territory excluding Texas.

3. If California standard endorsements are to be adopted, it would be helpful

to have the reference numbers of these correspond with the reference numbers of the standard exceptions. Thus, since 3.00 refers to restrictions, C.L.T.A. Form 100.2 could be numbered as endorsement 103.1, 103.01, and the like.

4. Under **Taxes,** Instructions (d) and (f) do not go far enough. Information should be included as to whether taxes, if any, were due or payable, etc. Possibly the implication of (f) is that there are no levies.

5. As to **Assessments,** I feel we should be advised whether any installments are due or payable, etc.

6. Regarding **Restrictions,** we will require some form of assurance in respect to present violations. (Possibly using riders, etc.) Also, if it is deemed of enough importance for standardization, some consideration should be given to the provision for upkeep charges sometimes found in declarations of restrictions.

7. Exception 4.02 covers indeterminate easements. Possibly some assurance in standard form against damage to the improvements should be considered.

8. Exception 5.00 is not acceptable, but it appears satisfactory as a standard exception even though we will usually require its deletion.

9. As to Gas and Oil Leases, Mineral Reservations, etc. we should have some assurance as to surface rights. See Paragraph 3, C.L.T.A. Endorsement 100.

TITLE REQUIREMENTS OF SECONDARY LENDERS—Comment No. 2

A. Add under TAXES—GENERAL INSTRUCTIONS, a new sub-paragraph (h) as follows:

(h) If issuing a policy to, or for the ultimate use of, a secondary lender, note that current taxes or current installments of taxes should be paid before the policy is issued.

B. It is believed that capitalized captions are unnecessary and add to the typing required. It is therefore suggested that all such captions be omitted.

C. **EXCEPTIONS**

TAXES—In their present form only Exception 1.00 can be approved but 1.03 would be acceptable if changed to read as follows:

"General and Special (1) taxes for (2) payable in installments, *installment paid; next installment of $, payable (3) ."
(The date filled in in (3) should always be a date subsequent to the date of the policy.)

ASSESSMENTS—None of these is acceptable. The following is suggested:
2.01 Special assessment No. of the (Name of District). Improvement District No. , created for (Purpose of District), amount $ payable on (fill in annual date) in each year in installments of $ each are paid to date. Next installment due .
(The date filled in just above should always be a date subsequent to the date of the policy, and if the loan is insured by the FHA, a date subsequent to the date of the endorsement of the Note for insurance by the FHA.)

RESTRICTIONS

GENERAL INSTRUCTIONS:

(a) If the instrument was recorded after February 15, 1950, add to the appropriate exception, the following:
"The covenants, conditions and restrictions referred to above include (or do not include) restrictions upon sale or occupancy on the bases of race, color or creed."

3.00 Restrictions in instrument recorded.....

* Current

in ..... of ..... page ..... which contain no forfeiture, express or implied, and which have not been violated.

3.01 (Intended as a substitute for existing 3.03)
Restrictions in instrument recorded ..... in ..... of ..... page ....., which provide that a violation thereof shall not defeat or render invalid any mortgage or deed of trust made in good faith and for value and which have not been violated.

3.02 (Intended as a substitute for 3.04)
If a right of reversion has been subordinated by separate instrument, add to the appropriate exception
"Agreement recorded ..... in ..... of ..... page ....., subordinates the right of reversion to mortgages and deeds of trust made in good faith and for value. The restrictions have not been violated."

3.03 (Intended as a substitute for 3.05)
If the subordination is to a specified lien only, add to the appropriate exception
"Foregoing right of reversion has been subordinated to the lien of the mortgage or deed of trust referred to in paragraph ..... of Schedule ..... by an instrument recorded ..... in ..... of ..... page ..... . The restrictions have not been violated."

* * *

Present 3.02 unless supplemented by affirmative insurance would not be acceptable nor would 3.06 or 3.07 be acceptable unless modified as indicated under proposed 3.00 above, so also with respect to present 3.08, 3.09 and 3.10.

EASEMENTS

Should be accompanied by survey, plat or map as may be appropriate. Acceptable 4.00, 4.01, 4.03, 4.07. Not Acceptable 4.02, 4.05, 4.06.

SURVEYS

Not acceptable—5.00.
No objection to the form of 5.01, 5.02, and 5.03 if accompanied by survey. As to whether the loan would be purchased would depend on facts shown on survey.

LEASES

No objection to 6.00, 6.01 or 6.02 if the leases have been previously approved by the lender.

MINERAL RIGHTS

No objection—provided affirmative insurance is furnished either by rider indorsement or by express language to be added in the exception, that there exists no right to disturb the surface.

(Note: See transcript of Mr. Swezey's letter of August 30, 1951, and Comment Nos. 1 and 2 in your study of these addresses.—Ed.)

SWEZEY: Mr. Chairman, Mr. Henley, and ladies and gentlemen:

I want to say that in all of my work with the members of this association, both individually and collectively, I have been delighted at the response for their helpfulness, both individually and collectively.

This project commenced, so far as I am concerned, back in March, 1950. Our company was purchasing a large number of residential loans, and so that our terminology may be exact, I would like to offer a definition or two. Our company classifies as residential loans, those occupied by one to four families. With us, all other loans are classified as business loans.

In business loans, we are perfectly willing to take the time, if you are, and sit down in each instance and discuss the form of exceptions which we will take in the title policy. But we

feel for the benefit of your company and for the benefit of our company and those other national lenders who wish standardization, we could agree upon standard exceptions to be included in Schedule B—in such form that we might be able to use senior clerks in checking these policies. The ultimate object of all national lenders is to receive from the field which produces these loans into which we put our money, a packaged product—that is, something which can be checked easily and swiftly. In other words, reduce the acquisition cost. You appreciate that our motives were not entirely altruistic, but correspondingly I assume that you have no surplus of trained personnel. I know we find it difficult to get adequate help. For that reason, from your standpoint, if we can simplify our procedures, we can gain thereby.

It has been told to me—and how true this is I do not know—but I believe it to be true—that several of the companies issuing title policies have a set of limitations or controls for each company, which is to be the assured name in the policy. Now, that is the kind of thing we are trying to get over. We are trying to get down to a common denominator.

Several suggestions have been made and considered. One was that this would have to be worked out on a state basis. In other words, in the State Title Associations, in the states where such associations exist. I believe that greater progress can be made if we can resolve on a country-wide basis. Our first tentative form—and that is the reason why we have been working on it.

In New York State, the annual meeting of the association was held at Lake Placid, I believe, on September 13th and 14th. In charge of this subject was Carl Schlitt. He is the counsel for Harry Davenport's company. Whenever in New York City we want to get something done, it used to be the habit of some of those in the title industry there to turn to Carl. I am very glad to have that done because going back over this last year, you know I never do anything at all if I can get somebody better qualified to do it. There are a lot of these men around, so I try to get out of work whenever I can.

Carl's report back to me after the meeting was that the meeting was definitely in favor of proceeding, that they thought we could arrive at a common understanding, that you could give us exceptions that could be acceptable to national lenders. The only question that was still open, and I don't want to prejudice the thinking of this group, was—it is still a debatable subject—is whether or not we cannot secure affrmative insurance, with respect to certain exceptions in the typewritten exception itself, and thereby avoid the use of the rider. In suggesting that, I am fully cognizant of the great stride that California has made in title insurance; the work that Ben and his associates have done in standardizing and reducing to a decimal system these riders. However, if we are going to have clerks check riders on policies, then I think we had better use affirmative insurance in the exception itself.

With that preface I am going to ask you to turn to certain specific places and then I am going to offer supplemental information.

Would you please turn now to the page that is headed "Taxes—General Instructions", subdivision G at the bottom of the page. It is in Title 1.1—at the bottom of that page. Now please don't try to copy my comments, but if you will just assimilate the sense of what I am trying to tell, I think it will be more helpful. And it will enable us to see it more rapidly.

The first suggestion is to add under taxes, general instructions, a new subparagraph lettered H, in parentheses, as follows:

> (H) If issuing a policy to or for the ultimate use of a national lender, note that current taxes or current installments of taxes should be paid before the policy is issued.

That seems so fundamental that it isn't necessary to discuss it, but I do

believe that you all understand. Let me give you a New York City example, because I am familiar with the law there. Our taxes in the City of New York become a lien half yearly. In other words, the first half of the taxes for the tax year of 1951-52 become a lien on October 1st, 1951. Under our law they may be paid without penalty up to and including October 31st. But if we are closing a title in New York City on October 1st, we require the payment of that half year's taxes in full, because they are a lien. Therefore, I think the procedure would be similar in the case of every national lender and that the assured would require the payment of all taxes which would then be payable, which were then due and payable and a lien on the premises.

Captions

Now the next suggestion is again critical but made in good faith. It is believed that capitalized captions are unnecessary and add to the typing required. It is therefore suggested that all such captions be omitted. If I did not serve as the Devil's advocate here, I would serve no useful purpose. And I think from the standpoint, certainly, of the assured under the policy, the caption is not necessary if the decimal point is observed and properly used.

Now let's turn over the page to the page that is headed at the top "Taxes" and marked at the bottom with .12.

Now my comment to Ben was this: In that present form, only Exception 1 can be approved. But 1.3 would be acceptable if changed to read as follows: Let's go back to 1. If you will just make a check mark against it.

It says: "Taxes a lien but not payable."

Now I thought we could cut out the caption there and just have the decimal number one (.1) cover general and special taxes that are a lien but not yet payable.

MR. HENLEY: Of course, those captions were put in merely for reference purposes, and it is not intended that they would go into the policy or report.

MR. SWEZEY: With respect to that particular one, Ben suggested that certain important clients who are frequently getting policies of his and other companies in the San Francisco area, have asked that the title companies add in parentheses the tax block and lot number. There would be no objection to that on anybody's part, I think. We would not consider that, I dare say, a deviation from the standard.

Now if you will go next to 103, and please follow, but don't try to copy what I suggest. I said it would be acceptable if the change were made as follows:

Taxes

General and special blank taxes, for blank, payable in blank installments, current installment paid; next installment of blank dollars payable blank.

And then below in parentheses:

(The date filled in, being the payable date, should always be a date subsequent to the day of the policy.)

Let's go on without debate, if we can, and we will come back.

I offer these, you see, as suggestions merely for your consideration, and I think ultimately we have got to sit down around a table and work this out.

Assessments

Now if you will turn to the page marked "Assessments." At the top of the page and down at the bottom is marked 2.0.

There I got a little bit rough, because I said none of these is acceptable, following a suggestion—

Now again if you will only follow the sense, please.

Special assessments, n u m b e r blanks of the blank (and here you fill in the name of the district) improvement district, number blank, created for blank, (you fill in the purpose of the district) amount dollars payable on—(and in that blank space you would fill in the annual date) in each year in so many installments (there is a blank space, maybe ten.) of dollars blank, each

are paid to date. Next installment due blank date (fill in the date).

Now I said at the end in parentheses:

(The date filled in above should always be a date subsequent to the date of the policy, and if the loan is insured by the FHA, a date subsequent to the date of the endorsement of the note for insurance for the FHA.)

That's to cover the regulations we have had over special assessments with the FHA.

Restrictions

We will pass on, if you please, to restrictions. Covenants, conditions and restrictions. The page is designated at the bottom 3.0.

Now here I added a general instruction, corresponding to what Ben had but you will notice there it says, in the first, under general instructions:

The covenants, conditions and restrictions referred to above include or do not include restrictions upon sale or occupancy on the basis of race, color or creed.

Now it is obvious that you can't have one decimal exception or addition to an exception which covers both sides of the fence. We have got to have something "include" or "do not include." What most of us want is a very definite red flag there at that point, so that if they include restrictions, it would have a chance to go in.

MR. HENLEY: Might I explain that, Charley? Of course, that was merely intended to mean that the exception would be used in the alternative. Either you would state that they did include such restrictions or that they did not. It was merely an indication that this particular form might be used in either case but would correctly state the condition of the restriction.

MR. SWEZEY: When Ben and I discuss these things, we are discussing them in the same way that we normally would across the table, and it is simply a different point of view.

The point there is if we are going to use senior clerks in the office of the assured to check these things, we have got to have a red flag. And if they include such restrictions—in the first place— let's go back a little bit. I don't mean to repeat too much, but what you people want to produce, just as your customer, the mortgage banker that produces the loan, is a saleable product, and we know that if you produce an FHA or a GI loan, and there were covenants imposed after February 15, 1950, or re-imposed after that date, then that is not a saleable product, in my estimation. In other words, it might be sold to somebody who was not well advised by counsel, but ultimately it would come back in your lap, because they would be definitely annoyed. That's an understatement, because if you went to work and gave a policy to somebody, an individual, who took a GI loan—it could be in the case of an FHA, but take an individual who took a GI loan, and it did contain a provision that would prevent or destroy the effectiveness of the GI guarantee, then you have done that client a disservice. I can guarantee that he will never come back to you for title insurance. So I want you to watch that particularly, and that is a thing, I say, that we have to iron out around the table, because we have got to have a red flag at that point.

Restrictions—Covenants

Now if you will turn over, please, to 3. If you will look at 3 next, please. Now, that I modified slightly, and put the affirmative insurance in. That was about what I did. I think, unless there is disagreement, when we get down to work on these we can cut out covenants, conditions and restrictions, and simply use the word "restrictions," which seems to be an all-embracing word. I will come back to that in a minute.

Now, this is 3.00. Restrictions and instrument recorded

blank in blank of blank, page blank.

Now those blanks are, respectively, first, the date of recording, because we run into the February 15th date and then "in blank" means in volume of book, or whatever you call it,

of mortgages, that would be, or deeds of trust, page blank, whatever the page is, which contain no forfeiture expressed or implied, and which have not been violated. Now that language, to satisfy some of you, might have to be amplified. I have tried to boil it down to the bare essence. You see, I say which contain no forfeiture expressed or implied and which have not been violated. Now, with your indulgence, I want to stop for just a moment and supplement what Stewart said, because it might be of value to you—I don't know but I hope. If you produce loans for sale in the New York area. Stewart properly raised a red flag at that point, and he might be glad to have my individual reaction. When you get home, either in your library or the library of your bar association, you might look at the New York Insurance law. Please look at Section 81, paragraph 6, which deals with investments in mortgage loans. The part I am speaking about is not FHA insured or guaranteed by the Veterans Administration. It does relate to 501 loans and exercises a control there as well as on the conventional loan. It says in substance that we must loan on unencumbered real property, but it goes on to say that such real property shall not be deemed to be encumbered by reason of existence—and I haven't got it here, gentlemen, but I will give you the thread—by reason of existence of leases or rights of way or by reason, and so on, provided—and here is a proviso that is important—provided such mortgage lien, provided they do not contain any right of condition or re-entry under which such mortgage lien may be cut off, subordinated or disposed of. In other words, there is a proviso at the end which indicates clearly to my mind as a lawyer that it must be an enforceable forfeiture clause. I argued that 20 years ago or more, and I didn't get many to accept that point of view. I think in New York we are coming to that point of view.

Re-entry

To go back just a little bit, if the statute had ended and simply said in the proviso "Provided there is no right of condition or re-entry", then there might be a serious question, because whether enforceable or not, it might have been impossible for a lender controlled by that provision in the insurance law to make a loan. But it seemed obvious to me if it went on and said, "Under which such mortgage loan can be cut off or subordinated or disposed of"—in other words, that indicated to my mind that it had to be an enforceable right. So, quite awhile ago, we notified our mortgage loan correspondents of our point of view, and we have been proceeding on that theory since.

But don't accept our point of view as controlling all other mortgage lenders who produce loans in the New York City area. I offer that as a word of warning. But, in discussing with them, you might approach it for your own rationalization. I'd be glad to have your reaction some time if you would care to write to me about it.

Easements

The second point there is that we would like to have the affirmative insurance covering this exception.

Now, supposing I skip the com ments on the other as time is running against us and I want to give you a minute or two. Let's turn to easements. Easements start on page 4.0. My comment is simply this: Should be accompanied by a survey, plan or map, as may be appropriate. That is, assuming you are going to put those exceptions in. Now here is what I have indicated. Acceptable—meaning that we will take them—4.00, 4.01, 4.03 and 4.07, if you want to mark them. Not acceptable—4.02, 4.05, 4.06.

Surveys

Turn to surveys. Page 5.0. 5.0 being the first exception is obviously not acceptable. Check that please. No objection to the form of 5.01, 5.02 and 5.03, if accompanied by a survey. As to whether, in fact, the loan would be purchased, would depend upon the facts shown on the survey.

Turn to page 6.0. No objection to 6.00, 6.01 or 6.02. That is, no objec-

tion to any of them, if the leases have been previously approved for the lender.

Mineral Rights

Mineral rights, page 7.0. No objection, provided affirmative insurance is furnished either by right of endorsement or by express language to be added in the exception that there exists no right to disturb the surface. That is the part that they are interested in.

Life Counsel

Now coming back a little bit. Before I left New York, I had the opportunity to talk to George Ford of the Equitable Life, and he expressed himself fully in accord with the thought. The Mutual Life, represented by Vincent Keene, an assistant general counsel, has not reached a definite conclusion. Mr. Bonnin, of the Metropolitan, is here, and I think from his letter, he is generally in favor. I think that Mr. Amerman is, and I think, if I may offer, so long as we have the floor (I am like some of the congressmen), I am going to try to hold it for the lenders. I think that would be more in keeping, Mr. Chairman, is that all right? Is that your idea, Ben, before I go any further or before you respond? I would like, then, if I could, to call on Mr. Bonnin, Assistant General Counsel of the Metropolitan Life Insurance Company. Would you come to the microphone, please?

MR. BONNIN: Mr. Chairman: As I have indicated from the floor, I have little or nothing to add to the statements made by Col. Swezey but am glad to appear before you and make the statement that I am heartily in accord with the efforts of the committee, headed by Mr. Henley, to work out a uniform set of exceptions.

I have seen most of the correspondence which has passed between Mr. Henley and Col. Swezey; have made some suggestions which have been incorporated in the statements made by Col. Swezey.

Our Law Division has found the use of a standard exception in California of great help. If something of a similar nature can be worked out for the other states, I am sure that it will be helpful to both the title insurance and life insurance companies. Whether the problem can best be solved by working out the forms on a state rather than a national basis must be given further consideration. Personally, I feel that it would be helpful if title insurance companies, working on a national basis, and life insurance companies could agree on the forms to be used. Without going into detail, I wish to state that the suggestions made by Col. Swezey seem to be practical. If affirmative insurance can be obtained and surveys, where required, are furnished to clear up questions on setbacks and easements, it would eliminate a great deal of correspondence.

Over the Table

It will require considerable work to determine just what is to be included in a general over-all exception and how the same is to be phrased, but I want to assure you that if there is anything that we can do to help in the matter, we want the committee to feel free to call upon us. It would, no doubt, be much easier if the members of the committee sat around a table and discussed the various exceptions and forms and arrived at the wording thereof than to try to resolve the problem by correspondence.

JOHN A. AMERMAN: We are in sympathy with anything that will save work for title companies and work for ouselves. We, too, are using what Charlie Swezey has called Senior Clerks. We call them Conveyancers. It's not a very exact term, and we are trying to find another one. These are men or women who are not admitted to the Bar, but who have had extensive experience with mortgage and title matters. We feel that it is in order for them to examine title policies in routine cases, including Schedule "B". I would not be honest, however, if I did not indicate, as I have already said to Mr. Swezey, that there are differences of opinion, different requirements, as between insurance companies.

For one thing, our general situation is that we deal directly, and place loans directly, in the majority of cases, under our widespread regional office system. In that respect, the problem differs somewhat from the New York Life's problem. With regard to taxes, our investment statute says, in effect, that taxes and assessments are not to be considered encumbrances unless they are delinquent. That isn't the exact wording, but that's the effect. In other words, you can have a situation under which taxes, or an installment of taxes, is payable. But it is not yet delinquent, and we define delinquency as meaning the time when taxes begin to bear interest or penalty. I think it is our experience that people don't pay taxes merely because they are payable, but they do pay them, or try to pay them, before they begin to draw a penalty. And as I say, our statute is so expressed that we don't have to have the taxes paid until the delinquency date. Well, that is one difference between us which may lead to the necessity for variance in the wording as far as we're concerned, and I submit that that simply adds to the difficulty, although I don't think that it should be such a difficulty as to dicourage these very worthy efforts. I could go on, but I don't want to take the time. I can merely say that I am very much in favor of continuing with this effort. We want to do everything we can, and we feel that we are very much indebted to the committee and the Colonel, all of whom have done so much good work on this.

MR. SWEZEY: So that there will be no misunderstanding. Our statute was amended at the last session by the New York legislature, this Spring, so it could give the same authority that John Amerman indicated in New Jersey. That is, in other words, the mere fact that a tax is payable, doesn't legally prevent us from going ahead and making the loan. And we do honestly try to follow the custom of the community. For example, if it ran for a whole year without paying, so that the man would not be delinquent, he had a whole year in which to pay,—can you imagine that situation? We probably would give him the benefit of it, but it might well be that it would have to have two exceptions, because other states may so restrict, and, for example, Massachusetts, has an odd number, Connecticut, etc. I don't know exactly what their statutes provide. But I feel that in New York City what I said was true.

Other Types of Lenders

I want to add just one other thing that I didn't speak about regarding the work that Mr. Schlitt is carrying on. He hopes to extend that discussion to other lenders who are more and more entering the national field, and who are an important group of lenders, namely, the Mutual Savings Banks of New York State. They have a large investment portfolio in mortgages, and their wishes should be considered. And it so happens that we've got a sort of a family interlocking there that should be most helpful. Harry Davenport is trustee, I believe, of two—maybe more now, because as you grow older, more honors are heaped upon you. He is a trustee, I believe, of at least two savings banks, and Carl Schlitt, being his counsel,—seems to me there is an obvious interlock.

MR. HENLEY: Thank you, Charlie. I would just like to make this comment about Charlie's thought that affirmative insurance should be provided in exception forms rather than by independent endorsements. I suppose many of you title people are not as familiar with the practice in California as are the life insurance companies. Over a period of years, the practice has developed there of providing practically all affirmative insurance by endorsements. The reason for that is merely this, that we find it very difficult to satisfy ourselves that it is proper to insert in a portion of our policy which says that "we insure subject to the following matters against which we do not insure, "a statement that we do insure that there has been no violation of the restrictions.

I appreciate the fact that as a practical matter, a Court may in determining the intent of the parties, construe that language to mean that the title insurance company is insuring, subject to the stipulations of the policy, that the facts which it states in the exception form are true. However, certainly the language is contradictory, and, if the construction of the contract became an issue in a law suit, it might be somewhat difficult to resolve. We feel, therefore, following the established practice of such eminent institutions as New York Life, Metropolitan, and the Equitable, in issuance of life insurance policies that where we are expressing the assurance,—expressing an obligation of protection,—that it should be clearly and unambiguously expressed in such a way that a court will know exactly what we are doing.

Protection

Now, as far as the examination of the policy by a Senior Clerk is concerned, it seems to me that it's going to be very easy for the Senior Clerk to know to what Endorsement Form Number 100 applies. That form was approved by the California Land Title Association, and was very affably and pleasantly accepted by all life insurance companies because it certainly gives them a lot of protection on easements and restrictions or one thing or another. That Senior Clerk will have no great difficulty in knowing that Endorsement Number 100 protects the insured pretty generally as far as easement encroachments, violation of restrictions and similar matters are concerned. And I would think, Charlie, that it would be much easier to have your Clerk work on the basis of these endorsements than on the basis of language contained in exception forms. I think our time is about expired, but if you would like to carry on, I think Ed will indulge it for a few minutes.

MR. SWEZEY: There's merit in what Ben says, as always, and I was conscious of that. It is not our proposal here to try to change the language of the ATA form. I think the greatest step forward, from the standpoint of the institutional investor, was the adoption by this Association of the ATA form, and its subsequent revision. There is merit in what Ben says about possible ambiguity but I think we can resolve that by having a simple statement to say that notwithstanding other than as we want it, any other language of the policy, the company thereby insures against any violation, or contains no forfeiture clause, or something of that general nature. So we can have a specific insurance. The reason I offer that is this, from their standpoint, they have gone ahead and made a definite contribution to title insurance in California. Nevertheless, I think that country-wide, it may be difficult to sell, you individually, and as members of the Association, on that procedure. It is something, I think, then when it comes to a new procedure, a majority will have to control in accordance with the American way of life.

ABSTRACTERS SECTION

Proceedings in Meetings of Abstracters Section

Report of Chairman of Section

GEORGE E. HARBERT

President, DeKalb County Abstract Co., Sycamore, Illinois

It now becomes my pleasant duty to render an account of my stewardship for the past year. During the past year the abstracters throughout the country have generally been prosperous. Here and there, a few spots have been called to my attention where business has fallen off and the abstract company could use a bit more work than they now have. In the main, however, the fall-off from the boom of 1950 has not been over 10%, and to most of us this drop in business was welcomed, as it enabled the abstracters to give better service to their customers.

State Conventions

One of the most pleasant portions of my position has been the attendance of six state conventions. In the states which I visited, I found that the abstracters were alert to the changing requirements of their customers. They are re-investing their surplus money in office improvements and are successfully simplifying their work and speeding up their service to their customers. While the specific instances are so numerous, there are two or three outstanding accomplishments that I think are worthy of note.

In the state of Montana, an oil boom developed in counties where the abstract plants were small, and the normal volume of business probably not large enough to be called average. However, while visiting that state, the attorneys representing the oil interests told me that the abstracters had delivered title service in quality and quantity far in excess of their expectations. Wherever I went, I heard nothing but praise of the splendid title service which had been given by these abstracters in sparsely populated counties.

More Interest

Throughout all of the states I found a continuing awareness of the need for membership in the national organization. In this day of economic stress and increasing centralization of authority, even the most hardened individualists realize that we must be strong and united in order to secure for ourselves a reasonable interpretation of the growing restrictive controls which are being imposed upon all business by our federal government.

This awareness has made itself felt in bigger attendance at state conventions, and, as you have noticed, bigger attendance at our national conventions. For those of you who could not secure a room at the Broadmoor, but were still willing to travel to this convention and put up with some inconvenience, I extend my most sincere thanks, because it is indicative of your willingness to put aside selfish considerations to assist yourself and your fellow abstracters in knitting more closely the ties that bind us into our national association.

To File or Not to File—That Is the Question

During the past year, we have been faced with a serious problem in attempting to determine whether we should recommend to the abstracters that they file price schedules under O.P.S. The Price Control Legislation requires that any one engaged in business, file a schedule of prices unless exempt by the Act.

Professional services are exempt, but no specific delineation of the types of business which are classified as rendering professional service has been made. Joe Meredith, Jim Sheridan, Mort Smith and I have had numerous telephone conferences to attempt to determine the position which we should take on this subject. After careful consideration, it is our opinion, that we think our

business is covered by the exemption of professional service, and we also feel that to attempt to have a specific ruling that abstracting is a professional service, as we eventually obtained in World War II under O.P.A. cannot be done until the turmoil surrounding the establishment of the offices has died down and the operation of this bureau has become more orderly. You can rest assured that this problem is present in our minds and you will be advised of any ruling, specifically exempting us or specifically requiring us to file.

(NOTE: Since this report was delivered, decision was made to file a Petition for Exemption. No decision on this has come from Washington as of a mid-February, 1952, date. Ed.)

Title Insurance

Title insurance continues to grow in popularity and its use is spreading. Most of you now represent some title insurance company on some basis. For those of you who do not, may I urge you to investigate the possibilities of title insurance? For years you have served your customers with the best title service available and if your customer wants title insurance you should be ready to furnish this service to him.

Abstracter-Underwriter Relations

During the past year, the work of our committee on abstracters-underwriters relations headed by Wm. McPhail has continued its outstanding job. It is our opinion that much has yet to be done to assure to all of us a sound, fair recognition in the changing picture. It will be our recommendation to the incoming president that this committee be continued.

From past experience I know the sad fate that awaits anyone who attempts any kind of an opinion poll, but with my eyes wide open, I walked in where wiser men fear to tread, and asked you for your opinions on many subjects through the medium of a questionnaire. The number of responses to this questionnaire were astounding and will be presented to you at this convention. When you hear the report, I sincerely believe that you will agree with me that the effort has been worthwhile. It may well be that additional results will justify an additional report at our next convention, so if any of you have not sent in your questionnaire, I urge you to do so as soon as you return home.

Public relations are more important today than ever before. I believe that the state of Oklahoma has developed one of the outstanding approaches to public relations which has come to my attention. They have organized a speakers' bureau in that state, and have supplied those abstracters who could speak, with certain basic material, so that the speakers may tell our story in an interesting fashion. This, by the way, was part of the reason for our questionnaire.

Statistics

With due apologies to the Kiwanians and the Lions' Club, I am forced to admit that I am a Rotarian, and many times we have had the speakers from various organizations introduce their speech with something like this: "The industry with which I am affiliated has a capital investment of billions of dollars, an annual payroll of numerous millions of dollars, and employs so many people." I was asked to speak before an organization in a neighboring county, and the toastmaster who introduced me asked me before the program, how many people were actually employed in the title industry. I told him I didn't know. He then asked me how many title plants there were in the United States. Again I answered, "I don't know." He then asked me if I had any idea of the capital investment in the title industry in this country, and again I said, "I don't know." Thoroughly disgusted, he got on his feet and introduced me in the following fashion: "George Harbert has been in the title profession for 28 years, but admits he don't know much about it. What little he does know, he will tell us in 20 minutes." Believe me, my talk ended in 12. And, while there was a lot of kidding about it, I did feel that some base literature supplied to our speakers would be of great assistance to all of us.

Speakers' Bureau

Through a speakers' bureau, much good can be accomplished from another angle. I can go into a neighboring county and tell the customers of my neighbor what a fine, honest and scrupulous abstracter he is, and they will believe me. He can return the compliment and come into my county and my friends will believe him, but I would not dare to throw out my chest and tell my friends that I am the best abstracter in the state of Illinois (which I admit I am) for fear they might think that I was boasting a bit. For these and other considerations, it is my fond hope that more states will adopt the speakers' bureau, patterned after the splendid example set by our friends from Oklahoma.

Economically, I believe that we are entering into a cycle of reasonably good business. Plant efficiency will pay dividends, because wages will continue high, and the price of our product will not advance. I see no immediate fear of a slackening of our business, as the recent modification of the down-payment required for home construction should do much to encourage new building. With employment at a high level, many people will undertake to build or finance a new home, who could not have afforded it a year ago. Most rural areas report an inflationary trend which, by a national survey, has increased the value of farm lands throughout the country 17% in the last year alone. Inflation feeds on a surplus of buyers, and a surplus of buyers means good business for us. So, from all reports, our business should continue good. There is only one warning which I must bring home to you. Do not neglect your service to your public. Continue your efforts to secure good public relations, and the basis of good public relations is, as always, courteous and speedy service to your public.

Program

During the next day and a half, we will bring to you speakers on subjects which we think are pertinent, and which we feel will be of interest to you. The last hour of the section meeting will bring before you the members of your executive committee, who agree that they can answer any problem which you may have to present to them. If you have a problem, write it down on a piece of paper, Byron Powell will pass slips out to you for that purpose and will be at the door at the close of this meeting to collect them. The requisitions will be handed to the secretary of this section, who will act as moderator of that panel.

Last, but not least, you have the responsibility of shaping our national program for this, and succeeding years. We do the best we can to carry out your wishes, so if you feel that there is any project which should be carried out on the national basis, the officers of this section and of your national association will appreciate your giving us your ideas as to what you think the association should do for all of us.

Personal Thanks

In conclusion, I want to thank the members of my executive committee, and my fellow officers, for the untiring assistance which they have given me during the past year. I know that all of you are aware that Jim Sheridan is a prize, but wait until he starts calling you at 1 o'clock in the morning, and you will realize that he eats, thinks and sleeps American Title Association twenty-four hours a day by the clock. So, to Jim Sheridan, who is celebrating his 20th year with the American Title, on behalf of our section, we extend our congratulations and our wish for a long life in the service of our association.

May I also take this opportunity to thank the Presidents and secretaries of the many state associations, as well as the many abstracters throughout the country who have written me during the past year, and who have, without fail, assisted in every assignment that was given to them.

To you, and each of you, go my sincere thanks, and I trust that during the coming year, you will all continue to be as helpful in your service to the American Title Association as you have been in the past.

A License Law for Abstracters

A Panel

Members of Panel:

Marvin Wallace, President, Cragun Abstract Co., Kingman, Kans.

A. A. Poirier, President, Wheatland Abstract Co., Harlowton, Mont.

Jacob H. Knol, Mgr., Abstract, Dept., Guarantee Bond and Mortgage Co., Grand Rapids, Mich.

Moderator: Richard B. Williams, President, Mesa County Abstract Co., Grand Junction, Colorado.

MARVIN WALLACE

Of the six or seven states, approximately, that have an Abstracters' License Law, Kansas is unique in that we did not get into agreement with the legislation of the other states. In preparing our bill, we did attempt to get a great deal of the Colorado law and some from the Wyoming law, but when it was finally passed, you would have difficulty recognizing the finished product.

Tract Books

Among the items knocked out was the track book requirement. It first was passed in the Senate, and then in the House, succeeded in getting passed by a small majority. I was asked by a friend if I thought we had secured anything. My answer was "Yes, I do; I think we have something on which we now can work. We have fallen short of getting what we wanted, but it does have the minimum requirements and we can now go to work to develop it."

The law went into effect in Kansas ten years ago, in September, 1941. It creates a Board of three members, to be appointed by the Governor each for a term of three years.

Registration

It provides for the registering and licensing of abstracters. By "abstracters" I mean individuals who operate individually, partnerships, corporations and associations. Of course and naturally it contained the "grandfather" clause, subject only to the requirement for a bond.

Bond

The statute requires a minimum bond of $5,000 and the Board has authority to call for a bond in greater amount if, in its judgment, such is in order. The Board has increased the bond requirement according to population and it now ranges from a minimum of $5,000 in the counties of small population to a requirement of a bond for $15,000 in the more heavily populated counties.

Presently, we are giving serious consideration to a recommendation the bond requirement be exactly doubled.

Personal and Corporate

The statute provides both for a personal bond and a surety corporation bond. The latter make for much more easy handling. The last personal bond situation we had required a great amount of checking, etc., to assure the sureties were of substance and that there was full capacity to fulfill the obligations if called upon.

Examination

The statute provides for examinations twice a year, one in January and one in July for all who wish to enter the field of abstracting. In our state of Kansas, we average about 15

applications each time. Those who fail the first time may try again the following examination time.

Revocations

The Board has power to revoke a license for malicious destruction of the records, and also for fraudulent practices. We have had no cases in the former category. We have had one license revoked for fraudulent practices.

The great objective behind our drive for a license law was to give better service, more sound service, more responsible service, to the people of Kansas. That, in turn, meant raising the standards of abstracting in Kansas. At the present time, I should say about 30% of the abstracters of the state have what I would describe as a complete title plant. By that I mean a complete set of indices covering all the land of the county, including not only deeds and mortgages, but also probate and district court proceedings and, in face, everything that affects title to land.

Most of the counties wherein there is no complete plant are either in the western portion of our state, where population is light, or in scattered counties of small population.

High Standards

We have attempted, in preparing our examinations for abstracters licenses, to set the standards sufficiently high so that we will not have any individual, casually interested, take and pass the examinations. In other words, we have tried to put it into such shape as to make it necessary for an individual to prepare himself to operate in our profession exactly as he might have to do if he wanted to enter any other profession —in other words, school himself. The results seem to be that about 50% of those who take the examinations are attorneys recently admitted to practice, and, in large measure, the others who have spent considerable time as apprentices in abstract offices of Kansas.

It is our feeling we have raised the standards of abstracting considerably in Kansas. It is my personal feeling that, in the future, title insurance will become the better and more popular method of title evidencing. We are preparing ourselves for that day. We feel that, by putting our standards high now, we will be quite able to cope with the situation when it presents itself more throughout Kansas. As a matter of fact, particularly in some of our larger towns, we are doing a nice business in title insurance at this time.

A. A. POIRIER

Age

The Montana Abstracters Law (Chapter 105 of 1931 Session Laws), was passed by the 22nd Legislative Assembly of the State of Montana, on March 9, 1931, and became law on April 1, 1931. The law has now been in operation for over 20 years.

The Montana law has been amended only once in all these 20 years, and this was a minor amendment sponsored by the Montana Title Association.

Law Upheld

During the 20 years the law has been in operation it has been contested once in the Courts, the Supreme Court of Montana declared the law constitutional. This case is known as No. 7380, State of Montana, in the Supreme Court, March term, 1935. State ex rel George O. Freeman, respondent vs. Abstracters Board of Examiners et al appelants. Submitted April 30, 1935, and decided May 9, 1935. (ii Mont. 564, 45 Pac. 2nd 668).

The Montana Abstracters law in brief provides that any person, firm or corporation desiring to engage in or continue the business of making and compiling abstracts of title to real estate within the State of Montana shall have for use in such business a set of Abstract books or other system of indices or records showing in a sufficiently comprehensive form all instruments affecting title to real property on file or of record in the office of the County Clerk and Recorder of each County wherein they operate, and shall have in charge of such business a Registered Abstracter.

Board of Examiners

The law set up a three-man BOARD OF EXAMINERS, appointed by the Governor, to carry out the purposes and enforce the provisions of the law, which members must be Registered Abstracters.

Any person, firm or corporation desiring to enter the Abstract Business must first secure a CERTIFICATE OF AUTHORITY from the Abstracters Board of Examiners. To secure such Certificate of Authority applicant must furnish satisfactory proof to the Board that Applicant has for use in such business a set of Abstract books or other system of indices and shall have in charge of such business a Registered Abstracter, and must furnish a Surety Bond, or deposit acceptable securities with the State Treasurer, in the sum of $5000.00. These Certificates of Authority are issued for one year, and are renewed every year upon application to the Board.

Temporary Certificate

There is, however, a provision in the law that if, on the date of application for a Certificate of Authority, applicant can show that he has a set of indices at least 50% completed and intends to complete said indices, and he can comply with the other provisions of the law, he will be issued a temporary Certificate of Authority good for one year.

"Grandfather" Clause

The Montana Abstracters law also has a "grandfather" clause which provides that any person, firm or corporation not having the Abstract books of indices, and who on the first day of March, 1931 (the date of the passage of the Montana Abstracters Law), is the holder of a valid and subsisting Certificate of Authority issued by the State Treasurer pursuant to Sec. 4140 of the Revised Codes of Montana, 1921, and who shall make application to said Board prior to the expiration of such Certificate of Authority, and complies with the other provisions of the act, shall be issued a Certificate of Authority under the provisions of this Act. (For States not now having an Abstracters law and who contemplate the enactment of such a law, this clause should be in the proposed law in order to secure the help and co-operation of all abstracters then engaged in the business of Abstracting).

Must Register

All Abstracters in charge of an abstract office, or who sign Abstract Certificates, must be REGISTERED ABSTRACTERS: That is, they must secure a CERTIFICATE OF REGISTRATION from the Abstract Board of Examiners. To secure such a Certificate they must pass a written and oral examination as prescribed by the Board. The Board holds two examinations a year. This Certificate of Registration states in part that applicant has satisfied the Board of his qualifications as an abstracter of real estate titles, and is granted a Certificate of Registration as a REGISTERED ABSTRACTER, and as such, is authorized, for a period of one year from the date hereof to take charge of any Abstract office within said State holding a Certificate of Authority issued by said Board. This Certificate of Registration is renewal every year on application, and the payment of a fee of $1.00.

Again under the "grandfather" clause, all persons who on the first day of March, 1931, were in charge, either individually or jointly with other persons, of an abstract office which is the holder of a valid Certificate of Authority, were upon application issued a Certificate of Registration without taking an examination before the Board.

I believe that the provision in the Montana law providing for the Registration of Abstracters in charge of an Abstract Office is one of the outstanding features of the Montana law and I don't believe is contained in the Abstract of law many other States.

The matter of securing an adequate Abstracters' law in Montana had been discussed quite extensively at several of our annual Conventions and Regional Meetings, and finally such a law was drawn up and submitted to the Legislature in 1929. The law was passed by the House with only 5 dissenting votes. It was then

referred to the Senate Judiciary Committee. They brought out an unfavorable report, giving as their reason that the bill was a radical change from the provisions then governing Abstracters and they felt that further study should be made by its members.

During the interim members of both Senate and House were contacted by the various Abstracters and the provisions of the bill explained to them. The bill was re-introduced in the 1931 Session of the Legislature, was favorably reported out of the committee of both the House and Senate and passed by a substantial majority, and signed by the Governor.

Overcome Objections

Any State Association wanting to enact an Abstracters law should first draft a law that will be agreeable to its executive committee. Then this law should be presented at Regional meetings so that every Abstracter has an opportunity to discuss it. This presentation should be made at all Regional meetings by the same party so that when the Regionals have been concluded this party will have in mind all objections there have been advanced, and which of these objections can be overcome.

No Monopoly

One of the main objections advanced by legislators and others is that it is monopolistic. Our twenty years' experience with the law in Montana has proven that it is not monopolistic, and I could cite you many concrete instances to disprove this theory. On the other hand we have found that while it benefits the Abstracters of the State of Mnotana, the outstanding benefit is the protection to the users of Abstracts prepared by Abstracters who are registered and qualified under the law. The law makes for better abstract plants, better abstracters and therefore better abstracts.

The Montana Abstracters Law has proven every contention made by its proponents and disproved every contention made by its opponents.

Today, after twenty years' operation, I don't believe you will find a single abstracter in Montana now engaged in the Abstract business who is opposed to the law.

JACOB H. KNOL

I am the "loyal opposition." My job in this panel is to find fault with all license laws for abstracters and to put on the record my objections to the whole idea. In fact, I'm even instructed to seek for things to which I might register objection.

Exemption

With regard to the Montana law, it exempts from its provisions County Clerks and Recorders who are employed by the County in the preparation of abstracts.

Michigan has a number of county abstract offices; that is, the county itself, through authority given by the legislature, may engage commercially in the making of abstracts. As I understand it, Montana, Colorado and Kansas have no such plan.

I think any other state which is studying the matter of a license law should plan—and certainly hope—to include any county offices and/or county officials. But I quickly will add I know of no county office, or any public agent, Federal or State, that could give better, or even as good, a products and service as can the privately owned abstract office.

Insurance

It is alleged the license law as enacted and applied in the various states tends to improve abstracting and to give more and better security to the public. Most of the states have some sort of insurance to cover errors; and it is my opinion that most of our abstracters are procuring that type of protection already.

And could not the same results be obtained by adherence, rigid adherence, to the codes of ethics and other requirements of our several state title associations? It seems to me the requirements of the state title association are pretty much in conformity with the average abstracters license law.

According to Each State

In the main, it would seem to be

the license laws of the states of Montna, Kansas and Colorado are pretty much the same, although differing in some of the details. They have been well prepared. After reading them, I wondered to myself what arguments I could offer to refute some of the good points in each. And I realize, of course, that each state has its own particular problems, based upon its own customs and habits and legislation and decisions of the courts.

In these days, about all we hear are words of the constant encroachment by Government upon business. So I ask you: Do you want the Federal or the State government stepping in and telling you how we should run our business?

That, I believe, is a uuniversal complaint of business—all business—today; and that, I suspect, is the principal argument of "The Loyal Opposition" on this matter of a license law for abstracters.

RICHARD B. WILLIAMS

I feel signally honored to have been privileged to serve on this panel as moderator. I shall try to discharge the duties of the position.

The laws controlling abstracting are the result of years of work by numerous state title associations. One does not proceed without criticism. Sometimes it hurts. But progress cannot be stopped. By one means or another, we are going forward to a better procedure and better methods —sounder structures, you might say —in the profession of abstracting and title evidencing.

Colorado Law

Our Colorado statute was enacted in 1929, amended in 1935, and again amended in 1945. It is our feeling it is adequate. The one thing we now might wish to consider is extending it to include the title insurance companies now operating in Colorado.

Tract Book Requirement

I have been asked from the floor whether the licensing laws may have become outmoded by reason of the increased use of title insurance. I think not. It seems to me that abstracting, like any other profession, is progressive science. As you go along in the conduct of your business, there arises one thing or another which you must meet in order to render good, or additional, services to the public of your community. I am quoting Mr. Wallace of Kansas and including it in my report, as to this question. He states they would like to have a requirement in Kansas that there be tract book requirements as part of the law; but that after having served on the Board for ten years, he wonders if this feature may not be over-emphasized in its importance. In other words, he feels the individual, the person, is more important than the book.

Mr. Wallace points out that doctors who graduate from medical school pass an examination, but they do not have to build a hospital. And he mentions that the lawyer does not necessarily possess all the law books in order to start practicing.

Annual License

Mr. Poirier responded to a question from the floor and, to complete the record, I shall say that under Montana law the license is issued for one year. Each year there must be filed an application for renewal of the license. He adds that one of the prime reasons for this arises from the desire that the tract books be kept to date; and that, in the return of his application form, he must state he has maintained his books to date. Otherwise the Board can refuse to renew.

Revocation

Under our Colorado Law, the Board may revoke a license for moral turpitude, habitual carelessness, habitual inattention to business, fraudulent practices or incompetence.

Price Control

A question from the floor inquires whether there is price regulation in the laws of Montana or Kansas. The answer to that is No. As regards the county owned and operated sets in the State of Michigan, there is no statutory price regulation. Under the

Abstracters License laws of North and South Dakota, there is regulation by statute, entirely so in the former and, as regards South Dakota, regulation of fees is controlled by statute on all items in the original law. It does not cover the matter of fees to be charged on items which have come into being since enactment of the statute.

Lecense Fees

In Colorado, the fees to have a new plant examined is $100. If a re-examination is required, the new fee is $50.00. The examination fee for an individual is $25.00. The fee for each year, that is for renewal, is $25.00. The law also provides there must be continuous bond coverage, furnished by a surety company.

Short Period Abstracts

HAROLD F. McLERAN, *Attorney*
Mt. Pleasant, Iowa

Shortly after I had hung out my shingle to practice law in the dismal '30s, I fell into the rut of my brother attorneys in making abstracts from the records. Since that time it has been my good fortune to purchase an abstract plant which, as you can imagine, put a new sense of stability back of my work. Incidentally in my community all abstracting is done by the attorneys at the present time. One day, early in my career, I expressed my regrets to one of the older attorney-abstracters, whose father had compiled the first abstract plant in our County, that people seemed to hate abstracters, and I couldn't understand why abstracting stood in such ill repute. His reply was that people had always rebelled against abstracting and having to pay to have the records searched and abstracted. He also said as long as he had been in the profession people had felt that abstracters were grafters and were trying to foster a needless expense on the public. This was in the days when the attorney-abstracters were in hot competition and would draw a deed for fifty cents in order to get the abstract to continue at fifty cents per entry.

License Law

This past year the Iowa abstracters unsuccessfully tried to put through a license law and we ran into some of the same arguments, so I guess neither the public nor the abstracters have changed much down through the years, depending on which side of the fence you are on.

From the beginning of time, man has devised various means of evidencing the title to land. At the present time in the United States three systems are in use:

1. Abstract—opinion system
2. Title Insurance
3. Torrens registration

For the purpose of this paper, the discussion will be limited entirely to the abstract-attorney opinion system.

Reasons

Arguments for short abstracts can only be predicated on the reasons that the short abstracts would (1) save expense, (2) speed up closing.

Is a short abstract of title feasible? If a short abstract would satisfy title requirements as effectively as a government abstract, then abstracters have a duty to furnish such an abstract. Many problems need to be considered before a conclusion can be reached.

Defined

There should first be an understanding as to what a short abstract is. An abstract of title has been defined as being a compilation in orderly arrangement and in abridged form of the materials and facts of record affecting the title to a specific piece of land.

A short abstract could be defined as being an abstract covering a predetermined period of time prior to the

date of the Certificate, whether for 10, 20, 50 or any number of years. Such an abstract would have to commence with a given title and would assume that title was in that particular person.

Problem

The problem of short abstracts must be considered from two viewpoints:

(1) Vendor-Vendee
(2) Abstracter

The need for an abstract at all arises from the relationship of the Vendor-Vendee. Our profession is entirely dependent upon these two important parties doing business, thereby creating the need for title evidencing.

Vendor

The Vendor would like to be rid of the burden of providing an abstract. Consequently he is interested in saving expense in preparing an abstract, and is also interested in speeding up closings. A short abstract would appeal to the Vendor because he would be willing to furnish anything that would get by with the Vendee.

Vendee

From the standpoint of the Vendee the situation is reversed. He would be willing to accept anything in the way of an abstract that would be satisfactory enough to enable him to pass it on to the next purchaser without any trouble. Consequently the Vendee reviews an abstract with caution and doesn't hesitate to raise objections if necessary, in order to protect himself. As we all know, that's where our troubles start. Most Vendees are cautious enough to have the title examined. His attorney, in checking over the title, then feels bound to raise fly specks merely because he's afraid of the next examining attorney. The fight then rages on with the abstracter in the middle with the Vendor-Vendee growing more and more comtemptious of the whole abstract system. This statement is not literally true because most communities have both types of examiners, as well as abstracters.

Source of Trouble

Since I am an attorney, I feel free to say that I think that the greatest share of the trouble with our abstract system lies with the examiner, and as a consequence the abstracter gets the blame. Mr. Clinton P. Flick, in his recently published book entitled "Abstract and Title Practice", at page 562 states:

"In a dynamic society such as ours, title to real property must be freely alienable. Experience indicates that the great majority of titles are marketable; that some few titles, which presently open to objection, are easily made marketable by securing deeds, releases, or calling for the payment of past due charges against the land; and that the percentage of titles that are clouded with objections is extremely small. The old style practice of the family attorney who always found "against the title" is hopelessly outdated, and an attorney with such an outlook damages not only his client but also society at large. Attorneys specializing in the field of real property are under a duty to find "in favor of the title" and if there are valid objections to the title it should be corrected in such a manner that it thereafter be freely alienable.

It is to be remembered that houses and industries must be built, schools and hospitals must be erected, farm buildings must be repaired, or newly constructed, and these things will be done only as title to the properties are made freely alienable by agreements among the attorneys and by the settlement of controversies at every level. Real property law thus becomes a part of the social process."

The General Standard set out in "Iowa Land Title Examination Standards" adopted by the Iowa State Bar Association in 1950, reads as follows:

Problem: What should be the attitude of the attorney in examining abstracts of title as to the making of objections and requirements?

Standard: Objections and requirequirements should be made only when the irregularities or defects actually impair the title or reason-

ably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation. Many attorneys are over-critical in examining titles and appear to have in mind the making of every possible objection and requirement. The Committee recommends a more realistic attitude with respect to title defects."

I might say in passing that the Title Examination Standards adopted by the Iowa Bar Associations are in keeping with the same action taken by the Bar Association in fourteen other States, namely, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Minnesota, Missouri, Nebraska, Oklahoma, South Dakota, Utah, Washington and Wisconsin.

Main Problems

Two main problems need to be considered from the Vendor-Vendee standpoint: (1) what constitutes a marketable title, (2) what constitutes a sufficient abstract.

The sale of real estate, whether by oral or written contract carries with it the requirement of furnishing a marketable title unless the parties contract differently. The purpose of this paper is not to discuss the marketability of titles, so let it suffice by saying a marketable title is such a title as a prudent person, familiar with the facts and apprized of the question of law involved, would accept in the ordinary course of business. Smith vs. Huber 224 Iowa 817.

Contract

The duty to furnish an abstract seems to be a matter of contract only. "In England it seems to be one of the legal obligations of a Vendor to furnish an abstract of the title deeds and other muniments upon which he relies to prove his title. However, in this country, a Vendor is under no obligation to prove his title except he may have entered into a contract to do so. But though an abstract cannot, therefore, be here demanded as a legal incident of the sale, the contract of the parties almost always provides that the Vendor shall furnish one. This is an enforceable provision, and whenever it exists, it constitutes a condition precedent to liability on the part of the purchasers." Patton "Iowa Title Examination", page 42.

Since the duty to furnish an abstract arises from a contractual relationship only, it would be within the realm of possibility that the Vendor-Vendee could contract for an abstract limited to an agreed upon time, and would be enforceable. It is extremely unlikely, however, that a Vendee would willingly agree to accept a short abstract unless he could be assured that such an abstract would be acceptable if and when the Vendee sold the property, otherwise he would require a complete abstract. Usually the Vendee is in the driver's seat so would not contract for a short abstract unless some other reason existed which would make is safe for him to do so.

Sufficiency

The next question from the Vendor-Vendee standpoint is: What constitutes a sufficient abstract? Only until recent times was there ever a question raised as to what was required in an abstract. All abstracts started with the Government Patent, or other origin of title, and showed everything down to the date of the Certificate. 55 Am. Jur. 732 Par. 294. As our country became older and titles longer the burden and expense of abstracting long titles brought about pressure to shorten up the showing of titles. In most of Iowa, for many years it has been the usual practice in the case of lots under a recorded plat, to furnish an abstract commencing with the recorded plat. This practice and custom was aided by an Iowa Statute which provides as follows:

Sec. 592.3 City and Town plats: "In all cases where, prior to January 1, 1920, any person, persons or corporations have laid out any parcel of land into town or city lots, and the plat or plats therefore have been recorded and the same appears to be insufficient, etc. And subsequent to such platting, lots or subdivisions therefore have been sold and conveyed, all such said plats which have not been vacated

and have been of record for a period of twenty years or more, are hereby legalized and made of full force and effect as of the date of the making therefore the same as though all certificates has been attached and all the other necessary steps taken as provided by law, and the record therefore shall be conclusive evidence that the person, persons, firm or corporation were the proprietors of such tract of land and the owners thereof at the time of said platting, and that said tract of land was free and clear of all encumbrances unless an affidavit to the contrary was filed at the time of recording such plat. After January 1, 1944, no action shall be brought to establish, enforce, or recover any right, title, interest, lien, or condition existing at the time of the platting, adverse to or against a clear, absolute and unqualified title in free simple in the owner or owners."

Obviously this provided some relief for lot holders in platted areas but the owners of lands were still required to furnish abstracts from the Government. Many people felt that this was discriminating and burdensome. If abstracts could be safely accepted from the date of recorded plats, why couldn't land titles be cut off at some predetermined time? The answer is found in the fact that under the Iowa Statute, special limitations were provided, cutting off prior claims to platted land when the land had been platted prior to a certain date and lots sold. To afford the same relief to lands, it would be virtually necessary to pass an individual statute for every piece of land, and of course this wouldn't be practical. A law in order to be constitutional must have general application, and since no two land titles were apt to have the same starting dates, it would be difficult to frame a general statute applying to lands.

Iowa

In Iowa in the case of the sale of lots under a properly recorded plat, and filed within the period of limitation, the Vendee undoubtedly would be required to accept an abstract from the plat under his contract.

This situation is further covered by the Title Standards adopted by the Iowa State Bar Association as follows:

Problem: Is an abstract covering a lot which is included in an official plat in a city or town satisfactory if it commences with the date of the filing of the plat?

Standard: Yes, if such plat has been of record since prior to January 1, 1920, such plat being conclusive evidence that the proprietors had title thereto at that time under section 592.3 of the 1950 Code.

If the plat has been filed for record since January 1, 1920, then an abstract covering a lot therein, commencing with the plat, and in which the entire platting procedure is shown, is acceptable provided that the addition was platted prior to Jan. 1, 1930, and shows a record title owner prior to that date, if there has been full compliance with all statutory requirements with reference to the platting, and if an affidavit of possession is furnished under Code Section 614.17.

Trend

For the past ten years there has been a growing tendency in various parts of Iowa, particularly in the southeastern part to afford relief in the case of abstracts to land titles. This first took the form of skeletonizing various court proceedings, etc., originating prior to a predetermined date. Also ancient released mortgages were entirely eliminated from the abstract. This was accomplished entirely by resolution by the local bar association, and its effect will be considered later on in this paper.

From Government Down

Mr. Flick, in his book referred to above at pages 11 and 15 is not in agreement with our Iowa practice in furnishing an abstract. He says:

"It is very important that the certificate of the abstract cover the full period of time from govern-

ment entry down to the date of examination, for it is an elementary rule of law that the abstracter is not liable for mistakes or omissions that occur outside of the period of examination. Thus, an omission of a small fraction of time should be called to the attention of the abstracter, who will either correct and initial the certificate, or furnish an additional continuation covering the omitted period.

"Where an abstracter undertakes to continue an abstract, or abstract a title, for a limited period between specified dates only, he need not include anything of record outside of such period, nor anything within such period which does not affect the title; and where he undertakes to examine certain records, or the records in certain offices, only, the abstract need not contain or set forth any matter not appearing on such records.

"In case the certificate of the abstracter does not cover the entire period from the government patent down to the date of examination, or if the abstracter has omitted to cover a specified period of time, the examining attorney should require that the abstract be amended or that a new continuation be furnished.

"Title to real property must begin with the patent from the U.S. Govt. and an abstract beginning at the time the property was platted is generally regarded as incomplete. However, attorneys in certain counties in particular states, agree among themselves that an abstract beginning at the date of platting will be acceptable in the county, but even in these cases it is required that the government patent be shown. Usually the general rule is that the abstract should cover the entire period of time from government entry and patent down to date."

Full Abstract

Generally speaking the rule would seem to be with regard to lands, that a contract to furnish an abstract would carry with it the obligation to furnish an abstract from the government. Waters vs. Pearson, 163 Iowa 391; 55 Am. Jur. 732 Par. 294, unless as stated above the Vendor-Vendee contracted for a shorter abstract.

If a short period abstract is to satisfy the contract between the Vendor-Vendee, then the gap between the Government and the beginning period must be satisfied by some method other than an abstract. This might be by statute arbitrarily stating that all titles back of a given date would be considered marketable upon the filing of an affidavit stating that the present owner of the land held title by a chain of title dating back to John Jones, who held title on the effective date of the statute, and provided that if no claims were made to the title within a period of time named in the statute, all claims originating prior to that time would be barred under the Statute.

Adverse Possession Statute

Such a procedure would find a parallel in Iowa under our so called Affidavit of Adverse Possession Statute which has been in effect in Iowa for more than 30 years, and which has practically done away with quieting title actions. This Statute reads as follows:

"Claim to real estate antedating 1930.

Sec. 614.17. No action based upon any claim **arising** or **existing** prior to Jan. 1, 1930, shall be maintained, either at law or in equity, in any court to recover any real estate in this state or to recover or establish any interest therein or claims thereto, legal or equitable, against the holder of the record title to such real estate in possession, which such holder of the record title and his grantors immediate or remote are shown by the record to have held chain of title to said real estate, since Jan. 1, 1930, unless such claimant, by himself, or by his attorney or agent, or if he be a minor or under disability, by his guardian, trustee, or either parent, shall within one year from and after July 4, 1943, file in the office of the recorder of deeds of the county wherein such real estate is

situated, a statement in writing, which shall be duly acknowledged, definitely describing the real estate involved, the nature and extent of the right or interest claimed, and stating the facts upon which the same is based.

For the purpose of this section, such possession of said real estate may be shown of record by affidavits showing such possession, and when said affidavits have been filed and recorded, it shall be the duty of the recorder to enter upon the margin of said record, a certificate to the effect that said affidavits were filed by the owner in possession, as named in said affidavits, or by his attorney in fact, as shown by the records."

This Statute has been upheld in the case of Lane vs. Travelers Ins. Co., 230 Iowa 973.

If this Adverse Possession Statute is good, why wouldn't it be effective in limiting the recovery of titles back of a certain period? The Statute would cut off the remedy to recover an interest in real estate just as is done under our Adverse Possession Statute and also under our Platting Statute, so consequently no constitutional rights would be involved under the due process clause. Swanson vs. Pontralo, 238 Iowa 693, page 698.

When Claim Arose

The joker in the Statute, however, would be the question as to when the claim arose or existed. How would a Vendee know whether any such rights existed under deeds with reversion covenants, etc. or in any number of other situations without having a complete abstract before him? It would be like buying a pig in a poke.

The Abstracter in Picture

We then come to the important part of this discussion. How does the abstracter fit into the short abstract picture? The fact that a short abstract might do away with some abstract business is beside the point. An abstracter can justify his existence only by the service he renders. If there is a safe method of shortening abstracts, then our profession has a duty to furnish such an abstract.

In the absence of a Statute arbitrarily cutting off the remedy for the recovery of real estate back of a certain date, then if a short abstract is to have any foundation whatsoever, it must be based upon an abstracter's certificate stating that as of a certain date title was in John Jones.

Immediately upon the signing of such a certificate the abstracter would find himself in the position of (1) insuring the title, (2) practicing law. If the lawyers would holler as loudly over that infringement of the sacred right to practice law, as they do about other unauthorized practices, the abstracters could be assured of a lot of trouble from the Bar. That little angle might be circumvented, however, by submitting the chain of title to a member of the Bar and letting him sign the certificate. Thus with the blessing from that honorable profession, the abstracter could proceed on his merry way continuing the abstract down to date. If the abstract was ever lost it would, of course, be necessary to have it blessed all over again by the Bar. Thus the abstracter could be saved from the ignominy of practicing law.

Insurer?

The fact that the abstracter would be an insurer of the title is of real importance. In order for the abstracter to start with a certain deed he would of necessity be required to state that on a certain date he found title to be in John Jones and that such title was free from encumbrances, etc. Such a statement would carry far greater responsibility than merely abstracting what was found of record. He would be assuming the position of an examiner as well as that of an abstracter.

Adequate Compensation

In order to render this service, the abstracter would be to the expense of keeping up his plant, just the same as though he was furnishing abstracts from the government, and if he is rendering a service based upon his plant investment, he should be paid for the service. The title would

need to be checked out just the same as though a complete abstract was to be made. A fair charge would need to be determined for that portion of the service rendered, plus an additional amount for the responsibility. About the main saving to the Vendor would be the clerical help in typing up the record, plus a savings in time in the closing. I believe that we would all agree that typing up the record after running the title would be the easy part, so perhaps in considering the matter of expense, the savings in a short abstract would not be as great as might be anticipated. Certainly an abstracter couldn't be expected to maintain his plant without proper compensation. That portion of the title left out would need to be charged for on some other basis, perhaps about two-thirds of the per entry charge.

Just as the furnishing of an abstract by the Vendor to the Vendee is a matter of contract, so is the furnishing of an abstract by the abstracter a matter of contract. His contract may limit the period of his searching. He cannot, in such cases, be held liable as to material not within the period of search which he was employed to cover. I Am. Jur. 165 No. 17. Under the decisions, the abstracter in order to protect himself should clearly and distinctly point out in his Certificate that it was a limited abstract. 70 Ill. 268.

Not a Guarantor

The general rule is that an abstracter is not a guarantor of title. 51 Minn. 282. If, however, the abstracter certified to a special Certificate that the abstract commenced at a certain date with title in John Jones, then clearly he would be liable for failing to point out any prior encumbrances on the title which might later result in loss. Arnold vs. Berner 91 Kansas 768, 1 Am. Jur. 166, Par. No. 18.

Legal Angles

The proponents of the short term abstract, in order to circumvent the responsibility of checking the records from the Government entry down to the beginning date, always propose that by Statute it should be provided that as between a Vendor-Vendee an abstract need be furnished, beginning only at a given date in the Statute. That would be a happy solution except for the legal angles involved. Such a statute would immediately tangle with the constitutional rights of third persons who had not been given their day in court. Also, the furnishing of an abstract is not an unlawful or immoral act in and of itself, so if the Vendee insists on contracting for a complete abstract, and the Vendor agrees to furnish it, there would be no reason why the courts shouldn't enforce the contract. The contractural relationship between the Vendor-Vendee will be satisfied by a limited abstract only when it is possible to devise a Statute which will protect the Vendee by closing the books on the title back of a given date. We are all agreed that that would be a happy situation if the legal angles could be worked out.

What effect do local Bar resolutions have on the Vendor-Vendee contractural relationship to furnish an abstract?

Local Custom

We are all agreed that local Bars do not make the law. The most that can be said for local bar resolutions is that to a certain extent they represent local custom. But such resolutions could hardly be said to represent custom. "A custom, to constitute a fixed element of a contract, must be certain, settled, and uniform, and known to the parties." 149 Mo. App. 12. Another authority has said "The fact that a usage appears to have been recently established, or that but few instances of its recognition can be adduced, has been held sufficient to deny it the status of a valid and enforceable custom." 55 Am. Jur. 268; 137 ALR 613. Different Bars will emphasize different points of law in the examination of a title, and also in their showing in abstracts. But, in the absence of a Statute, we still must rely on the prudent man rule in interpretating the Vendor-Vendee contract. The mere fact that in one

county, by Bar resolution, short term abstracts are acceptable wouldn't prevent the question of sufficiency being raised not only in that county but by anyone else, whether in or out of the county. Even if the prudent man rule can be tempered by local custom, could it be said that a bar resolution represented local custom since it was confined in its effect to only one county, and also was of recent origin? Unless restricted contracts are used between the Vendor-Vendee it would seem to me that local resolutions would have no legal effect. This conclusion is further strengthened by the cases which say that in a title suit in the determination of a merchantable title, the opinion of a lawyer in court as to whether a title is merchantable or not is not competent evidence. 55 Am. Jur. 643 Par. No. 172, 29 Cal. 407.

Skeletonizing

As has been mentioned previously in this paper, southeastern Iowa for the past ten years has taken some long strides in trying to eliminate some of the objectionable features of title examinations and abstract showings. In my judicial district, for a number of years, we have been skeletonizing our abstracts back of a certain date, making very brief showing of foreclosures, partitions, probate proceedings, etc. Also, we eliminate all ancient released mortgages. Jurisdictional matters in foreclosures, etc. are eliminated back of a certain date.

Davenport (Iowa) Standards

The Davenport, Iowa, Bar has gone the farthest, that I know of, in arbitrarily shortening the requirements for title showings. On Feb. 27, 1951, that Bar passed the following resolution:

"That an Abstract of Title to real estate lying within the corporate limits of a City or Town in Scott County, Iowa, which is a part of any addition or subdivision, including Auditor's plats, filed for record between Jan. 1, 1890, and Jan. 1, 1930, shall be sufficient if it starts with the date upon which said plat was filed for record, provided said abstract includes:

1. The material portions of this resolution.
2. The plat of said addition, together with all certificates made in connection therewith, and
3. The certificate of the abstracter that a designated person, or persons held record title on the date such plat was filed for record setting forth the respective interest of all such persons.

That for all other real estate in Scott County, Iowa, an abstract of title starting with Jan. 1, 1890, shall be sufficient, provided such abstract includes:

1. The material portions of this resolution.
2. Any plat filed for record prior to Jan. 1, 1890, together with all certificates attached thereto.
3. The instrument or judicial proceedings by which the owner on Jan. 1, 1890, acquired record title, and
4. The certificate of the abstracter that a designated person, or persons, held record title on Jan. 1, 1890, setting forth the respective interests of such persons.

In order to establish the title to land on January 1, 1890, the following certificate is used:

"State of Iowa, Scott County, ss.

The undersigned hereby certifies to any person relying on this Abstract of Title to the real estate described in the caption thereof, that we have carefully examined the records of Scott County, Iowa, as to the title of such real estate on Jan. 1, 1890, and that from such examination we find that on the 1st day of Jan., 1890, and prior thereto, the title to said real estate was in————as shown at item No.....hereof.

Dated at Davenport, Iowa, this .....day of ....., 19.....

(Signed) Blank Abstract Company

The abstracter is clearly an insurer of the title under that certificate, and would be liable for any claims originating prior to Jan. 1, 1890, and maturing after Jan. 1, 1890, and not cut off by our adverse possession statute. Such claims could be in the nature of covenants, conditions, contingent remainders, easements, party walls, long term leases, pending proceedings, etc. I am advised that the sum of $25.00 is charged for such a certificate. In answer to a question as to whether outside lending institutions would accept such a short term abstract I was advised that if such an abstract was refused by the lender, then a search was made until a lender was found who would accept it.

Marketability—Sufficiency

Lawyers being human beings, and being what they are, are apt to disagree as to what is necessary to show, not only merchantable title but also the sufficiency of an abstract. If two lawyers are determined enough in their viewpoints and can convince the Vendor-Vendee as to their views, if a compromise can't be reached then a lawsuit will follow. Most lawyers will agree that they aren't so much afraid of the legal effect on their client in a situation as they are of the fact that if they don't raise the objection, the next examiner is apt to, so in order to save face the objections are made and the battle is on.

Local bar resolutions are thus in effect a meeting of minds and a mutual agreement as to the effect of given situations. This saves bickering over situations which are of too small importance to justify a lawsuit. Such resolutions may or may not represent the law.

Early this year, when the Iowa abstracters attempted to put through a license law, an amendment was proposed to our bill which read as follows: "No showing of title shall be made prior to Jan. 1, 1900, with the following exceptions which if of record shall be shown and included under certification:

(1) The patent from the U. S.
(2) Copy of recorded Plat.
(3) Easements, party-wall agreements, decrees, or agreements establishing boundaries.
(4) Uncancelled mortgages where ten (10) years have not elapsed since the due date, and unexpired leases.
(5) Trusts affecting the realty under certification.

In my opinion, if a legislative approach is ever made to this problem, this amendment would furnish a good approach in setting up a short summary of the title from the Government entry down to the beginning date of the abstract, and on this basis a Vendee would have some opportunity to protect himself in the examination of the title. Even under that kind of a Certificate, the abstracter would still be the goat.

Statistical

In order to justify legislative action, the need for a short term abstract law should affect many land owners. In order to get some idea as to what percentage of the abstract business is made up of complete abstracts, I made a spot check over the State of Iowa with the following results: the lowest on percentage of orders for originals was 6.4% and the highest 35%. Other reports were scattered between those two extremes, the majority being under 20% or an average of 11.6% or an average over all of 17.89%. Thus the great percentage of the abstract business is not concerned with complete abstracts so why should the risk of getting a defective title be forced upon any Vendee in order to save a small abstract expense on the part of the Vendor.

During our license law attempt, it was suggested that a law be introduced cutting off abstracts back of 25 years. Out of curiosity in the preparation of this paper, I wrote to a number of the larger lending institutions to determine how many mortgages were still outstanding which were executed prior to 1925. All but one company had one or more mortgages still outstanding. One company still have 7.4% of its mortgages

still outstanding which were executed prior to 1925. Consequently 25 year abstracts wouldn't be safe from that standpoint. One company stated that "from the standpoint of title examination, it would be much better and much simpler for everyone in the farm loan business, if abstracts would not go back beyond 25 years. Abstracts that went back 25 years would cover 99.99% of our mortgages. If one had to be absolutely safe, 50 years would completely cover it. It is understandable why lending institutions would favor a short abstract. That would speed up closings and if the lendors had good luck most of their loans would be paid off without having to take over the title through foreclosure or otherwise, so could thus more or less avoid title risks. Also the lendors could avoid some of the bickering over the title which frequently results from title examinations and thus slows up loan closings.

Conclusion

In conclusion, it seems to me that while everyone would be in favor of shortening abstracts, yet the fact remains that no sure method has been devised under our system which could be relied upon for 100% protection. Even if it could be conceded that title losses would be small, what Vendee or lendor would be willing to gamble and take the risk of a possible loss? The purchase of an abstract is an incident in title ownership and in most cases is no more burdensome than the other expenses incident to a sale and certainly furnishes the most important link in real estate transactions. If short abstracts are to ever have general acceptance, a statute must be devised to cut off the remedy or else the abstracter will be expected to furnish a certificate of title.

Within the past few days the newspapers carried the story of a freak provision in a will probated in Independence, Kansas, 60 years ago, whereby if a man then 5 years old could on his 65th birthday, which will occur Feb. 24, 1952, produce a bottle of strawberry pop bottled before 1900 by a now defunct bottling company, he would be entitled to a farm in Montgomery County, Kansas, now valued at $14,000.00. Where would a short abstract be in that situation? People have a right to do what they want with their property, and if we are still going to protect that right, it will make it virtually impossible to pass a general statute cutting off titles.

Abstracts in Oil Country

(Better Stated as "Service By an Abstracter in an Oil County")

MILTON HAWKINSON

Partner, McPherson County Abstract Co., McPherson, Kansas

There is no happiness in having or getting, but only in giving; so said Henry Drumond. Then, someone else said something like this, "Do the best you can, with what you have, where you are." If the abstracter will keep those two thoughts in his mind always, we believe he will be able to do as nearly as possible the kind of abstracting and give the kind of Service the Oil Industry wants in any county. We have tried to do that for thirty-seven years, with thirty of those years privileged to serve the Oil Man. We have not always succeeded, but do not believe anyone can accuse us of not trying most of the time.

Years ago a most rugged individual from out of State, let's call him Jones, left an abstract with us and said "bring to date and mail to Charley Gray with bill"; Mr. Gray was a banker in our country. The abstract covered six city lots; three belonged to Jones and three to his

wife. The request was complied with the following day. Months afterwards, Banker Gray came to our office all smiles. First he handed me an abstract covering four lots and requested it be brought to date as to lot one only, which belonged to same Jones in former extension. "Milt," he said handing me a letter, "read this—it's a good one." The letter contained four pages complaining about the former extension covering three lots that belonged to the "old hen" (his former wife) etc. It is a masterpiece. Here are the last few lines and let's quote: "You say that abstrat man in Macfursun is fine fellow, maby you rite but he sure costs like Hell when you get him started. When you send this abstrat to that abstrat man be sure tell him eggsaxly what you want cause if you don't he never know when to stop."

Start and Stop

Where to start and when to stop on Oil Field abstracting is a big question. Abstracting or copying various instruments, showing of Probate or District Court Proceedings; the making of certificates or what not, relations with your Oil Customer and a dozen more subjects, any one of such subjects alone should require more time than is allotted here to say something about all of them. We do not claim to give you the correct answers on anything, as we all know there is more than one way to skin a cat. We are primarily abstracters and our principal product is the abstract. On the other hand, there are so many services that can be rendered the Oil Man that we must not ignore them. You can make friends by giving such services. In the long run what is better than a friend? The privilege of making abstracts for Oil Men is a by-product of the friends you make by serving. If we fail in making friends, we may not get many abstracts to make. We are only going to try to give you in general a few of the things we believe we have learned from our experience in Oil Abstracting, what we think the Oil Industry likes from the abstracter, what it wants as well as what it doesn't want. We hope we may drop an idea or suggest a pattern that will be useful to someone. If so, O.K.—if not, O.K.

Source of Information

The Oil Man likes to think of the abstracter as a source of all title information in his county. He likes to have the abstracter know the people of his county, the right people in the right places. When the Oil Man calls from 100 miles away, he likes to have you tell him if the side roads in Township 13, Range 23, are muddy. A suggestion of a few "all day suckers" to pacify the seven small children in the family is appreciated by the Oil Man when he goes out to buy a lease, right of way, or royalty from their parents. He likes to place his confidence in the abstracter and wants him to keep his mouth shut. He wants the abstracter to be dependable in every way. He knows he cannot be dependable as far as the Oil Man is concerned, if the abstracter plays the Lease and Royalty game. If you think you can do so, you are "kidding yourself and not fooling the Oil Man." We have never brokered leases or royalties and most every Oil Company and broker familiar with our area knows that fact. We are proud of such a reputation. The more complete the plant the abstracter may have, the better he is able to serve the Oil Industry and serve it quickly. The word "quickly" is what the Oil Man likes. Now, "and how," will best serve his desires. What kind of an abstract does the Oil Man want? Briefly stated, it should be something like this: neat, and that doesn't mean full of messy carbon copies, concise and accurate; typographical errors cause delays. Perhaps the next is consecutive order. If the Patent from the United States Government was filed in 1951, put it where it belongs—at the beginning of things. That is true as we see it about all entries. Put them where the examiner wants them rather than what suits your fancy. Ignore the filing date as to order. Insert all court proceedings where they fit in in the chain of title. It takes a little more

time and thought to do it this way, but after all you are serving the examiner, and that should be considered first.

You Can't Satisfy All

We call ourselves abstracters, and in our state we are licensed as such; we assume that we have a right to abstract a deed, a mortgage, release, etc., and we do abstract. One attorney told us in case of full copies in a certain abstract, that the "Abstracter had had a diarrhoea of words and a constipation of ideas." When it comes to Probate Court and District Court proceedings, we assume that we know enough to abstract certain parts of such proceedings. When we are not sure how to abstract a recorded instrument or court proceedings, then we copy. One fellow told me he copied everything in court proceedings—motions, etc. I asked him what sort of a copy he made of an oral motion. He could not answer. A year or so ago, a number of our abstracts found their way to the hands of attorneys for an Oil Company a thousand miles from our county. The land man of that company told us that the company's attorneys stated that the boys up in Kansas sure abstract, but they could find no fault with our abstracts except that it raised cain with them as they were under contract to examine for the company under a per page charge. If we send any more down that way, we are going to try to spread the pages a wee bit. Experience has surely taught us to show all Oil and Gas Leases and Royalty Conveyances in full whether their term has run out or not, except an Oil and Gas Lease that is fully released; then we show it in short. We show all mortgages, assignments and releases thereof in red. It takes a few more typewriter ribbons. We polled some forty-three attorneys a few years ago, most of them examiners for the Oil Industry, and all except one said they liked to have the mortgage title separated in that manner from the fee and leasehold title. The one exception stated, that too much red was hard on his eyes. The same thing is true with one's bank account when shown in red—it hurts your eyes.

Court

Let's say just a few words about abstracting of court proceedings. In many counties in our state and some other states, everything from "soup to nuts" is copied, even captions. We never have been able to comprehend this, either on the part of the abstracter or the attorney that requires the copies. Take a law suit or Probate that was completed seventy years ago where every possible door of attack has long since been locked. This might be briefed a little more than a current case. If those of us in our office that are competent to dictate the briefing are not too busy, we brief the petition in these cases and on down the line. If we are too lazy or too busy then we copy. We show caption once. Take a Journal Entry—here is the way we head it off. JOURNAL ENTRY, filed Sept. 23, 1951 (caption omitted) reads:, then copy verbatim. We never copy the Summons. We show, Summons issued Sept. 25, 1951, from under the Seal of the District Court of McPherson County, Kansas, and directed to the Sheriff of McPherson County, or whatever county it may be, for the defendent Jim Jones, etc., and the answer date. That's all. Then we say Sheriff's Return endorsed on Summons filed Sept. 25, 1951, reads: then copy the return in full. We all know, or should know, that SERVICE IS THE MOST IMPORTANT PART OF ANY LAW SUIT. We copy Affidavit of and for Publication, copy all appearances and anything that has to do with service. We copy all Journal Entries, except captions. Some Answers we copy in full, others we abstract. We believe if all an Answer does is to "deny the allegations and defy the allegator" that we are competent to abstract that Answer with greater assurance of safety to us than the abstracting of deeds. If that is not the case, why not copy every deed? A former President of our State Bar Association, several years ago, examined one of our abstracts.

He made the requirement that everything be copied in full in a Probate Court proceeding. We knew him and called him, not in a critical manner, but simply for information that might be helpful to us: He said "The abstracters in our county always copy everything; so when I saw that everything was not copied, I just required copies. Let me give the matter a little study and I'll call you." He called later and said "Just ignore that requirement as upon study of your abstract, find that you have copies of everything that are essential so far as the title is concerned." We are all creatures of habit. I find it difficult to quit smoking.

Off Record Matters

We all neglect some matters sometimes far more important to the examiner for the Oil Company, as well as others, than we realize. Let's consider such a subject of neglect, which has to do solely with showing in the abstract things the records do not show. That's a rather startling statement. Our good friend, Bill Gill, recently gave an excellent paper on Oil Field Abstracting. He said, "Show only what the record shows." That's fine, but we would add to that and then SHOW WHAT THE RECORD DOESN'T SHOW. Don't misunderstand me. We are going to consider abstracter's notes. The record doesn't show them, but the abstract should, and lots of them. There is never a day goes by but we make one or a dozen of such notes. Let me give you just a few samples. Here's the Patent to Kansas Pacific Railway Company in our county. The following reservation, "Yet excluding from the transfer by these presents all mineral lands should any be found in the tract aforesaid." That reservation just scares the "wadding" out of a strange Oil Attorney. We insert the following Abstracter's Note (See Vol. 117, Page 54 of Kansas Supreme Court Reports). If the examiner reads that case, that is the last you hear of that exclusion. Here are six assignments of an Oil and Gas Lease, but the lease that the assignments purport to assign has not been filed—we have seen dozens of such cases. You know the lease is not filed or you would have shown it under your certificate. Say so by an Abstracter's Note. The examiner will then know that you have not missed it. If there is a missing deed in the chain of title, say so by an Abstracter's Note. If there is no Summons, no Service of Publication, Appearance on Defendant Sam Jones, nor an Answer for him in a law suit, say so, by Abstracter's Note.

Here is a deed with a long messy description, a couple of dimensions missing and almost everything else. We showed a copy of that deed and with it a note by the Abstracter: "It is to be noted that the description in the above deed is "Cock Eyed," but we have checked and re-checked it with the record and you have it above as the records show it. We drove ten miles in the country to get our hands on the original deed to check it with the records, and it is exactly as "Cock Eyed" as the records show it."

Anticipate Need

The examining attorney for an Oil Company made no requirement for the abstracter to check that description to see if it was shown correctly in the abstract, nor did he require that the original deed be secured and re-recorded, if not correctly recorded. We beat him to it. You can beat the examiner to hundreds of requirements by putting your "Anticipator" to work and inserting in your abstracts some well-placed abstracter's notes. We could spend all afternoon on just this one item alone. One very good Oil Examiner told us that he could tell how good an abstracter really was by the quantity and quality of the notes that were inserted in his abstract. Aside from abstracting, there is a possibility that little intimate abstracter's notes in your own homely or well selected words, just put you a little closer to the examiner. Perhaps they do you more good than a calendar or jack knife with your name and friendly and accurate services printed or engraved thereon. We think they do, especially in ab-

stracting for the Oil Industry, where most of the examiners are not close at hand. Good advertising pays. We believe in it.

There was a politician, let's call him Jack, in our county that managed to get the votes out in his township almost unanimously. Just shortly before election several years ago, a young group came to Jack and said, "If we help you carry the township, we want you to buy us a barrel of beer." He said, "If you will do it, I will do it." The election turned out for Jack in a big way, so he bought the beer for the boys. Jack was a very active member of the Methodist Church in that neighborhood, and his preacher heard about the beer and questioned Jack about it. Jack said, "Reverend, let's go over to the parsonage and talk this matter over." When Jack was comfortably seated in the parlor of the parsonage, he asked the minister to get the subscription list for the current year's budget. The minister complied. Jack pointed to his own name at the top of the list, say for $300.00. "See, Reverend, who tops the list? Let's think that over, and then let's forget about the beer, and talk about what we can do for the good of the Church." That true story fits so well in with my next subject in abstracter's service to the Oil Industry that I just had to get it out of my system. The subject is the so-called or so mis-called "Certificate of Title" that is used extensively in our state for information as to ownership for cheap "wildcat leasing. If we could only forget about the name and think in terms of service, we could accomplish something. There is talent in this organization that could work out a happy solution as the matter has been "cussed" and discussed for years here and in many of our state organizations.

Certificates

Let's admit for the sake of argument that the so-called "Certificate of Title" should not be issued, and we have made thousands upon thousands of them for the Oil Industry which have actually been nothing but reports of title. They tell us there are some states that do not issue them at all. We know that in some states they issue a so-called Memorandum of Title, some Statements of Title, "Pencil Take-Offs", some signed and some unsigned. Other states' efforts are made to limit any liability under such statements or "what nots", by saying if this causes any trouble, bring it back, and we will give you ten "bucks" or five or whatever it may be. We like that, if it will work. Similar information to that supplied by the so-called Certificate has been supplied by untold hundreds in most of our offices by mere word of mouth. Can we afford to say, "just buy an abstract or get the 'Heck' out?" We think not. If you can't sell the Oil man a Silk Shirt we believe it is better to sell him a cotton work shirt, if that supplies his needs best.

Opinions have been given by attorneys that the making of so-called Certificates of Title are illegal and practicing law on the part of the abstracter; in other states' opinions just the reverse have been given. If any Court has ever determined the issue, the matter has not come to our knowledge. You just can't get rid of the nuisance by saying that you are going to abolish it. We tried that with war, and how far are we along? When it comes to this subject of so-called Certificates of Title, it appears to us that nobody seems to agree exactly with "nobody." There is only one solution, and that is for us to exercise a little initiative and refuse to become fixed or determined and consider that the matter of service to the Oil Industry is involved. If we don't do something in a spirit of co-operation the matter will retain its status quo—where everybody does just as he pleases to serve what he thinks are the needs of the Oil Industry. Perhaps after all that is the solution. We like what Richard Hooker said, and we quote, "When the best things are not possible, the best may be made of those that are." Let's try and do just that. Let's talk about SERVICE to the Oil Man. Does that service end by the acceptance of an order and the completion of an abstract? We think not; rather it is

only a start. Those of us that have experienced real oil field play know that the first thing the Oil Man wants is speed by the abstracter. We know he wants help in his title problems, no matter how trivial, and if you are equipped to help him, he surely appreciates it. He likes to have you get up at four o'clock in the morning and check your records for the expiration of a certain lease. I doubt that there is an hour of the night that we have not done just that very thing. We were leaving on our vacation one day. Five o'clock that morning the land man from one of the major oil companies called me and asked me when I would be at the office. I told him in about fifteen minutes. He said, "I can't get there that quick as I am 85 miles from McPherson, but I'll meet you at the office at 7:00." He said, "We are talking over a certain block and just have 18 days to get out the abstracts, have them examined and start a well." We got out the abstracts, 44 of them, helped get the requirements, and they had the well started in 17 days. The only thing we did not get completed was the vacation. What we do in our own office is to try and serve the Oil Man in every way possible. We don't know of any office rule that we don't break if it interferes with such service.

Perhaps somewhere in the few samples of service that we have tried to do, you may find a pattern that you can use. While it may appear that we are boastful, certainly that is far from our minds. So let's go.

Service

A broker dropped down to the office late one afternoon, said "Milt, I have an eighty acre lease down in the Bornholt Field, that is getting to look good. What will an abstract cost me on the eighty?" I checked it up and told him about $80.00. He said, "I might need it one of these days, but I will let you know." We booked the order the next morning and charged to "A. Gamble." The abstract was completed and certificate dated in pencil and laid in the vault. Six weeks later, this man called from Wichita at just 15 minutes of four and said, "I can make a drilling deal on that eighty of mine depending on how quickly the abstract could be delivered; that the drilling contractor had an idle rig and had to move in if he took on the deal within a couple of days." We "kidded" him a little about a week or ten days and then told him what we had done and would mail the completed abstract to the attorney that night. The second day the contractor moved on the location. We have charged "A. Gamble" many abstracts and completed them before we have the order. We seldom lose.

More Service

The head of one of the large law firms in Wichita called one day about three o'clock and ordered an abstract and said they had to have it the following day and would send someone up for it. We told him to wait while we looked at the files. We found that this was probably $130 to $150 abstract and knew that it would take a couple of days at the best. We told the attorney what he and we were up against. He said, "Well, just better cancel the order as there is a peculiar reason why the deal cannot be delayed." I remembered that about a month prior to this conversation we had the landowner's abstract and that it was in the hands of a nearby college, so I told the attorney that we could borrow that abstract. We called the Treasurer of the college, and he forwarded the base abstract that evening to the attorney in Wichita, and we supplied a supplemental. The complete title was in the hands of the attorney the following morning. Our bill was $12.50 which included the payment we made to the Treasurer of the college for postage and his trouble. Later we made a "$145.00 Abstract" when production was obtained on the lands. We have done similar things many, many times. Sometimes we have lost a few dollars by doing it that way, but we have had the fun in serving, and it has helped us make friends, which means more than a few paltry dollars.

Deal Gets Closed

Several years ago at 11:30 one morning a Broker laid down on the desk in our office an attorney's opinion for one of the major oil companies. He called for an affidavit which we could get in thirty minutes. Then we found that the attorney had completely turned the title down on account of improper service on the ward in proceedings of an Insane Person. The broker then told me that he had paid $80.00 for the entire lease and that his purchase order called for $8,000.00. He only had three days left under purchase order to comply with requirements. It just made him sick. We suggested that he talk the matter over with his attorney. He said that he showed the opinion to his attorney at the hotel, and the attorney told him in an off handed way that he was afraid that he was up against it. Now, we certainly do not claim to be attorneys and refrain in every way from the practice of law. The thought came to us to ascertain what attorney had handled the case. We told the broker to let us check into the deal a little and that we would see him after lunch. We got hold of the original files in this probate case. We found that the case was handled by a local attorney that was the most precise and accurate attorney that ever practiced in our courts. Since he was dead, we could not get help from him. We skipped lunch and did some digging. We found that in the early nineties, when the proceedings were had, the law on service had changed just two months after the proceedings being turned down were instituted. So the old law prevailed. We wrote a letter, addressed to the broker, and merely quoted the Statute that was in force as to service at the time the questioned proceedings were instituted and said that we hoped this might be helpful to him. We suggested he take our letter to his attorney and have him write the Oil Company. The broker left our office about 2:00 o'clock that afternoon. The land department in Wichita forwarded our letter and affidavit direct to their Tulsa Office that Thursday afternoon. The following Saturday morning the broker called us. He was in high spirits; he had just received the $8,000.00. We made a devoted friend out of that broker. Our fee was $2.00 for the Affidavit, and that was all. We claim no distinction for our help to the broker in the case. We do claim credit for using our intimate knowledge as to the attorney that had originally instituted the proceedings, as we think that knowledge is what brought about the solution of the broker's problem.

Here's a case where you sell real estate the same as personal property, just like corn, wheat and rye. You may say, that's impossible, and so have three opinions expressed the same view in our county. The case is where a mortgage covering land comes into an estate. The administrator forecloses and takes a title, which he converts into cash, with proceedings the same as in the sale of personal property. The Supreme Court in our state has upheld the principle, which we believe attorneys call equitable conversion; that where it comes into the estate as personal property, it goes out that way. The three titles in question were all passed when in a spirit of helpfulness and co-operation we secured a letter in each case from the attorney that handled such case. All three titles were then passed. The Oil Man completed his deal. The help we gave him was insignificant. It is the spirit of willingness to help that counts.

Time Is of the Essence

Two brokers appeared at our office just twenty minutes of four one afternoon. They said, "We must have a complete abstract today on the quarter where that 5000 barrel well was brought in a few days ago." Just an hour and a half before closing time. They had sold for immediate delivery 20 acres of Royalty for $1,5000 per acre or $30,000.00 They were afraid the well would go to salt water. They offered any price we would ask for the abstract, just get it completed if it took all night. We told them to stick around the Pin Ball Machine at the Hotel and that we would get the job done and call them. In just

two hours and forty minutes we delivered the completed abstract, and we started from scratch, 43 entries, 1 foreclosure, 2 probates, **at our regular price.*** They took out from Wichita early next morning for Tulsa, and had their $30,000.00 in less than 24 hours after the deal was started. They are still talking about that deal after many years. We do not know how we happened to get that job done so quickly. Probably just a little willingness to do the unusual now and then.

If we just use our heads, a little resourcefulness here and there, and show the Oil Man that we are really trying to help him in his title matters—he likes it. We think that, after all briefly stated, is the whole story of abstracting in an Oil County.

We like this, which has been credited to several persons, "We shall pass through this world but once; therefore, any good that we can do, or any kindness that we can show to any human being, let us do it now. Let us not defer or neglect it, for we shall not pass this way again."

* We never have or never will give preferential service for a bonus. We try to give the same service without it. We believe in the long run that is the only way to hold the respect of all the oil boys.

Abstracters Questionnaire

MORTON McDONALD
Vice Chairman, Abstracters Section
President, The Abstract Corporation, DeLand, Florida

When chairman George asked me to take the responsibility of checking the Abstracter's Questionnaire, I did not realize the amount of work involved. I received 397 replies from 31 states and the District of Columbia. I would say that we had good coverage from 17 states.

Let me say, to begin with, that I do not expect to make this a dry, statistical report. It would be better to leave nothing of value with you than to bore you to death with a lot of dry statistics. The answers to this questionnaire were not dry and I would rather pass on to you some of the interesting points. To begin with, the first one opened, in answer to the first question "Is your company a corporation, partnership, or individually operated?" answered "leased." The second one opened answered this question "Yes." So you see, I started with some very accurate information received from title men who are known for their accuracy. If the customers could see some of these answers, they might desire to make a change in the place of getting their title service. On the other hand, if my customers would check on the amount of work in this questionnaire and realize that I volunteered to do the job, they would possibly discontinue business with me on the basis of not having more intelligence.

Ownerships, Types

I think there were enough questionnaires returned to give a fairly clear picture of the title business throughout the country. 57% are corporations, 26% operate individually, and 17% as partnerships. This was surprising to me, as I would have thought a larger percentage would have been corporations.

People in Title Business

From the reports, and estimating on the balance, I think we can safely say there are around 35,000 people employed in the title business.

Abstracts Only

26% of the companies make abstracts only. Indications are that more and more are writing title insurance and increasing the percentage of their business that is derived from title insurance. Some who do not write title insurance and who

make abstracts and title searches seem to indicate that they are making fewer abstracts and more searches. This may mean that someone else is writing title insurance using the search rather than an abstract and reducing the income of the title man in that connection. There did not seem to be enough information in this line to give conclusive proof of this.

Escrows

About 50% of the companies handle escrows.

I first thought we would try to give an account of the square miles covered by these reports and the population. This got to be rather complicated, so we will leave it on the basis that we had reports from 31 states with 17 fairly well covered.

Non Members

One person in answering the question "How many abstract or title insurance companies in your county?" answered "Too many." I think that is an answer that can be given in several spots, although this is a free country and we certainly do not care to limit the number in any way other than by service. It appears that about 25% of the companies are not members of the American Title Association. This either means that we should make a special effort to get the others in the association or that they are of such caliber that they are not eligible for membership. If they are not eligible for membership, then we should encourage them to so conduct their business and improve their plant so that they could be eligible and receive the benefits that are derived from membership in the Association. One member said that he was a member of the Association, but did not know about his competitor. This would appear to be a very poor member to me, since it is very easy to know whether or not your competitor is a member.

What Abstracts Protect

Abstracting, or the title business, is not a small business. I think we can safely say from checking the reports that came in that this business represents an investment of about 85 million dollars, in title plants and fixtures. We, of course, are interested in making a reasonable return on this investment. One person, however, in answering the question as to the approximate investment in title plant marked "unknown." That person can possible rest easy at night as he is not worried about a reasonable return on his investment, as he has no idea of what he has invested. He will probably live longer than many of the rest of us who are worrying about the situation.

Home Owned

About 38% of the companies or individuals own the building in which they are located. This represents an investment of between 45 and 50 million dollars.

Payroll

Of course, there were some who politely said it was none of my business as to the amount of payroll they had. At least, several failed to answer this question and I took it to be a polite way of saying it was none of my business. But estimating from the amount as given, I think our annual payroll over the country will run between 50 and 55 million dollars. So you see, the title business is no mean business.

Advertising

A surprising disclosure to me was the number who advertise in local newspapers. 60% of the companies carry newspaper advertising. 38% distribute blotters. This will give Jim Sheridan a lead as to who will be wanting more of the A.T.A. blotters. Only 10% distribute a weekly or regular bulletin. This apparently comes mostly through the larger companies. The question of other means of advertising carried through most of the known types. The leaders in the advertising field appeared to be radio, calendars, novelties, telephone directories, pencils and maps. Several mentioned advertising in school publications, special programs of community affairs and the like. This possibly should be listed as good will and con-

tributions, for I do not believe it has any advertising value. One person stated that the best ad was competent service. This is of course a good ad, but I think it takes more than competent service to keep the business coming your way.

Christmas Presents

46% distribute token gifts to customers at Christmas-time. 20% distribute such gifts regularly, and those regularly were mostly in addition to those at Christmas-time. From the percentage using this type of advertising, it would appear to be profitable. The range of gifts was wide—from baby-spoons for the new-born babe to a bottle of stimulant for those in their dotage.

Variety

I think it would be well to comment on a few of these gifts. Those used most frequently are year-books, pencils, diaries, calendars, knives, letter-openers, and liquor, cigars, and candy. It would be impossible to mention all, but you would have thought this was an examination and someone was looking for a good grade, from some of the answers. For instance, the best gift in the opinion of one was the "land title course." That person expected Jim Sheridan or Bill Gill to grade these papers. One member from Iowa said the best gift he had used was Florida preserves. He goes to the head of my class. Now I want it thoroughly understood that both the men who are using the title course and the man using Florida preserves were using good judgment. Some of the other unique gifts were cheese, rain gauge, candles, football tickets, smoked hams (now, I'd like to get on the customers' list for smoked hams), pocket secretaries (I've heard about various and sundry secretaries, and I am not quite sure about this "pocket secretary"), hosiery and perfume (those two items have been used as business getters in various and sundry lines of business), and many, many more too numerous to mention. One or two mentioned discounts to certain brokers and lawyers. I never minded paying for a gift, but I always objected to giving discounts, and doubt very seriously that they are good business getters.

Novelty Advertising

The title industry does not seem to be very strong on entertainment. About 10% say they entertain the Bar Association, and most of them said annually. About 12% entertain the real estate men, and 20% entertain the court house personnel. Quite a few said they did not entertain the courthouse personnel, but did remember them with gifts at Christmas and special occasions. One man said he did not entertain this group, but made all their abstracts free of charge, which was a special favor to that group. One person stated that he entertained the bar and real estate men in small groups monthly, which sounds like a very good idea.

Conducted Tours

Only 18% have personally conducted tours of their plants for attorneys, high school students, or any other people. One person answered, "Yes, we take great pains to acquaint people with our plant and operation." I believe this to be very good public relations, and in all probability could be carried on more extensively for informing the public as to the amount of work required and the intricate details involved in preparation of abstract information.

Memberships

33% of our members are members of the Bar Association. 42% are members of the real estate board. 41% have membership in a country club, and 75% are members of some service club. It is well where one is eligible to be a member of the Bar Association and realty board or both, for the contacts and public relations. Membership in a country club is both good for public relations as well as relaxation for the member. I think the percentage in service clubs should be 100% rather than 75%. It was surprising to learn that some of the larger companies were not represented in service clubs. Although it was not mentioned in the questionnaire

under service clubs, it said Rotary, Lions, Kiwanis and so forth, and several ladies marked Pilots and business and Professional Women's clubs, it would be well to see that the key lady members of your organization were members of one of these organizations, and it would be money well spent to pay their dues for them. A man must be an executive to become a service club member in most service clubs, and an executive who is too busy to participate in the civic affairs of his community is one of those fellows upon whom the service club serum failed to take. An executive who cannot arrange his time for eating is simply fooling himself. He's a slave to his business. An executive whose business does not produce a lee-way to cover the cost of his service club membership ought to get a job with his competitor and give his new boss a chance to get into a service club. One member commented that he was also a member of the athletic club. To you fellows who are getting mis-located chests, it might be well for you to join such a club, too.

In Public Office

It was surprising to me to learn that so many of the title men were members of city or county commissions or other public office holders. 32% hold public office. Of course, from some of the offices listed, they apparently are doing title business on the side as an extracurricular activity rather than holding public office as extracurricular activity.

The most frequently mentioned was city commission or city council, including chairman or mayor, city planning boards, city attorney, and school board, both city and county. In addition, we had a few county clerks, judges, tax assessors, and so forth. One or two mentioned that they were on the Republican committee, but I would doubt that you would call that public office holding, since I do not remember any Republican office holders for so long a time. However, one man said that he was chairman of the state Democratic committee, which might be a rather powerful group.

Contacts with Legislators

77% maintain a close personal contact with the members of the state legislature. The other 23% should be trying to, at least. One member said he had always kept close contact with these men until the labor group had taken over. It appears to me that he needs to cultivate these men now more than ever before. They may not always been the men of our choice, but we should at least try to keep as friendly a relation with them as possible.

Vacations—Bonuses

86% pay Christmas bonuses. Only 5% do not give vacations. I am surprised that anyone can get employees to work without a vacation period and also surprised that a person would try to do this. There was another 5% who only gave one week for the vacation. In my opinion, this is not long enough. Practically all the companies gave two weeks, with some few adding an additional week for employees who had been with them for a number of years. 35% entertain their employees from time to time. 10% sponsor athletic teams and of course this number is small because of the small number of employees in so many of the offices. One company in Florida sponsors a girls' softball team for their employees, and the president of this concern is the active manager of the team. 23% have a plan for cost of living salary adjustments.

Profit Sharing

10% have profit sharing plans for the employees. 3% have a pension plan. 14% have group life insurance, and 30% have group hospital and medical care.

Basis for Charges

How do you base your charges for abstract work? 64% charge on the item basis. 4% use valuation only and 2% on a time basis only. 15% make an item plus time charge. 1% used valuation plus time, 8% per item or page plus valuation, and 6% make a combination of items, valuation, and time. It was interesting to note that one company had recently eliminated

the valuation charge. This was interesting in that we have discussed at some length at the last several conventions the advantage of a valuation charge. Another interesting observation, particularly to the men who have been arguing for a state abstracters license law, is the fact that several states have statutes that fix the charges than can be made by title companies. When you ask for state legislation in one respect, you usually get it in some respect that you would rather not have.

Yield

65% of the companies report that their income is sufficient to make a reasonable return on their investment and set up reserve and replacements. Those who are not getting sufficient income for this purpose state that it would take an average of about 29% increase to come in line. Some few reported that their principal source of income was not from abstracting. To a great percentage of us, the principal source of income is from abstracting and we certainly want our charges to give us a reasonable return.

Price Increases

64% of the companies say they have made an increase in price during the past three years. This increase averaged 23%. There is still a wide variance in prices for abstract work throughout the country.

Captions—Taxes

53% of the companies make a new caption sheet on abstract extensions. I am not going to attempt to tell you whether I think the procedures are good or bad, but merely give you the information regarding the performance of various types. 82% said "No" to the question "Do you certify only to delinquent taxes?" Some explained that they certified all taxes, and others that they certified to no taxes, so it is impossible to tell exactly what the companies are doing in this connection. 80% certify to general taxes currently due, but not delinquent. Only 35% of this group charge a fee for this service. A vast majority stated that this service was included in their certificate charge, while about 10% stated that they obtain a certificate from the tax collector, assessor or other taxing authority, and furnished this certificate for no charge, or for the charge as billed them by the taxing authority.

Special Assessments

A great majority stated that they report special assessments as regular entries in their abstracts, while less than 10% stated they obtained a certificate from the taxing authorities as to this information. About 15% stated that this was included in their certificate charge. The answers were about 50/50 on certifying special assessments previously paid.

Arrangement of Abstract

The answers to the question on arrangement of the abstract had a fair majority in favor of arranging by title, that is, showing satisfaction or release immediately after mortgage. Several commented that they used a modification of this form in arranging chronologically except as to mortgages when assignments and releases were shown immediately following a mortgage. A few companies, however, state that they have a different system entirely, which is placing the deeds first in chronological order, then all mortgages and satisfactions, then all probate, then all tax information. Naturally we want to satisfy the customers within our area, and certain arrangements, whether better than others or not, are the ones that the local people are accustomed to.

Separate Chains

To the question in connection with running several chains concurrently, an overwhelming majority stated that they concluded one chain before starting another. One answer said "We do not include more than one chain in an abstract." We doubt that this statement is correct, or that we have interpreted it correctly, and if this is correct and that company is represented here, we would like to have an explanation.

Paper

The size of abstract paper you use was asked because it was thought it

might be possible to arrange to have the paper watermarked with the Association emblem and maybe obtained in a standard form in a few sizes to an advantage to the members of the Association. There were 52 different sizes of paper reported, the smallest in width being 3½ x 8 inches, the largest in width being 11 x 14 inches; the smallest in length was 8 inches; the largest one was 10½ x 17, and one 8½ x 28 inches. Every company apparently used white paper with 4 exceptions, one using yellow, one green, and one used white for deeds and items other than mortgages and used salmon color for mortgages and liens. Another company did the same except using blue instead of salmon. The 3 sizes of paper most commonly used were 8½ x 14, by 35%; 8½ x 11, by 20%; 8½ x 13 by 15%.

More Study Needed

I also learned that the title men know very little about paper. At least, that is what a person would gather from reading the answers of the size, weight and rag content, particularly the weight and rag content. Not knowing too much about paper, and doubting that I knew anything after reading so many different answers, I talked to my printer for a bit of proper information. Many left this question blank, put a question mark by it, or said "Do not know." But of those answering, it appears that about 35% use 16 lb. paper, 16% use 20 lb., and 20% use 13 lb. Others used from onion skin to 24 lb. or did not know. As to rag content, 10% were 25% rag content; 15%, 50% rag; 5%, 75% rag; and 20%, 100% rag. Others varied in various rag content or stated that they did not know. It would appear that we should use a rag content paper, but possibly not necessary to use a 100% rag. We do need a 100% rag possibly for our record books, which are used and reused, but a good quality of paper for the abstracts that we produce and deliver would not require a 100% rag. 25% rag is not a bad paper, and 50% rag is an especially good grade. There is a great difference in the price—50% rag costs 20% more than 25% rag; 70% rag costs 50% more, and 100% rag costs 90% more—so you see by checking your paper you may be able to use good quality paper and still save money. Attention should be given to weight, particularly if you mail many orders. You will find that a slightly lighter weight paper will do the job just as well and save money in mailing costs.

Color of Paper

There are various colors mentioned as used for covers: I think every color in the rainbow, including a few that are not in the rainbow. Blue was predominant, followed by brown and tan. 18 different colors were mentioned, plus one company who said they used no cover. This of course did not include the many shades of these various colors. You may think this is of minor importance, but the appearance of a product has a tendency to impress the customer before the contents are studied.

Printed Abstracts

Most companies include printed or multigraphed plats in the abstracts. If not that type, then they are hand drawn. It appears that hand drawn would take too much time under present conditions. 70% of those showing plats charged as ordinary entries. Most of the others make additional charges for this service.

Spacing

According to one man, a great majority of us are criminals. One person reporting on the question of "What spacing do you give in abstracting court proceedings?" stated than any person single-spacing court proceedings was committing a crime, and over 75% of us single space court proceedings. We have been called criminals in this type of work by some other people, so I guess it's satisfactory for us to be called that again. Most of the others double space—a few using a space and a half, a few 2½ spaces, and a few with special type slightly more than single spacing. A few reported that they photographed the court proceedings and used photostatic copies.

Standard Certificate

There are 18 states who have a standard or approved form of abstracters certificate. There were too many answers of "Don't know" or "No" even in states that have these standard certificates from companies who seemed not to be familiar with the certificate. A goodly number have a clause in the certificate or some recognizable feature showing that the company using same is a member of the state and national association. Almost 30% of the companies in states using a standard certificate do not use this form. It seems to me that if the state association has adopted a certificate, it should be used, or if not in good form, should be changed so that it could be used. Title men are still rugged individuals. One answer to the question was "No, we use a better one." One man said, "We use only on special occasions for mortgage companies who demand it." It appears to me that this should prove to him that it was a good certificate and should be used on all abstracts. Another reported, "No, we do not use the standard certificate, for we are using the same form that this company has used for over 50 years." It would appear to me that in 50 years' time, there have been changes that would require changes in the certificate. But, as previously mentioned, we title men are rugged individuals.

Limitation of Liability

Less than 10% of the companies limit the liability in the certificate. Of course, our liability is limited to the amount we could pay if called upon, and many have insurance protection and fine reserve set-ups to protect the public in this respect. From observation, it would appear good business for those operating individually and as partnerships to create some limit in that certainly their entire fortune could be lost through errors on abstracts.

Insignia

About 50% of the companies use some cut or statement on letterheads, bill-heads, abstract pages, or abstract certificates indicating membership in the state association or in The American Title Association, or both. This percentage should be increased tremendously, as we should be proud to be recognized as members of the American Title Association and as members of our state association. I noticed an abstract cover sent in one of the questionnaires had printed on it "Member of National Title Association." This should be changed to conform to the correct name of the American Title Association. One man reporting from a small community had this to say: "No, in our small towns and rural counties, personal prestige, personal public relations and local reputation are all important. State and national associations have little import." I agree with this man in his statement, but I do think that to show the people in the small town or rural counties that the man they are dealing with is recognized by title companies throughout the country, and is somewhat of a national figure in respect to his business would add prestige and reputation in his community.

Miscellaneous

Question 7 under "Miscellaneous" says, "Please state briefly mechanical labor-saving devices you regularly use in your operations, other than those used in building and maintaining the title plant." The answers to this question covered everything from A to Izzard. Practically all the items mentioned have been discussed at various meetings and articles published concerning their use in "The Title News." The item that led the list, which I think is used by practically everyone, was the old reliable mimeograph. The photostat machine was high on the list of labor-saving devices, and the more modern microfilm equipment of various types, and electric typewriters. These, I would say, are the items used most. Some replies were amusing, and some rather enlightening. One man replied by saying, "How can I use any labor-saving devices when I am not allowed to even put a typewriter in the recorder's office?" That is not amusing —it is pathetic. Several reported by

saying "We use several typewriters," and I will admit that there are some offices where the typewriter is the only labor-saving device. Another said he used carbon paper. Some of the additional modern equipment mentioned were electric bookkeeping machines, electric mimeographs, autotypists, intercommunication systems, postage meters, check writers, dictaphones, wire recorders, IBM indexes. One item mentioned which might not mean so much labor-saving as it would time-saving, and this was mentioned by only a few but sounds feasible, was the take-off being typed on regular abstract paper and the original pulled and put together for abstracts, which would appear to be a great time-saver in completing the work. I am assuming that those using such a system have their typists type during their spare time replacements for instruments used. One mentioned a microfilm drying spool that had been worked out by the photographer employed in the office and had proved very efficient. This only covers a few of the interesting items mentioned as labor-savers in our work.

Production in Office

Of those who produce multiple abstracts, about ⅔ reported they did so in their office.

Customer Complaints

"What is the biggest gripe you have to contend with—First, from your customers, and, Second, from your employees?" The answers to this question covered a multitude of sins. It was surprising, however, that there appeared to be very few serious gripes from either customer or employee. The most frequently mentioned gripe of the customer was either excessive charges for title work, or time required for preparation of the abstract, or both. It seems that we need to spend more time in informing the user of our product as to the requirements necessary in this function and possibly would cut down the gripes in this connection, both on time and price. From the prices quoted, it is my opinion that a number of the companies do not charge enough. It is also my opinion that some of the companies need to increase their efficiency so that better service can be rendered and reduce the gripes as to the time required. Some of the answers were incorrect in that the owner was giving his gripes that he had with his customers and employees rather than the gripes they had of him. Of course, these gripes are legitimate, too, but the question was asked in a different way, and we did not ask what gripes the owner might have. One stated that neither his customers nor his employees had any gripes so far as he knew, but he said "We try to appreciate both, as both have given trouble in past years." I think he is on the right track, for we should appreciate both our customer and our employee; they are both vital to our work. One man reported that the biggest gripe his customers had was that he used carbon copies for delivery to the customer altogether, as he kept the original to make ozalid processed copies if necessary. I believe the customer has a fair gripe with this man, because there are hundreds and thousands of abstracts delivered that will never be used for making copies.

Employee Complaints

The gripes of the employees were surprisingly few, the principal ones being insufficient income, pressure of work and boredom at the tediousness of the work. The first of these could possibly be eliminated and in some cases maybe the employee has a proper gripe. It would be well for us to review our salary scale from time to time and see that we are paying our employees properly. The last two mentioned are hard to overcome, and in some cases I have found it advisable to recommend to an employee that he change his line of work because he could not stand the pressure or the tedious work involved in abstracting. One man stated that if he had dissatisfied employees, he replaced them. I do not advocate pampering but I do think we should consider their views. One man summarizes his employees' gripes as follows: "(1) Wages too low. Abstracting is

specialized business and wages should exceed places of business where it takes only a few weeks to become familiar with the business. (2) Make abstracting more interesting. (3) Want 10-minute rest periods A.M. and P.M. (4) Want soundproof proofreading room. (5) Teach new girls the Why of abstracting. (6) Educate public that it takes time to get abstracts out." This about summarizes the general trend of answers to this question and, although put in different words by different ones, it seems to me that the 6 points mentioned here by this company's employees are particularly well taken. It might be well for us to study these 6 points in conjunction with our own office experience. Another man reports as follows: "We have conscientiously attempted to satisfy all reasonable gripes over the years. Upon inquiry today, we are not able to find of our having any disgruntled employees nor any just gripes within recent months." I think the reason this man did not find any just gripes was because he has conscientiously studied employer-employee relations. There are many little things that build up to big things among employees that could be nipped in the bud if proper study is put on the subject. Most of the gripes of the customer or of the employee are reasonable, and I think the title industry as a whole is to be commended that there are as few mentioned. It appears the men are really studying the two most vital people in the title industry—the customer and the employee.

Personal Property Tax

In answering the question as to how your records or tract books are assessed, 75% answered Yes, that our abstract tract books and other title records were assessed for personal property. I am somewhat doubtful as to whether some know how their records are assessed, as I have found a number of companies that are not assessed as personal property insofar as the information in the tract book is concerned. The assessment merely covers the furniture and fixtures and the book value is only the cost of the replacement value of the books and not the information contained therein. This does not hold true in all cases, I am sure, but it is true in many. The next question asked whether the assessment was a small nominal assessment, or substantially large in the light of income producing, cost of production or original cost. All but 27 answered that it was small or nominal. These 27 came from 12 different states. Apparently in general the assessments have not been out of line with other businesses in the various communities. One person particularly wrote and said that he was very much interested in this question as he thought his assessment was especially high. The next question asked in round figures, "What is your personal property assessment per each book of deeds, mortgages, and miscellaneous." Many said they did not answer this as they were not assessed that way. However, many answered this question, and the range was from 28c per book to $50 per book, and each one stated small, nominal or reasonable. There is too wide a variance for all to be reasonable.

I do wish to comment on the one who stated that he thought his was high, and make this observation—this company has 6 employees and about a $30,000 investment. His 1949 assessed value was $6,370 with a total tax of $375. His 1950 value was $3,900 with a total tax of $245. His 1951 value is $6,750 and the tax had not been set. I agree with him that this is rather high in view of what I know of average taxes on title plants. However, another party thought that his taxes were very reasonable. He has three employees, a $20,000 investment, and pays an average of $350 per year. If this is resaonable in comparison to other businesses, I pity some of the other folk. One stated that he was assessed at a $2,000 value with a $5,000 investment — another $500 value with a 35 to $40,000 investment—another a $1,000 value with a $25,000 investment—another a $3,000 value and a $40,000 investment. The last one said "try and beat it." I believe the two above beat it considerably. However, all four of these said

they were reasonable. In view of the answers there appear to be some few out of line, but in most cases the men seem to be satisfied that they are being taxed reasonably in comparison to their neighbors.

Personal Thanks

This has been no small job in trying to analyze this questionnaire and report to you my findings, bearing in mind that you are not interested in cold, dry figures yet you are interested in something more than entertainment. I wish to express my appreciation to those who took the time to answer the questionnaire and to the many who wrote personal letters with their questionnaire making certain comments. I wish it were possible to answer each letter personally, but will take this method of expressing my appreciation. And finally, I wish to look to our Executive Vice President to reimburse me in the total sum of 49c, being the amount I paid out for postage due where some of you fellows tried to mail this as second class mail and the postman made me pay extra when it arrived. This Scotchman doesn't mind giving of his time, but he usually hates to part with his money.

I can justly testify that I personally know that there is one person who received definite benefits from this questionnaire. That person is Morton McDonald.

Problems of Taxation

Partnership vs. Corporation

WILLIAM GARRETT
Attorney, Chicago Title & Trust Co., Chicago, Illinois

Note: This paper was given prior to enactment of the Revenue Act of 1951. It has been rewritten in some particulars to reflect the changes made by that Act.

The long arm of the Bureau of Internal Revenue now reaches—or perhaps I should say clutches—into all business transactions, even little ones. The tax repercussions of a deal are not always quickly apparent. I suppose that a major reason for this is that since 1913, when the income tax amendment of the Constitution became effective, there has been a continuous struggle between the smart tax lawyers and accountants figuring out loopholes on the one side, and the Bureau of Internal Revenue on the other side trying to plug the loopholes. The result now is that the Internal Revenue Code, seems to be about nine-tenths loophole plugs and one-tenth straightforward statute.

Calculate With Care

I won't do any more than outline in a general way some of the considerations and factors which must be taken into account in deciding whether your business, from the tax standpoint, should be a partnership, a proprietorship or a corporation, and I can't emphasize too much that if you seriously consider making a change, you should retain an able tax laywer to effectuate the change. Calculate the whole thing, with infinite care, for your own situation. Don't change until you are sure—very sure—that you will gain by changing.

In spite of what seems to be the usual attitude of the Tax Collector, you are not obliged to set up your business so the general tax will result. It is perfectly proper so to arrange your affairs that the greatest tax savings will result, provided you have sensible reasons, other than tax saving, for so doing.

Limitations

Before I get down to cases I want to limit my field a bit. In the first place from the tax standpoint, there isn't much difference between a sole proprietorship and a partnership. As

you doubtless know, partners pay on their proportion of the partnership profit—whether or not that profit ever reaches their spending pocket. So also does a proprietor. Therefore I shall devote no time to distinction between partnerships and proprietorships.

Also, I won't touch upon state taxes. There are 48 states; no two are alike, and I couldn't scratch the surface of that field.

My remarks will be limited in another important respect. I shall not discuss businesses that make net profits of more than $25,000 per year. That is a major distinction because it is at $25,000 net income per year that corporation surtaxes begin and it is at $25,000 that excess profits tax angles enter the picture. Excess profits taxation is a field in itself; too complicated for discussion here.

That $25,000 limit isn't wholly for my own convenience. George Harbert tells me that ordinarily an abstract business earning $25,000 per year would have a considerable number of owners which would change the tax picture materially. Further, such a business probably has a tax lawyer on retainer.

Important though taxes are—they are not the only consideration. Perhaps a quick look at other differences between a partnership and a corporation is in order.

Separate Entity

The first such difference that I would mention is the very obvious one that a corporation is a separate entity—entirely distinct from its stockholders. Money in your corporation's pocket is not in your pocket. If a sudden need for cash should arise, if your liquid assets are in your corporation, it isn't so easy to put your hands on them. If you own your business or it is a partnership, it is a simpler thing to put the business cash to your personal use—and without red tape.

A corporation is much less flexible than a proprietorship or partnership. It must operate within the scope of its charter; its by-laws and the corporation statute. There must be stockholders' m e e t i n g s; directors' meetings; resolutions; reports.

Advantages

But there are advantages for a corporation. Its debts are its own; the stockholders are not liable for its debts. As you well know, each partner or a proprietor is personally liable for the business liabilities. This may well be important enough in the abstract business to be the basis for your decision to operate as a corporation.

Transfer of Stock

Ownership of stock in a corporation is much easier to transfer than shares in a partnership or the tangible property in a proprietorship. But another tax raises its head,—transfers of stock are taxable.

Pension

Two other advantages of corporations may be mentioned. Officers and employee stockholders of a corporation may be beneficiaries in a pension trust, payments to which by the corporation are expenses deductible for income taxes. But partners or a sole proprietor cannot be proper beneficiaries in a pension trust.

Social Security

Officers and employees of a corporation fall within social security—with its advantages at 65 years of age and insurance benefits for younger men with children under 18 years old. But partners or proprietors are not employees—and cannot qualify for these advantages.

I have generally mentioned some of the many factors other than taxes which might affect your decision of whether a corporation or a partnership is best for your business. My point is, although taxes are of tremendous importance, they are not the only consideration.

An able mathematician might be able to devise a formula by which in any given business situation one could determine whether, from the income tax angle, it would be more profitable to operate as a corporation or a partnership. I'm no mathematician but I can suggest a few basic tax

facts from which all the answers flow.

Tax Rates

The income tax on a corporation has been 25% of the first $25,000. It has been raised in the new tax law to 30%. If income is above $25,000, the surtax falls with its heavy hand —for all corporate net income over $25,000 there will be payable, in addition to the 30%, another 22% of surtax. In computation of excess profits taxes, which only corporations pay, there is a minimum credit of $25,000. I want to emphasize that excess profits taxes are paid only by corporations—not by partnerships. So you can see that in putting a $25,000 income ceiling on the businesses we are discussing, we have avoided discussion of corporate surtaxes and the excess profits. That gain is yours. Those subjects aren't only hard to talk about —they are even worse to listen to.

It therefore becomes apparent that only where partners or proprietors are paying over 30% on their net income is it worth their while to consider moving into a corporation as a tax saver. But in this day and age the more than 30% slash starts at a relatively low figure. For example, for a single man who cannot file a joint return with his wife, he starts paying 26% when he passes $4,000 of taxable income; after $6,000 he is paying 30%; after $8,000 he reaches 34%; at $10,000 he jumps to 38%, and, after a series of jumps if he has passed $20,000, he pays thereafter 56%. So a single man with a business giving him a taxable income of, say $8,000 or over might well look into the possibility of organizing a corporation. Those taxes are increased, roughly, in the new law, by an additional 11¾%.

Married Man

A married man occupies a better tax position. Not only does he get a $600 exemption for his wife, but he also has the right to file a joint return with her which also saves him money. He doesn't start to pay 26% until his income less exemptions and deductions passes $8,000 and he doesn't reach the 56% bracket, which his single friend meets above $20,000, until he has passed $40,000. Again, to be up to date, add 11¾% of the tax to reflect the new law. So maybe the first thing for a single man in the abstract business, interested in tax saving, is to find a wife. She is worth real money to him.

Dependants

Children or other dependents are important factors too. They knock off the taxable income at the rate of $600 per year each. The exemption status is a factor in every situation. What might be wise for a single man with no children might be folly for a married man with three children.

Transfer of Property

Let us assume you now have a partnership or a sole proprietorship and have decided that a corporation is right for you. Properly handled in the transfer to the corporation no particular tax problem is involved for the Internal Revenue Code permits a transfer of property by individuals to a corporation in return for stock or securities of the corporation. The tax experts call it "nonrecognition of gain or loss"—but it means the same thing. If you have a partnership you could transfer to the corporation in either of two ways. First distribute the parnership assets among the partners; then each partner transfers his share to the corporation which in turn issues to him his share of the corporate stock. The second method would be a transfer directly from the partnership to the corporation with the corporate securities issued to the partners in their proper share of the partnership.

As you well know, there is more to the organization of a corporation than that, but this is no place to go into it. There are franchise taxes and original stock issue taxes. All I need say is see your lawyer. But there are certain tax factors to be considered in the original establishment of the corporation. You will be handcuffed to your original setup—so it must be planned with care.

Frequently the best tax results can be obtained by establishing what is known as a thin corporation. The

goal always is to avoid as much as possible the double taxation of the corporate income—first as the corporation receives it and second to the stockholders as they receive a portion of the same income as dividends. In a thin corporation the capital stock would be as small as possible. Instead of issuing stock to the organizers, there would be bonds or debentures and frequently there might be a lease to the corporation from the stockholders of a building or possibly an abstract plant. The reason is, of course, obvious. It is to avoid double taxation. The interest and rent paid by the corporation is a deductible expense from the corporate income even though taxed to mortgage holder or lessor as income. But it is only taxed once. It is not like a dividend which would have to be paid if stock were issued for property. Dividends can't be deducted by the corporation that pays them.

In the typical situation with which we are here concerned, the partnership abstract company which desires to become a corporation, owns some capital assets. First it has its abstract plant and secondly it frequently owns a building.

Sale of Assets

At least two proper methods of avoiding double taxation present themselves. The first is a sale of such assets by the partners—or partner as the case may be, with a purchase-money mortgage back from the corporation as security; providing for interest and probably also for amortization over a definite period of time. Such interest so paid by the corporation is of course properly deductible as a business expense and is taxable only to the noteholder on receipt as income to him. The amortization or installment payments well may present difficult questions of capital gains taxation—but this is not the place to discuss such problems.

Care must be taken as always in transactions that arouse the curiosity of the Bureau of Internal Revenue. The interest payments must really be interest and not disguised dividends. The debt must be real. Liability of the corporation to pay interest should not depend on the earnings of the corporation. The debt should not be subordinate to the claims of other creditors. As for example, where the mortgage owned by the business owners specifically provides that interest and principal payments on it would be made only after creditors have been paid, there would not be a real mortgage from the tax standpoint.

Renting

There are certain advantages in renting the abstract plant or building to the new corporation. They remain assets of the partners and will not ultimately become assets of the corporation, as in the case of outright sale to the corporation with a purchase-money mortgage given as part of the price. Further, since the lease need not be for a long term, the rental paid can be adapted to business conditions and the going rate of rental for such property. Other business advantages will, no doubt, occur to all of you. Such flexibility might well be a very desirable feature.

Allowable

How much rent can you safely pay without a disallowance by the Bureau of Internal Revenue on the grounds that part of the rent is really a dividend and therefore taxable to the corporation as well as to the lessor? All the Internal Revenue Code says on the subject is that "rentals or other payments required to be made as a condition to the continued use of property" are properly deductible business expenses. There is no specific requirement in the statute that they be reasonable. But reasonable they must be—the courts have seen to that. The rental must bear a sensible relationship to the value of the property rented. For example, when the owner of substantially all of a corporation's stock leased a building for which he paid $50,000, to his corporation for $1500 per month—or $18,000 per year, a rate whereby the whole cost of the building would be returned in 34 months, the court thought it a little steep and allowed $700 per month as deductible rental expense to the corporation (Limer-

ick's Inc. v. Commissioner, 7 T.C. 1129; 165 F. (2) 483).

The answer is, set your rental on a sensible basis. Make it as high as you can—but be ready to substantiate the amount if the Bureau of Internal Revenue complains.

Salaries

One of the first tax questions that will be met by a small closely held corporation whose stockholders are its major officers, is how much salary can be paid to those officers? The Internal Revenue Code-23(a)1 permits the deduction as expenses of "a reasonable allowance for salaries or other compensation for personal services actually rendered."

In the case of small closely held corporations the Commissioner of Internal Revenue is vigilant to prevent the payment of dividends under the disguise of salaries. For the corporation and its stockholders disallowed salaries are doubly taxed—when received by the employee, and, through inability to deduct as an expense, by the corporation. So the question is a very pertinent one in your consideration of whether you should do business as a corporation or a partnership.

Wide Range

I thought there might be a test of percentage of net earnings paid to officer stockholders; that perhaps I could find some percentage of net earnings or even gross earnings which it would be safe to pay as salaries or compensation to officer shareholders. But a spot check of the cases showed that courts—including the tax court—had allowed salaries in a very wide range. There was one case involving an abstract corporation where the Board of Tax Appeals allowed 59% of net income to be paid to the 3 shareholder officers. It was considerably less than the officers had been paid by the corporation. A major question in the case was how much of the earnings was due to return on capital investment and how much to the work of the officer-stockholders. You must bear in mind that you can't attribute all of your net earnings to the sagacity of your officer stockholders. The reason is that the courts are almost sure to attribute some of your earnings to the capital invested in your abstract plant.

There are, however, some tests you can make to determine reasonable compensation.

These tests come out of the court decisions. They are not too accurate but if, in reliance on them you establish your salary scales to officer shareholders, you can put up a first-class fight against a claim that you pay too much.

Tests

These tests are:

a. The officer's qualification.
b. The nature, extent and scope of the officer's work.
c. The size and complexity of the business.
d. The relationship of such salaries to gross and net income; (I already mentioned this and decided it is not too accurate a guide).
e. General economic conditions—are times good or bad—is living expensive.
f. Comparison of salaries to dividend distributions.
g. Prevailing rate of compensation for similar work in comparable concerns. After looking at quite a few cases I think this is the most important single test. I'm not sure how well it would work in the abstract business for usually there are not many such concerns in a single territory and frequently the ones there are have wholly different problems.
h. The salary policy respecting all employees. In other words, the boss can't keep all the gravy.
i. Compensation paid in previous years to the officers.

I have a strong suspicion that you know pretty well what would be reasonable pay for your stockholder officers. And further that you can substantiate your position by some or all of the above tests. If you think you

might be questioned, it is always wise —**Be Prepared.**

The government is fully conscious of the fact that in a closely held corporation it is frequently profitable to the shareholders to keep the earnings in the corporation and not pay them out in dividends. If earnings go out in dividends there are two income taxes —one to the corporation and the second to the shareholder on his receipt of the dividend.

Section 102

As an obstacle to a corporation overdoing the retention of profits there is Section 102 of the Internal Revenue Code. This section enforces an additional surtax on corporations which, for the purpose of preventing the imposition of the surtax on their shareholders, permit earnings or profits to accumulate instead of being distributed. The section only affects accumulations which are "beyond the reasonable needs of the business."

The computation of this surtax—once it is determined that Section 102 has been violated, is relatively simple. From the total taxable income of the corporation there is deducted the income tax paid by the corporation plus dividends paid by the corporation, and upon the balance the surtax is imposed at the rate of 27½% on the first $100,000 and 38½% on all over $100,000. It is a dangerous chance for a corporation to take.

The Commissioner of Internal Revenue determines that the surtax should be imposed and the burden is on the corporation to prove that it should not be assessed. There are certain situations in which the Bureau of Internal Revenue will consider imposition of the surtax. They are:

a. Corporations which do not distribute at least 70% of earnings as taxable dividends.
b. Corporations with investments in securities or properties not related to their ordinary business occupations.
c. Corporations which lend money to their shareholders.
d. Closely held corporations which include all of the hypothetical situations I have been talking about.
e. Corporations with abnormally large amounts of cash or quick assets.

Sound Business Reasons

Now the presence of any or all of these facts do not necessarily imply that the tax will be levied. It merely means that explanations must be made. There are two types of answers:—First, that the purpose of the accumulation was not evasion of surtaxes upon the shareholders. A typical case of this was a bookkeeper's mistake. Another situation would probably be where there is no substantial surtax saving to the shareholders. The second answer is that that accumulation was for a sound business reason. Here are a few such reasons—need of strong financial condition to survive vigorous competition; need for extensive modernization; need for reserves for possible contingencies (but such possibility must be real); need of reserves for obsolescence and depreciation. There are others. But the reason must be real and demonstrable. The wise corporation keeps careful records to demonstrate the realty of its need to accumulate cash. Such records are invaluable to meet the onslaught of the Commissioner seeking to impose the 102 surtax.

All corporations such as are here being discussed must keep Section 102 in mind lest they get hit with the surtax. To be sure, there are possibly situations where it would be profitable for the corporation and its shareholders to keep the earnings in the corporation and pay the surtax but such situations are not for us.

Procedure

I have been talking quite a bit about partners who decide it is to their advantage to carry on their business as a corporation. But what of the corporation with two or three shareholders which wants to operate as a partnership? How does it go about doing it?

As you probably recall, partners may transfer their business to a corporation and receive stock in ex-

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change without incurring any tax liability by the transfer.

The same is **not** true however when a corporation decides to become a partnership. There is always the probability of one capital gains tax—and sometimes two.

Two Taxes

If a corporation sells all its assets and distributes the sale proceeds in liquidation, there may be two taxes. The corporation pays a capital gains tax of 25% on its profit on the sale. That profit is the difference between the sales price and the cost of the assets after proper adjustments of one kind or another. Then the shareholders on receiving the liquidating dividend pay a capital gains tax also,—on the difference between what their stock cost them (after the adjustments which must be made) and the dividend.

Capital Gain

But an abstract corporation that decided to become a partnership probably would distribute its assets directly to its stockholders who would carry on the business, about as the corporation had been doing. In all likelihood that distribution of assets to the stockholders will be taxable to them as a capital gain. The gain for each shareholder would be calculated by figuring the difference between the fair market value of each shareholder's share of the distributed corporate assets and the so-called basis of that shareholder's stock in the corporation. Basis is an ordinary word, but when it crops up in income tax matters it can become very complicated. For our purposes here, basis to the stockholder means what the stock cost him with additional deductions from or additions to such cost as should be made.

Example

Perhaps an example is in order. Assume a corporation distributes its assets of fair market value of $150,000 among its three shareholders. Each of the shareholders owns ⅓ of the stock so each gets $50,000 worth of assets. Shareholder A's stock cost him, after adjustments, $40,000. He has a capital gain of $10,000. B's stock cost $25,000. He has a $25,000 capital gain. C came in late and paid $50,000 for his stock. He has no capital gain.

I don't need to tell you that fair market value is a vague thing. What is the value of an abstract plant in Sycamore, Illinois on October 1, 1951? No one can say positively—but by figuring its cost less depreciation; the income it yields; what some one might pay for it, and other appraisal devices, you can come to some sort of idea.

Cash distributed as a part of liquidating dividend is just like the rest of the assets—except there is no need to appraise it. You know what it is worth—at least theoretically.

Good Will

The real headache in figuring the taxable gain will be the valuation of good will. Now no one knows for sure just what good will is. The Bureau of Internal Revenue is likely to insist that if a corporation turns a going business over to a partnership, one of the assets the partnership will receive is good will—and it must be valued in figuring capital gain.

The Bureau of Internal Revenue has a way of valuing good will. The Bureau will evaluate the tangible assets of the corporation; its building; its abstract plant; its furniture and fixtures. The Bureau then figures what amount of net income such assets should produce. It then deducts the estimated income from those assets, from what the corporation actually earned. The result of such deduction, says the Bureau, is income from good will. To get the value of the good will, they just capitalize the result. Here is a rough example:

> A corporation's building, cash and other assets are valued at $100,000. $100,000 at 10% should yield $10,000. But the corporation earned $15,000, so $5,000 was earned by our friend, good will. Capitalized at 10%, 10 times $5,000 makes $50,000 and at that figure good will is appraised.

Unjust

There is a lot of injustice in such arbitrary methods of valuation. Your

extra income may come from a lot of things, such as your own popularity. You might be able to prove such facts, but it would not be easy.

When you consider changing from a corporation to a partnership, don't neglect to include a valuation of good will in figuring the capital gains tax your shareholders will have to pay. Your business in nearly every case is an old, established honorable business. Your reputation is one of your great assets. But all of those things are elements of good will. Don't forget them.

Capital Gains

There is a lot of confusion about the capital gains tax. Many people assume it is always 25%. It is for corporations and for individuals paying at the rate of 50% or over. But to calculate a capital gain tax you take one-half of the gain, add that to your regular income and pay your regular tax and surtax upon it. The most that can be paid, however, is 50% of 50%, which amounts to 25% of the gain.

If you are thinking of going from partnership to corporation, look over your affairs carefully. You may have some losses to offset. It may be advantageous to spread the liquidation over a period of time—by taking only part each year.

Before passing on from the question of the taxes involved in converting from a corporation to a partnership, one more thing should be mentioned. In 1950, Congress, out of compassion for closely held corporations which want to continue the business in non-corporate form, enacted Section 112(b) 7 of the Internal Revenue Code. The Revenue Act of 1951 has re-enacted this section. Corporations wishing to liquidate and continue business in non-corporate form, by following the intricate provisions of this section, may in some cases save or postpone taxes. But there are a number of conditions.

Conditions

The first condition is that the liquidation must be completed in one calendar month in the years 1951 and 1952.

The second condition is that taxpayers—or, in other words—shareholders of the liquidating corporation must elect in a writing filed with the Bureau of Internal Revenue, to come within it.

There are some other conditions relating to corporate holders of shares in the liquidating corporation which I pass over here as not applicable to your typical situation. In your cases, where you have a corporation, the shareholders are probably individuals.

Advantages

Now for the meat—what are the advantages in this method of shifting from a corporation to a partnership? In certain cases no capital gains tax would be paid at the time of the liquidation. But they would only be postponed. When the individuals who got the corporate property, later sell, their capital gain would be figured on their cost of their stock in the corporation.

But

But there are two flies in the ointment for many situations. The first is that if among the assets distributed by the corporation there are accumulated earnings of the corporation included in the liquidation, each shareholder must pay regular income taxes on his share of such earnings. This must be distinguished from appreciation in value of assets. It is accumulated earnings only.

The second fly in the ointment is that if cash and securities are included among the assets distributed by the corporation, each shareholder must pay a capital gains tax on his share of such cash or securities when he gets them. I won't go into how this is calculated.

I probably have over-simplified this Section 112(b) 7 liquidation procedure. But if you think it might be useful, sharpen your pencil, call in your lawyer and be very sure it will benefit you before you decide to follow it.

Examples

Each of you has a set of mimeographed examples. There are a total of twelve situations, three for each of four types of ownership. I couldn't work out a magic formula by which

you could decide whether you should be a corporation or partnership, but I hope that among these examples there is one which is close enough to each business represented here, that it will be of some value. These calculations were made on the basis of the Revenue Act of 1950. To bring them up to date, figure the corporation tax at 30% and add an additional 11¾% to the individual taxes. However, the essential difference will remain about the same.

Maybe all I have done is to add to the confusion already present in a complex situation. But even that has its compensations. It might prompt you to see your lawyers before you act. If I leave only that suggestion, my efforts are not wholly futile.

EXAMPLE I

2-MAN BUSINESS—A AND B EQUAL SHARES

		$25,000 Net Per Year		$18,000 Net Per Year		$12,000 Net Per Year	
As a Partnership							
A's Tax on ½ of Net		$2,278.00		$1,438.00		$ 844.00	
B's Tax on ½ of Net		2,982.00		1,810.00		1,048.00	
Total Tax as Partnership			$5,260.00		$3,248.00		$1,892.00
As a Corporation							
Total Income		$25,000		$18,000		$12,000	
Less A's Salary	$10,000			$8,000		$5,000	
Less B's Salary	10,000	20,000		8,000	16,000	5,000	10,000
Taxable Corporate Income		$ 5,000			$ 2,000		$ 2,000
Corporate Tax at 25%			$1,250.00		$ 500.00		$ 500.00
A's Income							
Salary	$10,000			$8,000		$5,000	
Dividend	1,500			500		500	
Total	$11,500			$8,500		$5,500	
A's TAX			$2,018.00		$1,339.00		$ 750.00
B's Income							
Salary	$10,000			$8,000		$5,000	
Dividend	1,500			500		500	
Total	$11,500			$8,500		$5,500	
B's TAX			$2,606.00		$1,675.00		$ 931.00
TOTAL TAX AS CORPORATION— Corporate, plus A, plus B			$5,874.00		$3,514.00		$2,181.00
ANNUAL SAVING—PARTNERSHIP OVER CORPORATION			$ 614.00		$ 266.00		$ 289.00

NOTE: In computing A's Tax it is assumed that he is married no other dependents, joint return—standard deduction: B—single, no dependents—standard deduction.

EXAMPLE II

"A" — SOLE PROPRIETOR

		$25,000 Net Per Year		$18,000 Net Per Year		$12,000 Net Per Year	
AS PROPRIETORSHIP							
A's Income:				$18,000.00		$12,000.00	
From Business	$25,000.00						
Other	10,000.00			———		15,000.00	
Total	$35,000.00			$18,000.00		$27,000.00	
*A's TAX			$10,800.00		$3.860.00		$7,144.00
AS A CORPORATION							
Corporate Income	$25,000.00			$18,000.00		$12,000.00	
Deduct:							
A's Salary	10,000.00			10,000.00		5,000.00	
Interest on Mortgage (owned by "A")	2,500.00			———		1,000.00	
Plant Rental (owned by "A")	3,600.00			———		———	
Taxable Corporate Income	$ 8,900.00			$ 8,000.00		$ 6,000.00	
CORPORATE TAX			$ 2,225.00		$2,000.00		$1,500.00
A's Income:							
Salary	$10,000.00			$10,000.00		$ 5,000.00	
Interest	2,500.00			———		1,000.00	
Plant Rental	3,600.00			———		———	
Dividend	3,000.00			2,500.00		1,500.00	
Other	10,000.00			———		15,000.00	
A's Taxable Income	$29,100.00			$12,500.00		$22,500.00	
A's TAX			$ 8,047.00		$2,278.00		$5,394.00
TOTAL—CORPORATION, PLUS A			$10,272.00		$4,278.00		$6,894.00
SAVING—PROPRIETORSHIP CORPORATION			$ 528.00		$ 418.00		$ 250.00

*A is married; no other dependents; joint return; standard deduction.

EXAMPLE III

2-MAN BUSINESS — A OWNS 70% — B OWNS 30%

	$25,000 Net Per Year		$18,000 Net Per Year		$12,000 Net Per Year	
AS A PARTNERSHIP						
A's Income:						
From Partnership (70%)	$17,500.00		$12,600.00		$ 8,400.00	
Other	10,000.00		7,000.00		5,000.00	
Total	$27,500.00		$19,600.00		$13,400.00	
*A's TAX		$10,681.00		$6,200.00		$3,324.00
B's Income:						
From Partnership	$ 7,500.00		$ 5,400.00		$ 3,600.00	
*B's TAX		$ 877.00		$ 492.00		$ 168.00
TOTAL PARTNERSHIP TAX		$11,558.00		$6,692.00		$3,492.00
AS A CORPORATION						
Corporate Income	$25,000.00		$18,000.00		$12,000.00	
Deduct:						
A's Salary	$10,000.00		$ 7,500.00		$ 7,000.00	
B's Salary	8,000.00		6,000.00		4,000.00	
Interest on Mortgage (owned by A)	2,500.00		1,650.00		—	
Taxable Corporate Income	$ 4,500.00		$ 2,850.00		$ 1,000.00	
CORPORATE TAX		$ 1,125.00		$ 712.50		$ 250.00
A's Income:						
Salary	$10,000.00		$ 7,500.00		$ 7,000.00	
Interest	2,500.00		1,650.00		—	
Dividend (70% of $1500)	1,050.00		—		—	
Other	10,000.00		7,000.00		5,000.00	
A's Total Income	$23,550.00		$16,150.00		$12,000.00	
*A's TAX		$ 8,352.00		$4,518.50		$2,792.00
B's Income:						
Salary	$ 8,000.00		$ 6,000.00		$ 4,000.00	
Dividend (30% of $1500)	450.00		—		—	
B's Total Income	$ 8,450.00		$ 6,000.00		$ 4,000.00	
*B's TAX		$ 1,065.10		$ 600.00		$ 240.00
TOTAL TAX AS CORPORATION— (Corporation, plus A, plus B)		$10,542.10		$5,831.00		$3,282.00
SAVING—CORPORATION OVER PARTNERSHIP		$ 1,015.90		$ 861.00		$ 210.00
SAVING TO A		$ 1,541.50		$1,182.75		$ 357.00

*NOTE: A is single; standard deduction. B is married; 2 other dependents; joint return; standard deduction.

EXAMPLE IV

3-MAN BUSINESS—A, B AND C EQUAL SHARES

	$24,000 Net Per Year		$18,000 Net Per Year		$12,000 Net Per Year	
AS A PARTNERSHIP						
A's Income:						
From Business	$ 8,000.00		$ 6,000.00		$ 4,000.00	
Other	2,000.00		1,500.00		1,200.00	
Total A's Income	$10,000.00		$ 7,500.00		$ 5,200.00	
*A's TAX		$ 2,096.00		$1,405.00		$ 860.80
B's Income:						
From Business	$ 8,000.00		$ 6,000.00		$ 4,000.00	
Other	4,000.00		4,000.00		4,000.00	
Total B's Income	$12,000.00		$10,000.00		$ 8,000.00	
**B's TAX		$ 2,148.00		$1,636.00		$1,240.00
C's Income						
From Business	$ 8,000.00		$ 6,000.00		$ 4,000.00	
Other	—		—		—	
Total C's Income	$ 8,000.00		$ 6,000.00		$ 4,000.00	
***C's TAX		$ 976.00		$ 600.00		$ 240.00
TOTAL PARTNERSHIP TAX		$ 5,220.00		$3,641.00		$2,340.80

EXAMPLE IV *(Continued)*

3-MAN BUSINESS — A, B, AND C EQUAL SHARES

	$24,000 Net Per Year		$18,000 Net Per Year		$12,000 Net Per Year	
AS A CORPORATION						
Corporate Income:	$24,000.00		$18,000.00		$12,000.00	
Deduct Salares	17,000.00		15,000.00		10,000.00	
Taxable Corporate Income	$ 7,000.00		$ 3,000.00		$ 2,000.00	
CORPORATE TAX		$ 1,750.00		$ 750.00		$ 500.00
A's Income:						
Salary	$ 6,000.00		$ 5,000.00		$ 3,500.00	
Dividend	1,000.00		400.00		—	
Other	2,000.00		1,500.00		1,200.00	
Total	$ 9,000.00		$ 6,900.00		$ 4,700.00	
A's TAX		$ 1,810.00		$1,258.60		$ 758.60
B's Income:						
Salary	$ 5,000.00		$ 4,000.00		$ 3,000.00	
Dividend	1,000.00		400,00		—	
Other	4,000.00		4,000.00		4,000.00	
Total	$10,000.00		$ 8,400.00		$ 7,000.00	
B's TAX		$ 1,636.00		$1,319.20		$1,042.00
C's Income:						
Salary	$ 6,000.00		$ 6,000.00		$ 3,500.00	
Dividend	1,000.00		400.00		—	
Other	—		—		—	
Total	$ 7,000.00		$ 6,400.00		$ 3,500.00	
C's TAX		$ 780.00		$ 672.00		$ 150.00
TOTAL CORPORATION—Plus A, B and C		$ 5,976.00		$3,999.80		$2,450.60
SAVING—PARTNERSHIP		$ 756.00		$ 358.80		$ 109.80

*A—Single; no dependents; standard deduction. **B—married; no other dependents; joint return; standard deduction. ***C—married; 2 other dependents; joint return; standard deduction.

Abstracters Liability Insurance and Bond Coverage

Report of Committee

AL SOUCHERAY, JR.
President, St. Paul Abstract & Title Guarantee Co., St. Paul, Minnesota

At the mid-year convention of the American Title Association, the abstracters' liability insurance and bond coverage committee made its report.

It was surprising to see the interest expressed, and the number of abstracters who did not know they could buy protection, either from Lloyds of London, or from a domestic insurance company. On the other hand, a large number of our members do carry policies, but in many instances, had some reservations as to the extent of their protection. Several felt that premiums being asked for this type of coverage were out of line for the hazard being insured. In view of this situation, the committee was prompted to send out a questionnaire to determine the percentage of our members carrying policies and to obtain other information useful to the committee in the pursuit of its assignment.

Problems

All of us know something about insurance in a general way, but we are too busy in our own field to be cognizant of the many problems and obstacles that an insurance company has, before it undertakes to write a particular coverage. Framing the terms of the contract is one problem; fixing a fair rate is another. Two things definitely affect rates; first, the spread of the risk; second, the number of claims resulting in losses. It is not hard to understand that if only 1000 policies are written, and if 100 losses develop, the insurance company's experience on a percentage basis would be higher than it would be if 1500 policies had been written, with 125 losses resulting, provided all the losses were confined with the same average. It is therefore very essential that we do everything possible to encourage all of our abstracters to carry policies.

I know all of you will be interested in seeing the recap of the answers received to the questionnaire, as well as the committee's comments. It is hoped that "Title News" will carry this report in one of its future issues, so I will not go into this phase of our report at this time.

Examples

Surely our findings did not reflect a very healthy condition. It may be that your errors have been very few and far between, and that the price you have had to pay for your errors has been very small; on the other hand, can you afford to jeopardize your business by exposing it to a loss that might wipe you out of the title profession, any more than you can disregard the necessity of carrying a liability and property damage policy on your automobile, or fire and windstorm insurance on your home?

Something must be wrong. Either we of the American Title Association have not made it known to you that you can buy protection, or the insurance company has not done its selling job. After reading the replies to our inquiry, I am convinced that the fault is due to a combination of both of these elements. Many members felt that the rates were excessive, and that they could not afford this protection; some did not know that the insurance was available. In one instance, an abstracter reported that he represented the St. Paul Mercury Indemnity Company and did not know that the company wrote this coverage.

In the State of Minnesota, which happens to be my home state, as well as the location of the home office of the St. Paul Mercury Indemnity Company, there is, with few exceptions, only one abstracter to a county, and there are eighty-seven counties. We have thirty-eight American Title Association members, and of the thirty-eight members, fourteen re-

plied to our inquiry; eleven carry insurance; seven with St. Paul Mercury Indemnity Company, and four with Lloyds of London.

Might Be Universal

I believe you all appreciate that this is a very poor showing, because with good salesmanship on the part of the insurance agents, it would not be too difficult to place abstracters' liability insurance in practically every office. This condition seems to prevail in almost all of our abstract states.

We have given a copy of the recap of these questionnaires, to the officers of the St. Paul Mercury Indemnity Company, and in August, I conferred with them, endeavoring to obtain their reactions to the report, as well as to secure some definite statements concerning what they propose to do to promote their business, and to adjust rates.

Promotion of the Business

These company officials realize that there is plenty of room for improvement. They expressed a desire to give abstracters' liability policies another shot in the arm. They proposed to bulletin their field men and agents again, and in addition, expressed a desire to run an advertisement in "Title News", to get their story over to our members.

Term of Policy

The St. Paul Mercury Indemnity Company writes abstracters' liability insurance on an annual basis, as well as on a 3-year term basis. When a 3-year policy is purchased, the term rate is 2½ times the annual rate. There is no penalty in the coverage of a term policy, as against an annual policy, should a loss occur.

Protection of Policy

Under the terms of the policy, the company is not liable for an amount in excess of limits of the coverage in any one policy year. Term policies are considered to be 3 annual policies. To explain this protection; if you carry a $100,000 policy, you can have several losses during the year; however, each loss reduces your protection by the amount of such loss. If you have a $25,000 loss, your protection is reduced to $75,000, unless you pay an additional premium to reinstate the full coverage of the policy. When you have a term policy, the full limit of the coverage is reinstated upon the start of the second and third years, without the payment of an additional premium.

Should you have a loss under a term policy in any one year, and should you desire to reinstate the full coverage, an additional premium based on the annual rate is required.

Settlement of Claims

The St. Paul Mercury Indemnity Company is authorized to operate in every state, and it does so through authorized agents. Adjustments on losses are handled by the company's claim department, through its closest representative. Not one of us is far enough away to encounter any delay. An abstracters' liability policy is classified as a casualty risk, and of course, insurance companies are always against permitting the settlement of losses by the assured, for fear he may overlook closing the door, resulting in additional loss made on the same claim. In this respect, the St. Paul Mercury Indemnity Company realizes that our business is a little different from most casualty risks, our claims usually representing a fixed amount. When time is of utmost importance in paying a claim, special treatment can usually be arranged for with the local agent of the insurance company.

Rates

Under the insurance laws of our states, insurance companies such as the St. Paul Mercury Indemnity Company are required to file their rates with the insurance commissioners of each state. Once this rate has been filed, it is impossible to make any deviation therefrom. There are other insurance companies, such as Lloyds of London, which do not have to file their rates. Under these conditions, companies not bound by a filed rate can find numerous ways to grant special concessions that may tend to reduce the rate.

The base rates of the St. Paul Mercury Indemnity Company are premised on a deductible policy. When full coverage is requested, or a deductible different than the base rate, premiums are adjusted accordingly.

To secure an abstracters' liability policy, the abstracter must answer a questionnaire. One of the questions concerns the number of employees the abstracter has, and their specific classifications. It is felt that we have not been too careful in analyzing our employees. Only those employees who are directly responsible for compiling abstracts and the allied certificates, that might lead to possible error resulting in a claim, should be placed under this classification. All other employees should be placed in a separate classification, as they have no bearing in making up the overall rate.

At the present time, the St. Paul Mercury Indemnity Company has had 2½ years experience, and the officers of the company report that it has been satisfactory. In January, 1952, they will have had 3 years experience. Taking into consideration the company's promotion campaign, as well as such assistance we can give in selling the idea of abstracters' liability insurance to our members, there seems to be little doubt that some rate adjustments may be forthcoming after January, 1952.

Conflict of Policies

The correspondence received by the abstracters' liability insurance committee reflects some concern over the conflict between an abstracters' liability policy and a lawyers' error and omissions policy. Both types of policies are issued by the St. Paul Mercury Indemnity Company. In the abstracters' liability policy there is excluded coverage against losses occurring on opinions of title, whereas the lawyers' omissions and error policy protects this hazard.

In a great many instances, abstracters or abstract companies have agency agreements with title insurance companies. Frequently the abstracter or abstract company issues the title insurance policy, based on their opinion of title. It would seem to me that this is a dangerous practice, because the abstracters' liability policy would not cover any opinion losses, and abstracters and abstract companies, as such, could not obtain the lawyers' omissions and error policy. It would be far better if the abstracter, being also an attorney, issued his opinions on titles over his signature as an attorney. In this way he may carry both forms of coverage without any conflict.

It has been a real pleasure for me to work on this committee. I hope we have done something that will benefit our association, either this year, or in the years to come. We highly recommend that future committees carry on actively to promote among our membership, a campaign that will result in the best possible rates, with the broadest type of coverage.

I want to thank all of the members of my committee for their help, which has added much to my pleasure in serving.

* * *

Following is a copy of the recap of the questionnaire sent to American Title Association members, regarding abstracters' liability insurance. Twenty-nine of the forty-eight states replied, and of these twenty-nine states, six handle the bulk of title evidence on a title insurance basis. The same can be said of the remaining nineteen states who did not reply.

In the twenty-nine states who replied, there are 1994 American Title Association members; we had 546 replies, making 27.38%.

Eliminating the title insurance states, of which are six, there are 1646 members; we had 520 replies, making 31.59%.

This would not appear to be a very good showing on our part; however, the figures do reflect some valuable information.

Of the answers from the twenty-nine states, 375 carry policies and seventeen do not. The St. Paul Mercury Indemnity Company has 168 policies, Lloyds of London, 204 policies. Three members failed to answer this question.

Judging from the replies received,

there are many abstracters who want to know about this type of insurance. One abstracter stated that he represented the St. Paul Mercury Indemnity Company and did not know the company was writing this type of insurance.

One member questioned the advisability of buying this insurance on a term basis, because he felt the coverage was reduced on any losses which would require buying additional insurance. The St. Paul Mercury Indemnity Company states its coverage is not reduced by the payment of losses.

A number of the members who replied stated that they felt rates were excessive. A few members wanted to know what should be done about notifying the company in the event of a claim which occurs within the deductible on the policy.

A few members still think we should form our own company.

Commenting by State

Alabama—This state made the best showing; almost 100% replied, with 50% of our members carrying policies, all in St. Paul Mercury Indemnity Company.

Arkansas—With 66 members, developed 21 replies, or 32%. Nine carry St. Paul Mercury Indemnity Company policies, 9 carry Lloyds of London policies. Only 2 carry on a term basis. As to the remaining 68% who did not reply, nothing can be said.

California—A title insurance state, having 100 members, 6 replying. Five carry policies, all in Lloyds of London.

Colorado—With 65 members, developed 25 replies, for 38%. Twenty-four carry insurance, 22 in St. Paul, 2 in Lloyds of London, 6 on a term basis. One member stated he would carry insurance in an American company if he had information.

Florida—With 67 members; 22 replies, 33%. Twelve carry insurance; 5 in St. Paul, 7 in Lloyds of London. Several are interested in learning about the coverage.

"Title News" Is Valuable

To you and all other members only in the proportion it is used by you and other members. Use its columns:

1. When you have a problem, send it to National Headquarters, 3608 Guardian Building, Detroit 26, Mich. If we don't have the answer, we invariably can secure data on the subject by means of a bulletin. The responses always furnish excellent material for the columns of "Title News."

2. Don't hide your light under the W. K. bushel. When you deliver an address on any subject relating to our profession, or on the Law of Real Property, send a copy to National Headquarters. These manuscripts make excellent copy for "Title News."

You Can Make "Title News" More Valuable

Idaho—42 members; 11 replied, 29%. Eight carry insurance in St. Paul, 7 in Lloyds of London. One member stated that he represents St. Paul Mercury Company and did not know they offered this coverage.

Illinois—82 members; 33 replies, 40%. Only 18 carry insurance, 8 in St. Paul, 10 in Lloyds of London. Many are interested in additional information on an American Company, at more reasonable rates.

Iowa—140 Members; 53 replied, 38%. Forty-seven carry insurance; 21 in St. Paul, 26 in Lloyds of London. There are very few term policies. One member complained that it took 3 months time for Lloyds of London to settle a claim.

Indiana—69 members; 24 replied, 35%. Nineteen carry insurance; 8 in St. Paul, 11 in Lloyds of London.

Kansas—165 members; 41 replied, 24%. Nineteen carry insurance; 14 in St. Paul, 5 in Lloyds of London; one member stated that premiums are too high. Another member, that St. Paul Mercury Indemnity Company's premiums are higher than those of Lloyds of London.

Michigan—59 members; 17 replied, 30%. Eleven carry insurance; 5 at St. Paul, 6 at Lloyds of London. One member said more credit in rates should be given on deductible policies.

Minnesota—38 members; 14 replies, 40%. Eleven carry insurance policies, 7 in St. Paul, 4 in Lloyds of London.

Missouri—112 members; 34 replies, 30%. Twenty carry policies, 11 in St. Paul, 9 in Lloyds of London.

Nebraska—107 members; 38 replies, 35%. Thirty carry insurance; 10 in St. Paul, 20 in Lloyds of London.

New Jersey—15 members; 2 replies, 14%. New Jersey is a title insurance state.

New Mexico—31 members; 13 replies, 42%. Eleven policies are carried; 5 in St. Paul, 6 in Lloyds of London.

New York—54 members; 2 replies, 4%. New York is a title insurance state.

North Dakota—46 members; 19 replies, 41%. Seventeen carry insurance; 4 in St. Paul, 13 at Lloyds of London.

Ohio—74 members; 1 reply.

Oklahoma—94 members; 31 replies, 33%. 22 policies are carried; 14 in St. Paul, 6 at Lloyds of London. Two others —?—.

Oregon—51 members; 8 replies, 18%. Two policies are carried at Lloyds of London. Also a title insurance state.

South Dakota—69 members; 22 replies, 43%. Eighteen policies carried; 5 in St. Paul, 13 at Lloyds of London.

Tennessee—11 members; 1 reply.

Texas—217 members; 42 replies, 20%. Sixteen policies; 5 in St. Paul, 11 at Lloyds of London. One member states that St. Paul Mercury Indemnity Company's rates are excessive.

Utah—12 members; 7 replies, 59%. 1 Lloyds of London policy. Several desire information.

Washington—54 members; 6 replies, 1 policy carried. Washington is a title insurance state.

Wisconsin—70 members; 27 replies, 31%. Twenty-one policies, 9 in St. Paul, and 12 at Lloyds of London.

Wyoming—22 members; 8 replies, 37%. 7 policies, all at Lloyds of London.

It would seem reasonable to expect that the insurance company through its agents explain abstracters' liability insurance to the abstracter, thus developing considerable new business, all of which should tend to reduce rates.

Questions to Be Answered By the Insurance Company

1. Rates:
   a. When may we expect a reduction?
   b. Should deductible coverage be given a better rate?
   c. Would a closer classification of employees produce a lower rate?
2. Does coverage reduce if a loss is paid, requiring an additional premium to bring the policy up to face value?
3. Is there any conflict between an

attorney error and omissions policy and an abstracters' liability policy where an employee of the abstracter personally might issue an opinion to a title insurance company based on an abstract made by his company? Is there a difference where this opinion might be issued by the abstract company to the title insurance company?

4. What arrangements can be made to permit abstracters to make settlements of losses within the deductible amounts without first notifying the company? Can an endorsement be attached to the policy?

THE AMERICAN TITLE ASSOCIATION

Re: Abstracters' Liability Insurance Questionnaire

State	No. of A.T.A. members	No. replying to Qstn're	No. carrying liab. Ins.	No. in St. Paul Mercury Indem.	Number annual policies	Number term policies	No. in Lloyds of London	No. interested in securing liab. insurance
Alabama	6	5	3	3	3	0	0	1
Arkansas	66	21	20	9	16	2	11	1
California	100	6	5	0	2	1	5	0
Colorado	65	25	24	22	14	10	2	1
Florida	67	22	12	5	9	2	7	10
Idaho	42	11	8	1	3	4	7	2
Illinois	82	33	18	8	12	11	10	13
Indiana	69	24	19	8	14	3	11	4
Iowa	140	53	47	21	36	6	26	5
Kansas	165	41	19	14	18	1	5	21
Michigan	59	17	11	5	10	0	6	5
Minnesota	38	14	11	7	6	5	4	2
Missouri	112	34	20	11	15	3	9	12
Montana	56	12	8	0	8	0	8	2
Nebraska	107	38	30	10	24	3	20	6
New Jersey	15	2	2	2	2	0	0	0
New Mexico	31	13	11	5	10	0	6	2
New York	54	2	2	0	2	0	2	0
*North Dakota	46	19	17	4	14	1	12	2
Ohio	74	1	0	0	0	0	0	1
*Oklahoma	94	31	22	14	17	2	6	7
Oregon	51	9	2	0	2	0	2	3
South Dakota	69	22	18	5	15	1	13	3
Tennessee	11	1	0	0	0	0	0	0
Texas	217	42	16	5	16	0	11	19
Utah	12	7	1	0	1	0	1	6
Washington	54	6	1	0	1	0	1	4
Wisconsin	70	27	21	9	20	0	12	5
Wyoming	22	8	7	0	7	0	7	1

Total No. A.T.A. members in states reported above	1994
Total No. of replies to questionnaire	546
% of replies to total members in states reported above	27.38%
Total No. carrying abstracters' liability policies	375
Total No. carrying policies in St. Paul	168
Total No. of annual policies carried	297
Total No. of term policies carried	55
Total No. carrying policies in Lloyds of London	204

*One member reported carrying abstracters' liability insurance, but with neither the St. Paul company, nor Lloyds of London.

Wage Control Records

JAMES P. WATLINGTON
Attorney and Mgr., Texarkana Title & Trust Co., Texarkana, Texas

I know that it is good practice and good form for a speaker to tell at least two good stories before he gets into his subject. They consume time. which is good for most speakers, and it relaxes the audience and gets them into a jovial frame of mind, which is helpful. I could probably clean up a couple of good stories that would do to tell this company, but the time is short and I would like, with your indulgence, to use my allotted time in making this report with the hope that it will help someone avoid the experience that we had with the Wage and Hour Division of the Department of Labor.

I started to say, This Is The Voice of Experience. Most certainly, I am not the VOICE. It would probably be more descriptive to say THE THING.

Long In Business

But, I do have a story to tell, a story of a small title company that was organized in 1882 and through fire, floods, panics and depressions has opened its doors for business every work day since that time. The reason it could open its doors was because it produced and is producing an item that is essential to the economic structure of the community. It enjoys, as your company enjoys, the confidence of the community built up over a period of years by men of intestional fortitude, who were willing to risk their time, judgment and money, in building a business known for its fair dealings with everyone, including its employees.

G. I. Program

After World War II, we realized that those of us in the office had all been there several years, in fact the janitor has carried the keys to the building for twenty-seven years, and some of us have been there longer than that. It was our thought that we should get some young and new blood into the organization. Under the G.I. Bill, and particularly under Public Law 16, it was possible to enter into a contract with the Veterans Administration where you would agree to take a disabled veteran into your organization and give him on-the-job-training. You are familiar with the program, I am sure. You pay part of the salary of the trainee and the Veterans Administration pays a part; the Administration paying less each quarter and you paying more until at the end of the four-year training period you are paying all of the salary.

Complications

This seemed to us a workable program. It would enable a disabled veteran to rehabilitate himself, in a field that is not crowded, and would enable the small business to educate and train the employees and not have to bear the whole expense of the training period. For us, this worked well. We had one young man to complete the training period. We were satisfied and he was satisfied, so we decided to take on another veteran under the same program. This we did. Things were working smoothly until Congress (those gentlemen who spend their lives in Washington, so that they may spend our money), saw fit to raise the minimum wage to 75c per hour. The wage schedule under which our trainee was working had not quite reached that figure. We immediately took the matter up with the training officer of the Veterans Administration. It was his interpretation that in as much as we had a contract with the Administration as to what we would pay, that this increase did not affect us. However, in checking several bulletins on the matter, we learned that there was a provision in the law that where you were paying a trainee less than the minimum of 75c per hour, you could obtain a Learner's Certificate, which would exempt you from paying the minimum wage. We asked the Veterans Administration for such a Certificate and were advised that they had never heard of it, but that they

would take it up with the regional office. After weeks and weeks, we got a report from the regional office that this was new to them and they has asked Washington for instructions. After several more weeks, we were advised that since ninety days had elapsed, the Veterans Administration could not issue such a Certificate, and that it would have to come from the Department of Labor, and there is where we made the big mistake. We wrote the Department of Labor and asked for the Learner's certificate.

We Are Inspected

In due time, an affable gentleman with a large brief case came in the office one morning and announced in a loud and friendly voice that he was from the Department of Labor, Wage and Hour Division, and had come over to help us out of our difficulty. He asked to see our payroll records. Being a family business and a partnership, we do not have an elaborate accounting system. For years we paid everyone by the week, including the working partners. We had one check book that all of us used. We had worked 44 hours per week and had paid time and one-half for the four hours overtime worked, and had also paid for any other overtime that was worked. We had no time clocks, time cards or time records. We would merely ask who had worked overtime and how much, and each employee was paid accordingly. During the war, when we were pushed to the wall with a back-log of orders, and had no help, we were putting forth every effort to cut routine office work so that we would have everyone available to help get out the work. We asked our employees if it would be satisfactory to them to get their checks every two weeks so that we might cut down on bookkeeping. This was agreeable, so we were paying everyone every two weeks, but their wages were based on hours worked and we had always paid more than the hourly minimum wage. However, we had no records . . . only cancelled checks. All of our employees were satisfied with us and our system and their wages.

It Can Happen to You

The gentleman spent some three days checking our records. It was his conclusion that we owed our employees for back salary and overtime worked, $1,803.35. This was for a two-year period. To say that this came as a shock is putting it mildly. We had a quite a few words with the gentleman, some of them harsh I am afraid, but it was his advice that we pay off because if we went to court it would be double that amount.

If any of you good people think or believe that this couldn't happen to you, disillusion yourselves now. The title industry, both abstracters and title insurance, are definitely in interstate commerce under the interpretation of the Fair Labor Standards Act of 1938, as Amended, and this not only can happen to you, but probably will happen unless you get your house in order now. We were told that in our region alone, that this one branch of the Labor Department was increasing its personnel by 60%, so that there would be more investigators for this field work.

You, no doubt, are wondering how such a computation could be made when we were paying more than the minimum wage and also paying for hours worked and overtime worked. We asked the same question. The Department of Labor furnishes its investigators with a bulletin that has all the answers, namely, "Interpretative Bulletin, GENERAL COVERAGE of the WAGE AND HOUR PROVISIONS of THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, TITLE 29, CHAPTER V, CODE OF FEDERAL REGULATIONS, PART 776, Subpart A—General, May, 1950; and from this bulletin on overtime compensation it reads as follows: "where the salary covers a period longer than a work week, such as (in our case), a semi-monthly salary, it must be reduced to its work week equivalent and is translated by multiplying by 24 and dividing by 52, to get the weekly wage, then dividing by 40 to get the hourly rate." You can readily see what this formula would do to you where you have already paid for overtime as we had done.

Study the Law

I would suggest that all of you who are not familiar with these various bulletins and the Acts, to get copies, particularly the two bulletins "Records to be Kept by the Employer, Regulations, Part 516," and "Overtime Compensation, Interpretative Bulletin, Part 778."

How Figured

You also, no doubt, would be interested in knowing the ultimate outcome in this experience in the lives of a country abstracter. After several conferences with this investigator (who some in the office had dubbed "Mr. Nosey"), we were told that he could do nothing but make his report; that whatever settlement was made must be done by the Field Office Supervisor, who in due time would call on us. The investigation was made in August, 1950. In February, 1951, we had a settlement. We had our auditor check and re-check all calculations, and in some there were errors as to hours worked and the Department recognized these errors. We also found from checking the calculations, that every day of the week had been figured except vacation time. We suggested to the Department that due to the holidays, which were days that were not worked, we should be given credit for New Years, July 4th, Labor Day, Armistice Day, Thanksgiving and Christmas, stating that if any of these days fell on Sunday, that the day following was observed. After several conferences and lots of correspondence, these days were allowed, and the final settlement cost was $970.25. That is, WE HOPE IT IS FINAL!!

Constitutional Government

I am a strong believer in Constitutional Government. The Fair Labor Standards Act of 1938, as a law I suppose was necessary. It has its good points. The interpretations of this law, not by the courts but by the administrators of the law, has worked hardships and in some cases a miscarriage of justice, and that was never the intention of Congress.

In hiring these veterans, we had in mind two objects. We could help a veteran who had fought to preserve our liberties, his and mine, to rehabilitate hisself, to be self-supporting, and to be of service to his community. Whether we admitted it then or admit it now, the idea was appealing to us that the Government would foot part of the bill. We, as individuals, as communities, and as States, are losing our freedom and liberties by going to Washington with our hands out—something for nothing—the old gravy train.

Socialism?

Which gravy train do you want to ride on? There are two of them. Train No. 1 is a beauty at first sight. Pasted on its sides are signs reading "This train takes you to the land of all play and no work." "Ride this train, it gets to the better things of life." "Destination: Utopia, the land where everything is free. The Government subsidizes all." This train follows a route that goes through a mythical forest where "money grows on trees." Then it runs through towns called "Socialism" (let the Government do it); "Communism" (nobody has anything of their own, not even peace of mind; it all belongs to the State). Finally, this train arrives in a war-ravaged state of dictatorship, where armed guards patrol the streets and where every home is not a castle.

Free Enterprise

Train No. 2 is simply labeled "The Free Enterprise System." It's powered by an engine called "Competition." The track it run on is long and stable. This train goes through towns named "Hard Work," "Initiative," and "Self-Respect." The track leads through the "Mountains of Responsibility"; they wind their way through the "Plains of Personal Achievement." Train No. 2 arrives at the "Station of Progress."

Yep, they are both gravy trains. It all depends on what kind of gravy you like.

Abstracter-Underwriter Relations

WILLIAM A. McPHAIL
President, Holland Ferguson & Co., Rockford, Illinois

Mr. Chairman, Ladies and Gentlemen:

If you will remember correctly, I acted as Chairman of this committee last year. It is rather unfortunate for you that you have to listen to me on the same subject two years in a row, but when our national president asked me to head the committee again this year, I hated to refuse because I believe we should help with the work when asked to do so. However, my report is very short, so I will not keep you long.

As you understand, this committee was appointed to investigate and report grievances, differences, and misunderstandings between Abstracters and Underwriters.

The reason for the appointment of the committee was because of some of the statements made in one of the sessions of the Abstracters Section held at the time of the Atlantic City Convention, which led to the belief that grievances really did exist.

In attempting to locate all the grievances and misunderstandings possible, on which to base the report made last year, I mailed **150** letters of inquiry to Abstracters scattered through our various state associations. I received **15** replies from Abstracters in **11** different states.

A Year Ago

Based on the information gained in this manner, the committee made it's first report at the time of the Annual Convention held in Oklahoma City, one year ago. This report was published in full in one of the recent issues of "Title News."

In order that we may all better understand conditions as they now seem to exist, as compared with conditions a year ago, let us review last year's report for just a minute.

One writer complained that the small fee he received for all the work he had to perform was not commensurate with the responsibility taken, or the service given.

One reply came from a member who was alarmed because there were more Title Insurance Companies wanting to do business in his county than there were Abstract Companies to go around.

Another complained because Title Insurance Companies, who were members of the A.T.A., were getting their information from curbstoners, thus supporting the very principles the A.T.A. was trying to eliminate.

Another letter came from a member who complained that the Title Insurance Companies were too slow in getting out their letters of opinion after they received his abstract.

And the last I will mention, complained that the lawyer was getting a part of the premium, while he received only the fee for preparing the Abstract.

This short review will give you some idea of what last year's report contained with respect to grievance and misunderstandings.

Letters of Solicitation

After consulting with our national president, the Chairman of the Abstracters Section, our national secretary, and the members of my committee on how best to locate the trouble spots this year, I mailed out 43 letters to abstracters scattered through the various state associations.

I received 16 replied from members of 13 different states as follows: Indiana 1, South Dakota 1, Texas 3, Minnesota 1, Iowa 1, Kansas 1, Utah 1, Illinois 2, Oklahoma 1, Montana 1, Virginia 1, Florida 1, and Wisconsin 1.

I think you will agree with me that the replies come from the areas where trouble was most likely to exist.

It seems to me that if there were any serious problems that should have been called to the attention of my committee, some one of these replies would have reported same.

Of the 16 letters received 15 reported no grievances or misunder-

standings between the Abstracter and the Underwriters. They all state that the relations are very satisfactory.

Complaint

The other letter came from a member in Texas and is as follows:

Quote. "Dear Mr. McPhail:

In reply to your letter of the 25th inst., relative to report of Abstracter-Underwriter relations, wish to advise: Until very recently, relations between Abstracters and Underwriters have been very happy. However, within the past year, a number of the issuing companies, of which we now have sixteen operating in the State, have been entering into contracts with attorneys to represent them, which naturally, does not serve to keep relations on the old happy basis.

Contracts between Underwriters and attorneys have to be on a quiet basis, since our statutes provide that contracts between Underwriters and Abstracters must be filed with the Department of Insurance & Banking for approval, and they will not, I am sure, approve a contract with an attorney. I know of only one instance where the attorney actually issued the policies, and this has been discontinued at this time, the attorney only securing the business, examining the title and forwarding the papers to the home office for issuance of the policy.

I do not know just what will be the outcome of this condition, as several complaints have been filed with the Department of Insurance & Banking. However, the irony of the situation is that, while complaints have been filed by one Underwriter against another, they are nearly all 'Tarred with the same stick'. End of quote.

Yours very truly,
A. B. CURTIS."

Of the other letters received, I might state that the member who wrote last year and complained because there were not enough abstracters to go around, now reports that one of the companies in his county now represents two Underwriters and that arrangements seem to be satisfactory.

Cooperation

In support of this practice a member from Oklahoma writes that every qualified abstracter in Oklahoma acts as local agent for one or more Title Insurance Companies, and that there seems to be a good spirit of co-operation on both sides.

It is very gratifying to myself and the members of my committee, as well, not to have any more grievances to report than the one mentioned shows. It makes our report very short.

I cannot help but believe that the work of the committee last year, and the publishing of last year's report, has done much to bring about the improved conditions. If this be so, the committee can well feel their efforts have been worth while.

Recommendation

However, in view of the fact that grievances still exist, we recommend that the committee on "Abstracter-Underwriters Relations" be continued, and we recommend further that the Chairman of this section, report the findings of this committee and the recommendation made, to the Board of Governors of our National Association.

It seems that we are working more harmoniously together now than we did a year ago. Let us strive to make it 100% in another year.

The committee wishes to thank all who took of their time to answer our letter of inquiry. Without these answers there would be no report.

W. A. McPHAIL,
Chairman.