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A JUDICIAL DECISION TO HELP AN ABSTRACTER

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Every now and then there is recorded in a state court a case of vital interest to our profession. Here is such a case taken from the publication of the Oklahoma Title Association, "Titlegram."

A question arises occasionally in an abstract office whether a person should be listed as a fee owner in a tract of land due to some wording in a conveyance. If he holds title, then his name must be checked and certified to, but if he does not hold any title, then his name need not be listed, and time and effort have not been wasted on a useless job. In case of doubt, we try to take the safe ground in our office, and certify to the name, but what we really like is when there is no doubt because the question has been settled by judicial decree. A fairly recent case from our Supreme Court has settled one such question that had made us wonder "what was what", and that is the information I would like a pass on to you at this time.

The case is Leidig vs. Hoopes, reported in 288 p (2) 402. It arose in a quiet title action. Will Reed was married in 1906 to Rosa Reed, and they remained husband and wife until her death. During coverture he patented a tract of land and took title in his name only. In 1940 they deeded the land, both joining in the conveyance, and made the following reservation: "Reserving to the vendors, their heirs, administrators, exevutors, or assigns, for a period of 25 years from the date hereof, the right to mine and remove all oil, gas and other valuable minerals deposited in or under the above described lands." (s underscoring mine). In 1941 Rosa Reed died, leaving as her only heirs her husband, Will Reed, and her brother, Louis J. Hoopes. In 1948 Will Reed died leaving Leidig et al as his heirs. The sole question before the Supreme Court in this case was: "Who owns the minerals reserved in the above reservation?" Or put in another way, did the reservation above vest title to an undivided one-half interest in the minerals in Rosa Reed?

Our Supreme Court held that Rosa Reed was not vested with any title to the minerals, and as a consequence, Hoopes, her heir, could not have any interest now. This case presents this question for the first time to our Supreme Court, but it held with the rule that a reservation in a deed, to be effective, must reserve some right or interest owned or possessed by grantor at the time the deed was made, and that a reservation cannot create title or enlarge a vested right of the grantor, it merely reserves the specific interest named therein from the operation of the grant, and leaves that interest vested in the grantor to whom it belonged at and before the execution of the deed. In deciding the case the Supreme Court quoted excerpts from an Indiana case. The Indiana case was based on a reservation reading as follows: "The grantors and **each of them** reserve in said above described real estate a life estate therein, for and during the natural lives of **each** of said grantors." (Again underscoring is mine.) nI this case again, the husband owned the property and wife joined in the execution of the deed. The Indiana court held that the wife did not have a life estate in the property, only the husband, and it would appear from the reading of the case, that our Supreme Court found such ruling correct, as a matter of fact, it was on that case that it based its ruling. The Oklahoma Supreme Court did point out that such ruling would not be correct if there had been any words of grant to the wife in the deed, but

since there were none, she can hold no greater interest in the real estate after the deed than she did before.

I thought this case was very interesting. The opinion was written in clear and unmistakable language, and certainly settled this point. I only wish I could find some more decisions to take me off some other hooks.

PROTECTING YOUR RECORDS AGAINST DISASTER

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Whenever there is a discussion of records, and the possibility of the loss or destruction of valuable documents, it certainly is of importance to those in the title business. Records are our business. Here is a discussion on protecting records against disaster taken from the publication of the "Small Business Administration." It is worthy of our attention and interest, although it does not specifically deal with title plants, it can apply in our business.

Disaster is no respecter of small business. Recently, a typical small concern in a disaster area lost everything—including all records. It was a striking example of what lack of important documents and information can mean to a business establishment in time of disaster. An appeal was made to the American Red Cross and Small Business Administration for funds with which to restore the business. Both agencies were badly hampered by the lack of proper records of earnings. If the businessman had taken proper advance precautions to protect his valuable records, there would have been less delay and little chance of his not obtaining the funds he needed.

During the past two years, various U.S. regions have been the scenes of major disasters. These have ranged from tornadoes and hurricanes to salt-water floods and high winds with torrential rainfall. In addition, while business buildings are often located above the flood line, many of them do not have adequate protection from cyclones and tornadoes.

In situations like these, one of the gravest management problems derives from the loss of business records. The problem is grave because any evaluation of the extent of damage, to be acceptable, must be supported by accurate figures and descriptive information. Virtually every organization providing financial assistance covering losses due to a disaster—a bank, an insurance company, the Red Cross, or the Small Business Administration—must have dependable proof as to the size of the loss and the fact that relief is justified. To provide this proof, correct and current records should be maintained and should be protected against destruction.

Where business records are concerned, carelessness and lack of foresight by owners and managers is all too common. Often, important ledgers and irreplaceable legal documents are lost forever. As a result, there have been many cases where disaster-struck concerns, seeking financial assistance for rehabilitation, have met serious obstacles. Such difficulties could have been avoided had essential information been protected systematically in advance. Moreover, the fact remains that in large companies, as well as in small concerns and among individual proprietors, most regular records are vulnerable to loss or destruction.

Experience

Here is the experience of one firm. This concern was operated in a one-story, wooden-frame building located in a low area at the foot of two hills.

A flood swept through the building damaging the flooring, electric motors, and inventory. The operator stated that he "kept the books under the counter, and they were so badly damaged that they were thrown out with all of the other debris." When the owner applied for a loan, he could not give any figures to substantiate his loss, nor could he submit any figures which would enable an investigator to determine what the past business experience of the concern had been. The inability of the applicant to substantiate any claims resulted in his loan application being declined. In fact, he could not be helped in any tangible way.

Floods, winds, and fire can strike anywhere and cause key documents to be destroyed or rendered completely useless. How would your concern make out if your office were demolished? Do you have an alternative, immediate source of information as to inventory, receivables, finances and similar items? Could you prove how much a disaster cost you? Could you back up your tax returns?

Tax Considerations

Continuity of records—and hence the safeguarding of them—is important from the tax standpoint. Some records (like employee withholding statements) are required by law, others (like unusual business expenses) are dictated by commonsense. All of them help to document earnings statements and avoid mistakes on tax returns. What you need, of course, is sufficient evidence to support the figures you claim. The burden of proof lies with you. If appropriate records are not available, due to a disaster, expensive confusion and even tax penalties may result. Here again, carefully protected duplicate information is usually the best answer.

If your return is questioned and the Treasury agent finds upon inspection that you haven't appropriate records to justify what you claim, you are told both orally and by letter to keep permanent books of account plus the following original records: invoices, bills, vouchers, tapes (such as for cash register), and receipts. These items, therefore, should be added to your list of records which should be protected against disaster.

In fact, if a follow-up investigation shows that a businessman has consistently failed to maintain proper records, the Internal Revenue Service may hale him into court on the charge of willful negligence. The penalty for this misdemeanor is a fine of $10,000 or one year's imprisonment, or both, plus the court costs.

Four specialized types of records which are important to safeguard for tax purposes are depreciation, tax withholding statements, unusual business expenses, and business losses.

• **Depreciation.** — To substantiate depreciation figures on capital assets (like machinery and equipment), you should safeguard records on date of purchase, cost, estimated useful life, estimated salvage value; and depreciation already taken in past years.

• **Tax Withholding Statements.** — As an employer, you are required by law to maintain records on (1) income taxes withheld from employees' wages, (2) taxes withheld from employees' wages under the Federal Insurance Contributions Act for old age and survivors insurance, and (3) taxes on employers under the Federal Unemployment Tax Act for unemployment insurance. Hence, these documents, too, should be protected.

• **Unusual Business Expenses.**—If you want to take the full deduction for unusual expenses such as entertainment and travel which are incurred on behalf of your firm, they should be fully documented to show that they are both accurate and allowable. These records, therefore, have lasting value.

• **Business Losses.**—There may also be legitimate deductions for losses sustained in the course of regular operations. For example, a marketing innovation may not work out, a manufacturing experiment may fail —or a disaster may strike. Such situations may produce sizeable losses which are quite properly deductible —if suitably recorded.

Here is a case in point. One busi-

nessman, engaged in the manufacture of automotive devices, was the victim of a severe flood. A substantial part of his loss was destroyed or damaged inventory ($35,000) and records. An outside financial specialist had to be brought in to make estimates and analyses of the company's sales and normal inventories—with the usual ratios in effect in the automotive trade. If the owner had been able to produce proper inventory records, he would have been able easily to substantiate his inventory losses. Failure to maintain these records and store them in a safe place required that the financial specialist devote much high-priced time to his estimated verification of the flood loss.

Government Contract Records

If you have a supply contract with the Federal Government you have still another series of documents to protect. They can range from invitations to bid and requests for proposals, through your actual bids or proposals, to the contract itself with the specifications, drawings, reports, correspondence, invoices and payments relating to it.

Essentially, you want to be able to reconstruct the terms, history and status of your contract. Details about what you agreed to do, how far you have progressed, and what remains to be accomplished can be of cardinal significance in working out with your contracting officer arrangements for completing work and avoiding delinquency.

For example, an aircraft company sustained heavy loss as a result of floods. Unfortunately, master blueprints and specifications for plane production were lost and serious interruption of operations resulted. The cost of reproducing the necessary thousands of drawings and specification records was very high. Moreover, only a rough estimate of their replaced value could be made. The loss on account of production problems, and delays in delivery of finished units was extremely heavy. However, if a second set of prints and specifications had been deposited in a safe, dry vault located on high ground out of reach of floods, the company could have been back in production almost immediately—and could have saved much goodwill and thousands of dollars.

In the same way, you also need to take care of records relating to any Government work you may be doing under subcontract to a larger prime contractor. Remember that the prime has schedules and prices to meet, which, in part, depend upon you. If disaster strikes you, the prime will want to know as soon as possible what the effect will be upon him and how soon he can expect you "back on the team" productionwise.

You may also need detailed records on costs and pricing in connection with the renegotiation procedure. If your Government-contract work during a fiscal year totaled $250,000 or more, and involved renegotiable contracts, you can be renegotiated. If you are, and can offer proof of having priced closely and of having accepted risks, you stand a better chance for a favorable settlement than if your operating statements show apparently excessive profits with no background facts to justify them. Such background facts can come only from good records.

Constructive Action Possible

The cases of lost records mentioned in this Aid point to a serious situation. Nevertheless, it is one in which constructive action is possible—even for the small enterprise.

A good place for a firm to start is to collect all its valuable papers which are not frequently used for reference. They should be placed in a safe-deposit vault (for example, a bank or other safekeeping institution) where they will be adequately protected from fire, wind and from water damage in case of flood. Such vaults are available for rent in most cities; the cost is low when compared to the potential loss.

Current records of accounts payable and receivable should be reproduced regularly and preserved in a safe place. Similar precautions should be taken for sets of tracings, blueprints, drawings, and important specifications, as well as for models and prototype mechanisms. Special

care should be taken of items for which it is not feasible to make and store a duplicate. Insurance policies and related data also deserve special care. The settling of claims can be greatly accelerated when adequate information is available. Then, too, if a dispute arises between the businessman and the insurance company, proof of loss through accurate documentary evidence may save thousands of dollars for the insured.

Remember, however, that such safety measures are worth very little if the material you store and safeguard is out of date. Unless all documents are maintained on a reasonably current basis or have a long-term value, you are missing the point of the whole procedure.

Four Steps to Take

What kind of action, then, should be taken once you have decided to put this program into effect? Basically, there are three steps:

- **Analyze the Records.** All your operating executives should be told of the plan, and asked to make a complete survey and listing of all their valuable records—reports, drawings, and other material—which are vital to the full operation of the activities they supervise.
- **Copy Key Items.** Make arrangements to reproduce all of these key items. Then accumulate all of the duplicates, carefully indexed or identified, and properly packed and protected for storage.
- **Arrange for Safe Storage.** After assembling this material, contact the warehouse, bank, or other safekeeping institution and describe your space needs. When you have arranged adequate storage, you should provide the executives of the storing company with the names of the persons representing your firm who have authority for access to these valuable documents.
- **Keep Things Current.** Once you have your system of safe storage in operation, check up on it regularly to see that the right material is stored, that it is up to date, and that material which is no longer useful is extracted and destroyed.

A Word About Microfilm

In connection with copying key records, the question of microfilm may well come to mind. Basically you can use microfilming in any one of three ways: (1) have it done for you on contract, (2) do it yourself with rented equipment, (3) do it internally with purchased equipment. The main deciding factors are cost, volume of work, and control requirements.

The great advantage of microfilm is space saving. This can be very important if the protected storage space you plan to use is relatively expensive. Obviously, when reduced to microfilm, a great many documents can be fitted into a space the size of an ordinary desk drawer. If, however, you can get well-protected storage space at relatively low cost, be very careful to compare the cost of storing duplicate, full-sized documents with the cost of microfilming. According to the National Records Management Council, full-sized records can sometimes be stored for several years at less expense than the initial cost of microfilming.

The classified pages of your local telephone directory should help you find both contract microfilming services if you want them, or concerns which rent or sell the equipment. Naturally, costs will vary a good deal, but rental charges for a microfilm recorder run typically from around $35 to $80 per month. To buy a recorder would cost anywhere from about $450 to $3,300 and the reader to go with it would involve some $165 to $800 more.

Note to Individual Proprietors and Partners

In the case of individual proprietorships, it is important to recognize that the person and the business are more closely identified than is true of corporations. As a consequence, it is imperative in guarding against disaster that a will, insurance policies, copies of income tax returns, deeds for property, and other essential records and legal instruments, be placed in a safe depository. In this way they can be preserved for

reference—not only by the individual himself, but also by those who will have to take over the management of the estate in the event of the owner's death or incompetency.

The matter of protecting a will is particularly important. History demonstrates that healthy businesses can be forced to the wall because there is no owner's will. The fact that the will was destroyed in a disaster doesn't help.

Through the specific instructions in a will a proprietor can provide for executors to carry out plans he made during his lifetime for the management or sale of his business interests. Conversely, the lack of specific authorization to continue operations can result in immediate liquidation of the business—as ordered by the court having jurisdiction over the administration of the estate.

In partnerships, too, the preservation of business records can be essential. If, for example, key agreements and similar documents are destroyed at a time when the partnership has to be dissolved, management and legal problems can arise very quickly. For this reason, the wisest policy is often for the partners to provide individually for the safeguarding of records. When this is done, each has available the material he needs for his own use and protection.

Getting a Program Started

Many small business owners will be inclined to say: "Fine! I agree with all that's been said. Something should be done. I'll get at it just as soon as my regular work lightens up a bit."

But then they get involved with other things. Memory dims, enthusiasm slackens, and the whole idea is forgotten. Or they put off positive action on the grounds that their "affairs are not in order."

These are natural tendencies, but they are also dangerous. For instance, a small manufacturer of a patented, food-packing machine experienced a heavy loss by fire. Unfortunately, no precaution had been taken to keep a complete duplicate set of drawings and specifications in a safe place. The delay in preparing a new set of dimensional drawings—secured by actually dismantling a complete machine in a customer's plant—was expensive. The problem could have been avoided if another set had been printed in the beginning and put away for safekeeping. The cost of such protective storage in a suitable vault would be only a few dollars a year.

However, an important word of caution is appropriate at this point. All changes, additions, or other information concerning these drawings and specifications should be made in the secondary source immediately after such changes take place in order to keep stored records constantly current.

The threat and risks of disaster exist whether you forget them or not. You seldom, if ever, get all your affairs in perfect shape. Furthermore, your business needs to have its important records protected more when the risks are not evident, and when affairs are not in "apple pie order," than when they are. Procrastination increases the risks of loss and waste—and competitive disadvantages.

Putting off the start of a constructive program is a major reason for being caught short when misfortune occurs. Intelligent plans and positive action are essential if you are to give your business a reasonable chance of survival and recovery. Just as you insure a home and personal property against loss, so also you should protect your business against disaster by safeguarding its vital records. The time to begin is now.

HISTORY OF TITLE INSURANCE

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In the fiftieth year of the American Title Association, it is often refreshing to look into our history. Here is a learned treatment on the history of title insurance and should be interesting to all in our field. It originally appeared in the Florida Title News.

In this article in relation to title insurance, we will attempt to present first some basic facts which we hope may depict the background and methods used prior to the availability of insurance which g u a r a n t e e s the owner of real estate who holds such assurance of freedom of possibility by reason of any loss that may result from the failure on the part of the contract or policy of title insurance to properly inform the purchaser, owner of the real estate involved, of such infirmity or deficiency in the title, and further to protect such owner against any legal attack, regardless of the season thereof.

Many of the States, certainly those along the Eastern Seaboard, whose history dates back before the Revolution, still contain in their laws, the elements of the old English Common Law, as set forth in Blackstone in his Commentary.

According to Sharswood's Blackstone, the common law was divided into two rather inclusive headings:—

1—Rights
2—Wrongs

We are definitely restricting our interest to Rights and that only of persons between themselves and individuals as respecting real property.

Under the English Law, there were several kinds of real property which will be referred to in the order of their importance.

1—Lands
2—Tenements
3—Hereditaments

Hereditaments are subject to two divisions:

1—Corporeal
2—Incorporeal

The former consists wholly of lands in their largest sense, either above or below the earth. The second, to wit, incorporeal hereditaments, are the rights that one person may have in the lands belonging to another, examples of which are as follows:

Commons—The right which one man has in the lands of another in common with him as our Public Squares. In England, these are known, in many instances, as the Commons.

Ways—Right of passing over land of another through franchises which are rights granted by governing body. An example being the street railways which are accorded the right to run tracks and cars over the streets controlled by the governing body in question.

Rents—Not the land itself, but a certain right or profit which issues out of the land in yearly, monthly or other prescribed periods for payment.

Estates in Lands (The Interest that Owner Has in It)

The quantity and quality of this interest is determined generally by the length of time that the person to whom the interest is lodged, enjoys that privilege.

The largest Estate that a man can have is a Fee Simple or an Estate that is granted to a man and his heirs forever.

Of course, today there are many estates that are limited to the life of the holder thereof.

We all know that title may pass under a will and this title comes under the heading of title by purchase, not a title under descent which is confined entirely to real estate owned by those dying without a will. This title passes under the Intestate Laws of the State in which the real estate is situated.

Although a title by will may come from an ancestor, through a will, it is a grant from a dead man to some individual, the consideration of which

is nominally natural love and affection or other constraining influences which are sufficient to warrant the action by the decedent and which, under the various laws in force in the state of domicile, pass title.

Originally, under the laws of England, there was no such a thing as inheriting land. The holder of any land was only a tenant of some higher landlord, the King himself being the Supreme Landlord.

He, the King, let out most of the land of the Kingdom in return for which he received Military Service. Each tenant sub-let most of what he received on a like term to a smaller tenant and so on through possibly six or seven steps.

If a man died, the person under whom he held this land, was the one who was entitled to it. Later, however, Estates became hereditary. The practice of primogeniture was instituted, which was the inheritance of land by the oldest son only. In that event, the eldest son then inherited the land and he became the one to whom the landlord looked for performance of Military Services rendered by his father during his lifetime.

When English Settlers came over to this country, they came over here primarily to get away from military service and fix their laws accordingly.

In Pennsylvania, until about 1797 the law was that when a man died leaving two or more children, his estate was divided into parts numbering one more than the number of children and the eldest son was entitled to two of the parts and the others were each entitled to one of the parts; that is, the eldest son was entitled to two shares.

The present laws generally provide that if a man dies the Estate can only be inherited by his children equally.

Under the heading of Titles by Purchase comes.

1—Estates

In Pennsylvania, titles were originally settled in the State and should an owner die without heirs, the Estate would escheat or return to the original holder, to wit, in the State of Pennsylvania, to the State. This escheat must be established by the laws prevailing in the jurisdiction in which the land is situated.

Title by Occupancy is the taking of possession of that which before had no lawful owner. Therefore if a man had been in possession of the land for 21 years and can establish proof that he used it openly and continuously, adversely he is entitled to it under the laws of the State of Pennsylvania.

Title by Possession, of course may be acquired in other states and is governed by their statutes, which set forth the time for this open, notorious and adverse possession.

Title by Prescription is confined to incorporeal hereditaments, right of way, etc., previously referred to, over another man's land. The principal governing being is that if you freely and adversely use any portion of another man's land for a prescribed length of time without interruption and he has not abated you, the law holds that you have a right to continue to do it presuming that the right was granted to you at some time or other.

Alienation by Devise—Devise is the word used when speaking of real estate. Personal Property is bequeathed; Real Estate is Devised.

A will is made by one as a means of disposing of his property after his death. Naturally, it does not take effect on the day it is made but upon the death of the testator and it must be probated in the several offices provided for the recording or registering of wills. The technical requirements as to witnesses and other conditions are usually different in the several states and, therefore, will only be touched upon to this extent in this article.

Land originally was not subject to the disposal of the owner by will and is one of the results of long historical advances whereby this privilege became more and more liberalized.

Prior to the Norman Conquest, there was no system of devising land by will. However, during the reign of Henry VIII, a statute was passed providing that a man could leave two-thirds of his estate to whomever he pleased, provided it was held under a military tenure.

However, at the time of the Restoration of King Charles, all military tenures (previously referred to) were abolished by what was called "socage-tenure" which was substituted therefor. Therefore, under the statute of Henry VIII, a man's whole interest in land held under such tenure could be disposed of by will.

When William Penn landed in the United States, or we should say on the Continent of North America as there was no United States at that time, the law he brought with him, and adopted by the state, allowed a man to will his property to whomever he pleased.

Of course, laws regarding wills, as previously stated, vary in different states and there is a general policy of reciprocity in most states which provides that a certified copy of the will filed in the Office of the Register of Wills may be filed in the state where the real estate actually is situated.

Of course, the Intestate Laws and the laws governing the control of a man's estate by wills, are subject to the statutes in the various states in which the real estate is situated.

Philadelphia, with its historic background, was the scene of many incidents in the life of the Republic which made for finer manhood, happiness, liberty, industrial and economic advancement, beginning with the immortal document of the Declaration of Independence.

It was in Philadelphia in 1876, there was first written the type of assurance that guaranteed the quiet enjoyment of real estate (and especially of the home), in the City of Philadelphia, noted for a home-making and home-loving population.

Therefore, it was a historical coincidence that the first company to sponsor this activity, the Real Estate Title Insurance and Trust Company initiated this business, just 100 years after the birth of the Nation in 1876.

I am sure that we will agree that anything that enhances and assures peace of mind in relation to the ownership of real estate, particularly our homes, which are the bulwark of this democracy, is to be looked upon as more than a mere business venture and is worthy of our interest and understanding.

Previous to this date, the general transfer of real estate was in the hands of the Conveyancers who were men, not necessarily lawyers, but learned in the law of real estate and practiced in the preparation of the necessary papers for the transfer of such instruments or papers of this important element in our national life.

After the line or brief of title information was assembled, there was then a legal expert who passed on the sufficiency of the information developed to pass the title desired.

It has generally been held by most Courts, that there was no personal liability, should there creep in an error or should construction of a will or other title evidence be faulty, provided the conveyancer and lawyer use their best ability in making the necessary decisions.

Therefore, it could be seen that in interpreting wills and other items affecting titles, that losses were more or less frequent, and the owner suffering such loss, had no regress. Therefore, the ground was ready tilled for a company organized to eliminate this possibility by guaranteeing to the holder of the policy or contract, to make him whole, either by perfecting the title at their expense or reimbursing him for the loss occasioned by the failure of title.

Therefore, the company organized, became increasingly successful and was later followed by the Land Title and Trust Company, which company was chartered in 1885 and later still by another company, the Commonwealth Title Insurance and Trust Company, which was chartered in 1886.

Normally, titles were traced back to their original derivation. In Pennsylvania, it was the Penn Grant by the English Crown, fortified by the Penn Treaty with the Indians who occupied it and used the land involved.

Back of any contract is the matter of good faith. William Penn when he concluded his treaty with the Indians whereby he perfected the title to a vast tract of land did not need title

insurance nor was it available, as there was no splendidly developed system of title insurance to facilitate real estate settlements, but there was behind this transaction the element of good faith referred to that is so necessary. Now, where once that simple settlement was consummated, the progress of centuries has wrought an inevitable change. "Under the Elm Tree" has become the home of an urban population, the site of a large commercial and industrial city in which daily, with all the complications of modern business, similar settlements are conducted. The mode and procedure of modern commercial, business and legal transactions have spread a recorded network upon the simple ground. The public archives are inundated with masses of contractual agreements recorded as notice to the world of the passing of titles, of pledges for securities, of leases to tenants; agreements which not only affect the present holders of the title, but which may extend to their heirs and assigns indefinitely. The simple twig by which the ancients symbolically passed the quiet title and free enjoyment of real estate referred to earlier in this article may today actually carry with it burdensome encumbrances and embarrassing restrictions undiscoverable to the average innocent purchaser.

It is this setting which created the necessity for the security and protection that all title companies had in their inception, but look beyond the contract and see that the same good faith that characterized the Penn Treaty prevails in the companies with whom you do business today and that such good faith is fortified by expert and experienced judgment of the guarantor.

We feel that title insurance companies enure to the enhancement of real estate titles by replacing the former risky procedure by a contract which may be accepted with confidence and peacefulness of mind, definitely enhancing the facility with which real estate may be used for security or ownership.

I think preliminarily that it would be well to keep one thing in mind and that is when there is a purchase made of real estate, the purchaser not only buys the ground or the houses or both, but must at the same time be sure that the rights to use the real estate will not be contested and that, when the time comes to convey it to others or pass it on to the family, the right to do so will be uncontestable, which right is known as the title.

Every individual piece of land, whether it be urban or farm land, small tracts or large, has its own individual title chain which originated from the Government, which acquired the original title by conquest, discovery or purchase. Every title chain must be carefully examined down to the present owner and each transfer thereafter must be carefully, legally and properly made in order to secure the right of the grantee by the deed of title.

Title insurance is a definite contract or agreement which is referred to as the policy whereby the insurer for a valuable consideration designated as the premium agrees to indemnify the insured to a definite maximum amount named in the policy against loss that may arise through claims and defects in the title of an interest in real estate.

This insurance is sometimes misunderstood, for, as one authority put it: "Other insurance begins where title insurance ends; to wit: at the date of the contract or the policy." It is also a fact that the defects insured against must be in existence at the date of this contract.

Title insurance is not a wager against a thing that may or may not happen in the future, but a clean cut contract that a certain interest in real estate is safeguarded to an amount named in the policy. Therefore, it would appear to be a false and foolish economy to take less insurance than the actual cost to the insured of that interest. The policy, when written, has no definite date for its termination as in other classes of insurance, but affords protection as long as the interest in the particular real estate insured exists. It automatically ceases, however, with the transfer of the real estate to a third party. It is never safe, there-

fore, to accept real estate because the seller has already secured this form of protection without securing a new contract continued to the date of the new transfer of the real estate involved.

To properly understand the protection afforded, it is well to have a general idea of the machinery and its operation when an application is made to any of the many conservatively conducted corporations specializing in this form of assurance. This application should be made when the contract or agreement of purchase is signed. For the protection of the insured, the insuring corporation should be supplied with an accurate description in metes and bounds of the real estate to be insured, for any error in furnishing this information by the applicant may result in a policy or contract, which does not fully cover the real estate purchased. When this application is received, the insuring company charts the same on its record, and if, perchance the company selected has already insured this particular parcel, it will then, only be necessary to examine the title from the date of the last insurance, this is what is technically and quite happily known as a bring down.

It is, however, most infrequent that in examining modern titles that it is necessary to go back to the origin thereof. This examination is nothing more or less than the history or pedigree of the real estate involved, carefully traced step by step as shown by the recorded deeds or recorded evidence, such as wills, etc. and by descent, which is governed by intestate laws. The same time this examination is being made by the clerks, the records are searched for mortgages, liens, claims, taxes, etc. that may possibly affect title to the real estate which is to be insured. This information, when assembled, is expressed in a preliminary certificate, or title report, upon which is set forth every fact of interest to the insured that affects the title to the real estate in question.

This report or certificate is then taken to the party selling, or his representative, and demands are made for the elimination of any features that fail to conform with the representation made by the seller as evidenced in the contract or agreement of sale. The seller is then confronted with the duty of securing satisfactory evidence, disposing of the objectionable features, this evidence is produced to the insuring company, which passes upon the value thereof, and removes such objectionable features, provided the evidence produced is sufficient and in proper form. This should be done before the balance of the purchase money due under the contract or sale is paid over. The insuring company acts as agent for both the purchaser and seller, conducts settlement, accepts the money paid by the purchaser, and if there are any mortgages, liens or other encumbrances, which the seller has agreed to dispose of, pays these in full out of the fund in question, and assumes the responsibility of seeing that such encumbrances, liens, etc. are properly removed from the records as affecting the real estate insured. The balance after making these payments is then delivered to the seller, who in consideration thereof delivers his deed, which is recorded by the insuring company, and thereby effects transfer of title to the purchaser.

The insuring company then writes the policy or contract, dated the same day as the recording of the deed of transfer.

This policy should contain the amount of the indemnity, the consideration or premium paid for such indemnity, and should be signed by the proper officers of the indemnifying company, and should have the seal of that corporation properly affixed thereto. It should contain an accurate description of the real estate insured, which description should exactly tally with the description in the deed of transfer, and should refer specifically to such deed. It should name the estate or interest insured, and how such estate or interest became vested in the insured.

Under Schedule "B", in most standard policies (which schedule should be carefully read and digested), are All Estates, defects, objections and liens, charges and encumbrances,

which do or may now exist and which the insuring company does not insure against. This schedule also sets forth any special risks to which the real estate may be subject, and which are specifically insured against.

Under this schedule would be noted such encumbrances as Building Restrictions, which frequently are beneficial or also may affect the market value of the estate insured adversely. Therein is also set forth mortgages, and other liens or claims to which the purchaser has agreed to take subject.

As a summary the following may be emphasized:

1. The purchaser should not pay over purchase money until all the facts disclosed on the preliminary certificate or report have been explained to his complete satisfaction or removed entirely.

2. Do not accept the previous owner's policies as evidence of a good title, since the date of this guarantee the title may have been encumbered by mortgages, liens, judgment, and unpaid taxes or other claims too numerous to mention, which may seriously detract from the value of the real estate or many entirely destroy it.

3. Be sure that the facts set forth in the policy or contract of guarantee against which the insuring company does not agree to protect you, are carefully read and thoroughly understood.

Why Title Insurance

It is the belief that the advantages of title insurance in general are well known and universally acknowledged. It will, therefore, be the writer's effort to take specific instances where there is doubt in the mind of the parties concerned as to the necessity for this form of assurance.

Primarily, it might be well to keep in mind the methods by which titles may devolve. Basically, there are only two methods by which a title can pass from one entity to another; to wit: by purchase and by descent.

The Law of Real Estate includes both title by purchase and title by descent, the latter being governed by the Intestate Laws.

Why should you have a title insured when you know that the present owner has been in title for years, both personally and through family contacts and where, in addition, you have assurance that there are no outstanding obligations of any kind.

By one's last will a man or woman may encumber the estate left by him or her, as surely and as effectively as he might in his lifetime by giving a mortgage, by leaving legacies, annuities and various other charges therein. Of course, it is only possible to ascertain said facts if the will in question has been filed in the Office of the Register of Wills.

Furthermore, the law usually allows a certain period after the death of the person for the filing of claims for debts due by same; these claims, if properly established, are good as of the date of the death of the decedent.

In addition, there may be such charges as Transfer Inheritance Taxes, Federal Succession Taxes (if the estate is of sufficient value), bankruptcy proceedings and other liens undisclosed by record evidence but established by statute.

Further, a child born subsequent to the date of a will may seriously upset the provisions therein by definitely affecting the transfer of any real estate owned by the decedent.

Where a person dies leaving no will at all, the situation becomes even more involved; the transfer in such case being controlled entirely by intestate acts. Sometimes, it is impossible to eliminate all possibility of interest, remote though it might be; as in the case of the disappearance of an owner of an interest in real estate, leaving no trace of whereabouts, as the time for assumption of death varies in different jurisdiction.

Where title is conveyed by the sheriff it is frequently stated that title insurance should not be necessary, but when it is remembered that the title acquired by such deed is based entirely on the lien under which execution was had and should that lien be faulty in any respect, the title acquired thereunder must be likewise faulty and must consequently fail. Apart from this fact, since the proceedings for sheriff's or court sales are definitely governed by statute,

they must be strictly followed, in order to insure the passage of a marketable title under any circumstance.

If you will only consider for a moment the many pitfalls obviated by title insurance, such as outstanding equities in strangers to the instant transaction; unrecorded debts of a deceased owner where title is being transferred with the year; children unborn at the time of the death of the owner of the real estate; liens established by Legislature (Corporate taxes, gasoline taxes and transfer inheritance taxes, etc.); unknown heirs of an Intestate; pipe line easements; bankruptcies; judgments; zoning acts; restrictions; proceedings in partition; physical encroachments effected by continuous use; tax liens incorrectly filed; right of mechanics to file liens for new work under the Mechanics' Lien Act; leases with option to purchase, recorded and unrecorded; party wall encroachments; persons in possession of property without deed, but with an unrecorded agreement to purchase certain conditions; adverse possession; prescription which is the right of another to use part of premises unrecorded; faulty powers of sale; risk assumed by Title Companies in accepting affidavits as to the existence or nonexistence of heirs, etc.; as to whether or not a person is single or married and countless other risks, you will agree, we are certain that title insurance is not only necessary, but also unavoidable and indispensable.

FEDERAL LIENS V. STATE LIENS

WILLIAM R. KINNEY, *Chief Title Officer*

Land Title Guarantee and Trust Co.
Cleveland, Ohio

Questions regarding federal liens continually pop up. TITLE NEWS has run frequent articles dealing with this all embracive field. Here is another by a learned authority which compels your additional study.

When the proceeds of a foreclosure sale are not sufficient to pay all encumbrances in full and the encumbrances to be paid include (1) real estate taxes, (2) federal tax liens and (3) mortgages and/or judgments which in point of time antedate the federal tax liens, how are the proceeds of sale to be distributed? Or, to state the matter somewhat crudely, who gets what?

The distribution problem arises, of course, from the fact that the federal courts have construed the applicable federal statutes as giving federal tax liens priority over all state liens, except mortgage and judgment liens created before the filing of a federal tax lien notice, while the effect of applicable state statutes is to give real estate taxes priority over **all** other liens (including federal tax liens) without exception.

Therefore, if all applicable statutes, as they have been construed, are taken at face value under the factual circumstances outlined above, the real estate taxes would have priority over the mortgages and judgments, which in turn would have priority over the federal tax liens, which in turn would have priority over the real estate taxes—which would all add up to what might appear to be a distributive impasse when there is not enough money to pay all three items in full.

The Ohio Supreme Court (with two judges dissenting) recently resolved the problem by devising a formula to be applied under the circumstances in question in two cases that were heard and decided together and that should be of considerable interest to attorneys in general and of prime interest to attorneys who represent lending institutions.

These two cases were the follow-

ing: The Southern Ohio Savings Bank & Trust Co. v. Bolce, and Renner, Treasurer v. Merriweather, 165 O. S. 201 (Ohio Bar, May 14, 1956). The distributive formula devised by the court, as same is set forth in the syllabus, is as follows:

First: To the extent that the proceeds of sale are sufficient, there is to be set aside out of such proceeds a fund equal to the amount of the creditor liens which by federal statute are preferred over federal tax liens;

Second: Out of such fund the real estate taxes are to be first paid;

Third: The remainder of the fund is to be paid to the creditor lienholders whose liens are so preferred over federal tax liens, according to their lien priority;

Fourth: The balance of the proceeds of sale, if any, remaining after such fund has been set aside, is to be paid to the United States on its tax liens.

Under this formula, federal tax liens benefit at the expense of prior mortgages and judgment liens to the extent that such latter liens are subordinated to the lien of the real estate taxes and the court admits that its solution of the problem is subject to criticism on that account. However, it characterizes its said solution as "the most equitable solution under the impasse presented."

One question not yet specifically answered is this: What happens when the fund that is set aside is not sufficient to pay the real estate taxes in full? A seemingly logical surmise would appear to be that, under such circumstances, the purchaser in an ordinary foreclosure will take title subject to the lien of any real estate taxes that are not paid out of the fund and that in a tax foreclosure any such taxes so left unpaid must be abated under the provisions of section 5721.19 of the Revised Code. However, these are, of course, matters for our courts to decide.

While on the subject of the priority of federal tax liens over state liens, the very recent decision of the United States Supreme Court in United States v. White Bear Brewing Co., Inc., which is referred to in the Ohio Supreme Court's opinion in the Bolce and Merriweather cases and is reported in the May 1, 1956, issue of the Supreme Court Reporter, deserves special emphasis because of its extremely disturbing nature. The effect of the decision (which was rendered without written opinion) is to uphold the priority of a federal tax lien over an Illinois mechanic's lien, even though the mechanic's lien was for a specific amount, was prior in time to the federal lien, and was being enforced by court action before the federal lien arose. Moreover, by the time the United States filed its action to foreclose its tax lien, the mechanic's lien had been reduced to judgment, the real estate had been sold at public auction and had been transferred by the purchaser to other parties. The decision would appear to be a complete departure from the principle, previously recognized by the court in comparable factual situations, that, in determining lien priorities, "the first in time is the first in right." Mr. Justice Douglas filed a vigorous dissent, in which Mr. Justice Harlan concurred.

Why I Value Association Membership

DICK PHILLIPS, *Vice President*
American-First Title & Trust Co.
Oklahoma City, Oklahoma

Members of the Association can often explain why they hold membership in their trade association, but few of us ever see it in writing. Here is a presentation by a former president of the Oklahoma Title Association. It can be adapted to any state association for its own particular use. Although this deals specifically with the Oklahoma Title Association, one can see that it is applicable anywhere.

When you really stop and give this subject some thought, there are many, many reasons why one should value membership in the OTA.

This association has worked diligently for public recognition of the abstracter as a professional man. Without association membership, this professional standing never could have been achieved.

American business, as a whole, has long been keen to discover and develop new ideas and quick to utilize them. Trade associations are based primarily on the value of the exchange of useful information.

The old custom which recognized the trade secret as a valuable business asset has given way to modern plans of helpfulness to all. Now we all exchange ideas through a clearing house afforded by membership in this association.

We in the abstract and title business no longer fear competition across or down the street. The lumberman is not afraid of the other fellow in the lumber business nearly as much as he is of the brick manufacturer. The fear, if any exists, is from others introducing substitutes for our services. By working together in association work and continuing to uncover and put into practices systems and ways to make our present sound title system so efficient and satisfactory to our customers that no one will have cause to introduce a substitute for our services. This can only be accomplished through association membership and association work.

Membership in this association is significant in the sense that you are an abstracter with a code. That you are honorable and honest in your dealings, that you know your business.

Those who do business with you want to feel they are doing business with the tops in the profession. Why should they risk their life savings for services less than the best? Your OTA emblem and certificate is a symbol of this professional standing.

I value association membership for many reasons and, being human, I value it for selfish reasons. It gives me an opportunity to meet the "cream of the crop" and an opportunity to exchange ideas with the best.

The association has developed to the point where it can point to actual accomplishments for the good of its members and their profession. It always has pursued an intelligent direction and produced the necessary leadership to obtain its goals. It has developed one of the best uniform certificates in the nation, yet there is a committee working and attempting to uncover ideas to improve the OTA uniform certificate.

A great deal has been accomplished toward perfecting a uniform abstract, yet the association is continuing to study uniformity and hopes to come up with something still better.

If it were not for your membership and mine in this association and the unified efforts of us all, the few results I have listed and many, many more never would have been obtained. Instead we would be "just rockin'" along trying to figure ways to keep ahead of and/or cut the throats of our competition. Today such methods are wholly obsolete. All of us welcome clean competition, that is the American way of life. I say, frankly, there is no better way to keep our business on a sound, clean competitive basis than by all of us working together in the OTA.

REPORT OF CHAIRMAN OF JUDICIARY COMMITTEE

F. W. AUDRAIN
Chairman; Chief Counsel, Security Title Insurance Company
Los Angeles, California

Again I extend an invitation to send to me the references to or copies of decisions in your State that are of general interest to title men.

In recent years we have tried to select decisions that are primarily of interest to title men everywhere. There are, of course, many decisions within individual states which are of interest to title men in their own state but, being based on a statute or a distinctive line of decisions in that state, are of little help to title men across the state line. Some decisions are of regional interest and these will be of greater interest.

The same comments may be made as to Federal cases. Some are of interest to all title men. Some, like the homestead-bankruptcy case next mentioned, are not of interest in every state.

Decisions involving our insurance contracts are nearly always of interest to title men. For example, Mr. F. S. Stamper, President of Houston Title Guaranty Company, had an insured whose title was good on the public records. The policy was a record title policy and did not call for the insurer to make any survey or inspection.

The claim arose out of a controversy between adjoining land owners over a fence which was not located on a lot line. The title company declined to defend. The insured was successful in his own defense and now sues the title company for his costs and attorney's fees. I knew of no reported case on the point. I told him of the practices of two title insurers in California. Maybe we would like a reported case in point and maybe not. But if you have had a case in point, it will be of interest.

* * *

The policy of the legislature in some states has been to increase the homestead exemption so as to recognize economic trends. For example, in California, the exemption for the head of the home has moved upwards in one or two steps from $5,000 to our current $12,500. However, in a controversy between creditor and owner, our courts tell the owner that after he becomes obligated to his creditor, the latter is not prejudiced by the subsequent legislative increase in the exemption figure.

This situation was the subject of a bankruptcy decision—England v. Sanderson, 236 F 2d 641 (October, 1956). The bankrupt sought the benefit of the $12,500 value as against persons who became his creditors when the exemption was $7,500.

The appellate court applied the state law and cases; and the bankruptcy trustee was successful in his contention that the lower exemption controlled.

The court also noted that this bankrupt had creditors who became such after the increase to $12,5000 and hence there was a $5,000 differential to be worked out between two creditor groups.

The court noted that one prompt creditor could gain an advantage if the creditors were sent to State courts as to the $5,000, and said:

> "Such an unfair result is contrary to the policy of the Bankruptcy Act. Its policy is not to subject creditors to the haphazard chance of 'grab law.' Its chief purpose is to afford all creditors an equal opportunity to realize on their indebtedness.
>
> "The trustee, being entitled to take possession of all the estate in excess of $7,500 in protection of pre-existing creditors' rights, must distribute it according to the terms of the Bankruptcy Act, which requires distribution in dividends of equal percentum on all allowed claims."

A recent California case (December 14, 1956), Trisdale v. Shasta County Title Company, 146 ACA 925, involved a preliminary report issued by the named defendant (not a title insurance company) and the policy of title insurance by a title insurer wherein both documents in identical language referred to an easement recorded in Book 217 of Official Records at page 105, belonging to Pacific Tel. & Tel. Co., a corporation, whereas in fact the easement belonged to Pacific Gas & Elec. Co.

The demurrers of the defendants to the complaint of the insured for damages alleged to have been suffered as a result of a misdescription of the easement of record were sustained on the premise that no cause of action had been stated. The appeal was on the premise that a cause of action had been stated and, upon reversing the lower court, the appellate court said in part:

> "The terms of the policy are clear and unambiguous. They insure plaintiff against any encumbrance not shown or referred to in the policy. A reference to an encumbrance belonging to 'A' is not a reference to an encumbrance belonging to 'B'."
>
> "It would appear that the court sustained the demurrers to both causes of action upon the stated ground that the plaintiff was itself negligent in failing to inspect the record after being given notice of a certain easement being recorded in Book 217 of Official Records, at page 105. This ground was apparently intended to be equally applicable to the cause of action based upon the title insurance policy. The court's ruling appears to be, not that there has not been a breach of the policy, but that the insured is barred as a matter of law by its own contributory negligence. We think that the court erred in so ruling."

"The principal question in the cause of action based upon the policy is whether there was a breach of the policy, or, in other words, a breach of the contract of indemnity against loss. No California decision can be found that suggests that the negligence of the insured could be set forth as a bar to such an action, particularly as a matter of law as has been done by the trial court in this action. The New York decision of Maggio v. Abstract Title & Mortg. Corp., 277 App. Div. 940 (98 N.Y.S. 2d 1011), indicates that the doctrine of negligence has no application to a contract of title insurance. At page 1013 (98 N.Y.S. 2d) the court stated:

> "'. . . In the case of a title insurance policy, the insurer undertakes to indemnify the insured if the title turns out to be defective. That is the purpose of procuring the insurance and knowledge of defects in the title by the insured in no way lessens the liability of the insurer. The doctrine of skill or negligence has no application to a contract of title insurance'."

As to an abstracter's obligation:

"It is generally accepted that an abstracter's obligation in preparing an abstract of title, such as the preliminary title report here in question, is contractual, and that liability will result, on the theory of breach of contract, for damages resulting from negligence in the preparation of the title report."

"So far as he (abstracter) assumes to describe instruments of record, due care and skill require that such description shall be accurate." (American Jurisprudence).

"The person employing the abstracter has the right to rely upon the truth and accuracy of the abstract as regards essential facts of record, unless it is plainly apparent from the certificate that there was a mistake. He does not, by so relying upon the work of the abstracter, defeat recovery for negligence." (American Jurisprudence).

> "Respondents argue that the date, book and page being correct, and no terms of the easement being set forth either in the title report, or title policy, the appellant had no other recourse than to look at the public record referred to, or inquire

from the Telephone Company as to its rights, and in either case the true facts would have been disclosed.

"However, as appellant points out, there is nothing in the report to indicate that such a statement as to ownership of the easement was inaccurate. The language in the exception, 'for poles, towers and incidental purposes,' would not of itself indiment of ownership was inaccucate to a layman that the statequestion of fact as to whether such was the case."

The decision closed with this excerpt from Bridgeport Airport, Inc. v. Title Guaranty & Trust Co., 71 ALR 348:

"The defendant, having assumed to search and report upon the title, the very purpose of obtaining its services would be undone if the plaintiff could not rely upon the truth and accuracy of its report as regards essential facts of record, unless perhaps the terms of the certificate made it plainly apparent that there was a mistake."

Mr. Eggertsen, President of Security Title Company, Salt Lake City, submits a decision of the Supreme Court of his state—Tracy-Collins v. Goeltz, 301 Pac. 2nd 1086—wherein the husband alone signed mortgage paper to refinance an earlier loan on property held by himself and wife as joint tenants. However, he signed his wife's name and this was irregular and became the basis of her efforts to defeat the new loan. The court applied the doctrine of equitable subrogation to deny her effort to enrich herself at the expense of the innocent new lender, since she was in any event obligated on the old loan which was paid off with the new loan, and the husband was found, of course, to be liable on the entire new loan.

"The second principle announced by the court was that the execution of a valid deed or a valid mortgage by one of two joint tenants severs the joint tenancy and thereby creates a tenancy in common between the parties. They found that the execution of the $7,100.00 note and mortgage by Mr. Goeltz was binding upon him alone and thus created a tenancy in common."

Other reading on this last point, for those of you whose states may have a like rule, is found on page 817, 129 A.L.R.

A TRIBUTE TO "TITLE COURSE"

(Although the famous book by William Gill, President, American-First Title & Trust Company, Oklahoma City, Oklahoma, needs no introduction to most title men, here is further assurance of its value which we are proud to carry. Incidentally, copies are still available from the American Title Association headquarters.)

JACKSON, MISSISSIPPI

The American Title Association
3608 Guardian Building
Detroit 26, Michigan

Gentlemen:

I am currently teaching the course in "Abstracting" at the Jackson School of Law. As you know, the Jackson School of Law has used your "Land Title Course" by Mr. William Gill, Sr., for many years.

At the Jackson School of Law we are attempting to teach a practical course in abstracting. It is our aim that the student master land titles in the State of Mississippi. We use your "Land Title Course" and supplement it with cases dealing with land title in the State of Mississippi and various legal periodicals. We think that your "Land Title Course" is the best practical book dealing with land titles that we have been able to obtain.

Our students use the "Land Title Course" as reference material in their other courses dealing with real property. Mr. Gill has very carefully and amply compiled the material in the "Land Title Course" and we feel that every law student should have a copy of it. Many of our students use the book for reference material for many years after they have left law school.

Very truly yours,

RUSSEL D. MOORE, III
Professor of Abstracting

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AVAILABLE—

Extra copies of the popular article, "United States Patents to Public Lands" are now available at 50c each. There are also extra copies left of "Those Troublesome Federal Tax Liens." Both of these have been ordered by hundrds of men and women in and out of our profession. You can place your order now by writing National Headquarters.