OFFICIAL PUBLICATION
AMERICAN TITLE ASSOCIATION

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TITLE NEWS

VOLUME XXXVI JULY, 1957 NUMBER 7

TITLE NEWS

Official Publication of

THE AMERICAN TITLE ASSOCIATION

3608 Guardian Building — Detroit 26, Michigan

Volume XXXVI July, 1957 Number 7

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GROUP INSURANCE OFFERED TO AMERICAN TITLE ASSOCIATION

By CLIFFORD F. GOULD, C.L.U.
P.O. Box 711, Coral Gables, Florida

At the last National Convention of the American Title Association the Board of Governors approved a plan whereby the membership would be offered for consideration a group insurance plan on a national basis. The author of this article, Mr. Clifford F. Gould, sets forth for the membership some interesting points about a group insurance plan. This is by way of introduction.

Should the membership show sufficient interest in such a proposal, the Association plans to make it available as soon as details can be worked out. It is not available now. It is only being introduced for the interest of the members. Additional information may be obtained by writing to Mr. Gould at the address given above.

Many Associations similar to the American Title Association, have adopted group life insurance plans providing group insurance protection for their members at substantial savings to them. That these plans are successful and beneficial is shown by the increasing number of Associations that have adopted such plans and the enthusiastic endorsement of the plans by member participants.

There are many valid reasons for adopting such a program, among them are the following:

1. Small firms cannot purchase true group insurance. A group plan sponsored by the American Title Association would make attractive group rates available to the smaller firms, even where there are only two or three persons in the firm.

2. Larger firms able to purchase their own group life insurance program, frequently find they would like larger amounts of protection for the Executives and key personnel than their present plan provides. The National Association could make limits available up to an additional $20,000 for owners, executives and key personnel, with the possibility of increasing it in the next few years to possibly double this amount.

3. (a) Greater liberality can be offered at substantial savings through standardization on a National basis as compared to a State or local plan. (b) Several States restrict amounts of insurance written on individuals or refuse to allow group insurance plans for Associations. A National plan, because of the larger participation, could reduce costs to participants in substantial amounts, and because of the national spread of risk, could prevent fluctuating costs.

4. In the competition for efficient manpower, fringe benefits are increasingly necessary to compete with other employers. The National Title Plan would make benefits available otherwise impossible.

5. It is possible for employers to provide tax-free insurance for their employees (deductible as a business expense), and qualify under the 1951-54 tax law which makes possible a $5,000 tax-free gift to the estate of an employee. (This will be fully covered in a later article on insurance).

6. Many persons who are uninsurable or insurable only at highly rated premiums, will find the purchase of group insurance highly gratifying to rounding out their insurance program for family protection, estate tax, liquidation or business buy and sell arrangements.

USING FRINGE BENEFITS TO SATISFY EMPLOYEE

Most employers today have mulled over methods of giving key men more after-tax pay. Among the most promising possibilities are "Executive fringes". The heavy tax bite on executive pay obviously makes it most difficult today to attract first-line executive talent and provide effective incentives. Many companies are also hit by the loss of executives who

leave to launch businesses of their own, hoping to build capital through equity ownership. The situation is bound to continue regardless of business conditions.

FRINGE BENEFITS PAY OFF

"Fringes" carry a double-barrelled advantage (1) they can substantially boost the executive's real income where they are tax-exempt to him. (2) The net cost to the employer can be less than the boost in salary that would be required to cover them. This is almost always the case where they are deductible by the Company and may also be true even in the absence of a deduction. Illustration: "Corporation Services, Inc." pays it Vice-President Mr. A. a straight salary of $25,000 a year (his outside income equals his exemptions and deductions). The Company also provides the following benefits at the cost indicated:

Combination health and accident policy	$300
Free country club membership	400
Free meals in the company's executive dining room	250
Annual medical check-up	50
$20,000 of term insurance under a group policy	240
Total Cost to the Company	$1,240

Since "Corporation Services, Inc." is in a 52% corporate tax bracket, its after-tax cost of providing these benefits is $644.80. Suppose that instead of providing these benefits, "Corporation Services" gives Mr. A. a straight salary increase which would enable him to buy them direct that the same cost. Since Mr. A. is in a 43% individual tax bracket, he must get $2,200 to meet the cost of $1,240. After-tax cost to "Corporation Services" of the raise would be little over $1,000. Net result is that by providing the benefit, the Corporation gives Mr. A. the equivalent of $2,200 salary increase at an after-tax cost of $644.80. This is a substantial saving over the cost of a straight increase.

Observation: It is true that the executive paying for these benefits himself, might be able to reduce their net cost through partial deductions. But he would pay more for many benefits than the company's participation to group insurance. The following table illustrates the savings possible to the Corporation under the

	GROUP		INDIVIDUAL PLAN Term to Age 65	
Employees Income Bracket	Cost of Group to Employer Per Annum. Note †	Cost to Employee If He Pays It Out of Salary Per Annum.†	Cost to Employer If He Pays All. Per Annum.*	Cost to Employee If He Pays All. Per Annum. Note *
$10,000—				
Age 30	$120.00	$162.12	$110.80	$149.69
Age 40	120.00	162.12	147.10	198.73
Age 50	120.00	162.12	209.70	283.30
Age 60	120.00	162.12	338.10	456.77
$15,000—				
Age 30	120.00	171.36	110.80	158.22
Age 40	120.00	171.36	147.10	210.00
Age 50	120.00	171.36	209.70	299.45
Age 60	120.00	171.36	338.10	482.80
$25,000—				
Age 30	120.00	210.48	110.80	194.34
Age 40	120.00	210.48	147.10	257.84
Age 50	120.00	210.48	209.70	367.81
Age 60	120.00	210.48	338.10	593.03
$50,000—				
Age 30	120.00	235.00	110.80	217.17
Age 40	120.00	235.20	147.10	288.31
Age 50	120.00	235.20	209.70	411.01
Age 60	120.00	235.00	338.10	662.68

† No health questions—all get policies at same premium.
* Assuming employee is in perfect health and good moral risk—premiums could double or triple if health impaired and may not be written at all.
* If premium was given to employee to purchase the term to 65 insurance, it would possibly increase his tax bracket an unknown per cent—this cannot be calculated.

52% tax bracket where it furnishes benefits to a married executive instead of giving him a salary increase to cover his purchase of benefits at the same cost.

WHAT FRINGES ARE COMPANIES OFFERING?

Most companies today provide some form of fringes. A typical example is Curtiss-Wright's advertisement for a chief chemist, chief metallurgist and a patent attorney, offering:

> "Free hospitalization, surgical and medical care. Free hospitalization for your family $4,000 worth of life insurance free of cost An opportunity to increase all the above benefits at small cost Liberal pension and retirement plans Eligibility to qualify for membership in the Lake Rickabear Club, a private recreational facility for you and your family."

AIMING AT LOWEST TAX COST

For maximum effectiveness at minimum after-tax cost, an executive fringe program must meet a double test:

First, is the cost of the benefit deductible by the Company? For a fringe program of any significant size, and covering a number of employees rather than a small group, most companies will have to insist on deductibility.

Second, is the value or cost of the benefit tax-free to the executive? A taxable benefit can lose much of its appeal to an executive who must pay a good part of its value himself when income tax time rolls around.

For some executive fringes, the law plus Treasury regulations, are definite enough to permit anticipating the tax effects with **reasonable** accuracy. This is true, for instance, of **health and accident insurance coverage, life insurance policies** and executive expense accounts.

The tax treatment of many other benefits is much less definite and must take into account the possibility that, in individual cases, the Treasury may come up with new answers. Nevertheless, these benefits are subject to general rules:

The Company can take a tax deduction for benefits not specifically covered by the law or regulations if the expense is:

. . . a deductible additional compensation for services rendered by the executive. However, when it is deductible by the Company, it is chargeable to the employee: or

. . . a deductible general business expense — incurred, for example, to promote the health, well being, or good-will of the executive:

But deduction by the Company is barred if the expense is not an ordinary and necessary business expense, but is in reality:

. . . a gift to the executive: or

. . . a dividend, where the executive is also a stockholder. (This may be a critical issue where the executive receiving the benefit is also a stockholder in a closely-held corporation).

Whether the benefit is tax-free to the executive can be even harder to pin down. In all but a few cases, the law and the Treasury are silent on this question. But under the general rules, the cost or value of the benefit is taxable income if it is:

. . . additional compensation for services rendered; or

. . . a dividend, where the executive is also a stockholder.

TAX POINTERS ON SPECIFIC BENEFITS

While some companies may be willing to forego a deduction and some executives are unconcerned at being taxed, no executive fringe should be adopted without careful review of the tax consequences.

CORPORATIONS

Corporations may use group insurance made payable to themselves for the purchase of stock held by stockholders of the corporation that are employees. The premium of $240 per year (estimated) per $20,000 would not be deductible tax-wise, and would be "after-tax" rather than "before tax" as it would be in the case of employees (where the employee has the right to name his own benefici-

ary) the Corporation could have all rights and benefits under the policy. Assuming there would be four corporate members that would want to be insured for $20,000 each in the event of the death of one of them under this plan, the corporation would receive $20,000 tax-free to the corporation. If the corporation was in a 52% tax bracket, the actual amount it would cost the corporation per employee would be $364.80 per annum. Now if you would project this on the individual basis and use the premium shown above, under "Observation-Fringe Benefits Pay Off", you would find the corporation would pay a much higher figure all the way through, plus the fact that employees would **have to be in perfect health** and a good moral risk.

PARTNERSHIPS

On a partnership basis, the one partner could pay the premium on the other partner's insurance and be made beneficiary. This would not be a deductible expense. However, due to the very low premium, the cost would be negligible, and in the event of the death of one partner, the other partner would receive the $20,000 tax-free with which to buy the partner's interest.

PROPRIETORSHIPS

Occasionally a proprietor wants to know that he has a ready market for his plant and equipment. Competition will not, after the death of the proprietor, pay what the plant is worth as a rule. The employees working in the plant are most interested in their jobs and the continuation of the operation. Therefore, it may be provided in many such organziations, that the employees would pay for insurance on the life of the proprietor so that in the event of his death, the employees would have enough money to pay substantially toward the ownership of the business or pay it off entirely, thereby guaranteeing the widow of the proprietor full value for the property.

In all of these cases, it has been clearly brought out that only group insurance guarantees the insurability of a person or persons in the case, and also guarantee the premium rate at the same figure for all members, irrespective of age.

HAVE YOU COMPLETED THE QUESTIONNAIRE ? ? ?

All members have been mailed a questionaire relating to the group insurance plan to be offered to the association. If you are among those who have not as yet completed the questionaire and returned it in the self addressed, stamped envelope to Mr. Clifford F. Gould, P.O. Box 711, Coral Gables, Florida, we ask you do so right away. The information requested is necessary to ascertain the insurance needs of the association membership.

FEDERAL CODE PROVISIONS— THEIR EFFECT ON TITLES*

F. Wendell Audrain, Moderator; *Vice President, Counsel,* Security Title Insurance Company, Los Angeles, California

MEMBERS OF PANEL:

A. Edmund Peterson, *Vice President,* Chicago Title & Trust Company, Chicago, Ill.

Ray L. Potter, *Vice President, Chief Title Officer,* Burton Abtract & Title Company, Detroit, Mich.

William Wolfman, *Chief Counsel,* Title Guarantee & Trust Company, New York, N.Y.

Mr. Audrain: May I note at the outset that the panel members and many of you are familiar with the articles written for and addresses delivered to title men in recent years on several of the subjects which the panel will briefly mention. A few of these are: An article by Mr. Broadstein in the 1955 issue of Title News; an article by David MacEllven in the November, 1955 issue of Title News; an article by panel member Ed. Peterson, etc. in the Illinois State Bar Journal for 1956; the address by Judge Friebolin printed in the November, 1955 issue of Title News and an article by Bruce Jones, Associate Counsel of my company, appearing in the 1955 proceedings of the CLTA.

Our panel topics are formidable material for forty minutes for four men. We will refer to several familiar aspects of our subjects and to several that are not so familiar and of course our comments by the limitations of time, will have to be somewhat summary in character.

Our first discussion item will involve this set of facts: A lender by an agreement with the borrower, executed concurrently with the promissory note and security paper, has obligated himself to make payments of the loan proceeds on a definite installment basis, precisely related to certain steps of completion of the structure being built with the loan funds. This is the familiar obligatory payment program, which for some of us is significant as to mechanics' liens and as to other encumbrances that may later attach to the property, voluntarily or involuntarily. Midway of the loan disbursement program an income tax lien based on the borrower's tax delinquency, attached to the property securing the loan.

This set of facts has been noted by others, including those in attendance at the 1956 convention of the Pennsylvania Title Association and by Mr. MacEllven in his paper.

Ray: A lender holding a policy issued by your company has this prob-

* *Following the last National Convention of the American Title Association, considerable interest was shown in the panel discussion concerning the Federal Code Provisions. All of the remarks of the panelists were extemporaneous. It was necessary, therefore, for all panelists to edit the recorded discussion of the myriad legal problems before the material could be finally presented in printed form. Each reviewed the entire matter as recorded to clarify and edit for readability. It was a long, tedious task, but one readers will find well worthwhile. We are happy to present it now and thank the participants for making it possible to do so. Ed.*

lem. May he make his next advances and retain priority over the federal tax lien? And suppose you should say "No", you and he might speculate on his borrower's threat directed to the lender, because if the further advances do not become available, the borrower may have troubles on his hands more serious even, than the tax lien; all arising because a lender became fearful of a tax lien. Your thoughts on these problems will be of interest to us.

MR. POTTER: I think it is axiomatic to say that a mortgage lien arises when a debt is created. That is, when money is advanced. And that the extent of the mortgage lien is measured by the amount of the money advanced. But, in the open end mortgage situation, where the making of further advances is not obligatory, the law of many of the states would make the total amount ultimately and finally advanced a lien as of the date of the initial execution and recording of the mortgage.

This depends upon the principle of relation back. That is, the total amount finally advanced becomes a lien which relates back to the original mortgage and becomes a lien as of the date of said mortgage.

However, the Department of Internal Revenue has indicated very clearly that it does not recognize the doctrine of relation-back, at least in this situation. A ruling issued in February of this year states very clearly that such advances do not have priority over an intervening tax lien. This seems to be reasonably consistent with a number of decided cases, and I think is in answer to that question. But I realize it is not an answer to the question I was asked.

Now, if we assume, as we do here, that it is obligatory to make these further advances, certainly we have a case which is much stronger for the application of the principle of relation-back, and the distinction is recognized by the laws of a number of states.

But the question is, is it recognized by the Federal law? For we have been told, repeatedly, by the Supreme Court in recent cases that the question of the relative priority of a Federal tax lien is always a Federal question. We know from the ruling I refer to and the United States v. Security Trust and Savings Bank decision that the Federal courts do not recognize this principle of relation-back.

In fact, in the Security Trust and Savings Bank case, the Supreme Court of the United States, in giving priority to the Federal lien, said that it would regard the attachment which was involved in that case as mere notice of the right to perfect the lien and not a lien at all.

The court uses the preposterous language that they would not permit the principle of relation-back to operate to destroy the realities of the situation. The realities of the situation apparently mean that the Government is going to have a prior tax lien.

Now, to try to answer the question. I would say that, notwithstanding the obligatory character of the advances, their priority over the intervening tax lien can depend only on the principle of relation-back, which is not recognized by the Federal court, and not recognized by the Department of Internal Revenue. The lien of the mortgage, in so far as it consists of the amount advanced, is not specific. It is not perfected in the Federal sense. So, I would be most reluctant to say that in this case the mortgagee would have a lien for the latest advances, which would be superior to the tax lien. I think it creates an anomalous situation where the Government may have a greater right in the property of the taxpayer through the lien, than the taxpayer himself has.

I am not unmindful of the fact that there may be some serious, practical consequences of this view, should it be adopted. A builder, who has entered into such a construction agreement and who is the unfortunate subject of a subsequent Federal tax lien, may find that the mortgagee will not advance further funds. This refusal may cause the builder great embarrassment. If the mortgagee makes the advance he may find that the tax lien is prior to a portion of

his mortgage lien. If he doesn't make the advance, he may well be liable for damages resulting from breach of his contract to advance.

I think that is an unhappy situation. It would be nice if one could escape it, but I see no escape.

MR. AUDRAIN: Edmund, suppose that your builder came to you faced with that situation. He is in desperate need of a third advance to meet the pay roll and to keep in good standing and you do not have a tax lien situation that reaches an astronomical figure? Have you any ideas to recommend to your borrower that would enable you to go ahead and give the assurance to the lender that he might make that next advance and find your company protected in the event that the tax lien dispute with the taxpayer was resolved in favor of the Government?

MR. PETERSON: Well, I think we could devise some practical solution to the problem. The Department's ruling referred to, seems to draw a ligated to make the advance and the distinction between the type of advance, one where a lender is not obligated to make the advance and the other where the lender was obligated to make the advance in the first instance.

Consequently, in the situation we are discussing, the borrower and lender could very well argue that their situation is different than the open end situation.

We have not encountered this matter directly. However, as a practical matter, we at the present time insist on a search for possible Federal liens before giving an assurance with respect to subsequent advances.

MR. AUDRAIN: Supposing that the borrower proposed to give you a surety bond to protect you, then would you be willing to assure your lender, in the face of that arrangement?

MR. PETERSON: Well, of course, if you get sufficient security you can pass any kind of a lien.

MR. AUDRAIN: William, what are your comments here?

MR. WILLIAM WOLFMAN: I do not share the doubts of Ed on the subject at all. The Federal lien in unquestionably, in my mind, ahead of the later advance, whether the advance is compulsory or optional.

Congress undoubtedly has the power to give the Government a lien for taxes and can make it prior to or subsequently if it chooses. And the courts have interpreted the Congressional Statutes so as to make the U.S. liens ahead of all the prior liens if they are not perfected liens, and future advances, in no possible sense of the term, can be perfected liens, at least that is the way the U. S. courts see it.

I feel that the subject is so clear that if the District Director came to us and asked for assurances that the lien was ahead of the later advance on the mortgage, I would not hesitate to give the District Director the assurance. But I do not know whether the Pennsylvania boys got the same answer. Did they?

MR. AUDRAIN: No, I cannot tell you what their final conclusions were.

Most mortgages provide that if the borrower fails to pay taxes, to take care of the fire insurance and maintain proper repair of the premises, the lender may take care of those items and the amount advanced becomes part of the principal.

Now, we have a situation where the borrower fails to take care of the fire insurance. And let us assume that a paper is held up by a supervised institution, such as an insurance company, and the supervision includes seeing that the files of that lender are in good order, that everything has priority and that the insurance is kept up. If the borrower fails to pay the fire insurance and the lender is aware of the tax lien difficulties of the borrower, what kind of problem, Ray, does that make for the lender? If he has a four- or five-hundred dollar insurance premium that has to be paid, not only because that is the prudent thing to do, but is also a required thing to do under state law or supervisory regulation, is the amount paid for the premium which becomes part of the principal debt subordinate to the intervening Federal tax lien?

MR. POTTER: Having taken the

position that the intervening tax lien is prior to an advance made under obligatory arrangements, this case seems much simpler, for here the obligatory aspect is absent. I can see it no other way but that a lien arises when the money is advanced for payment of taxes, insurance or whatever, and would take effect as of the date the money was advanced — not as of the date of the original mortgage.

It may be that some earlier priority date would be recognized for some purposes by state law, but I do not think it would be under the Federal law by which we determine the relative priority of Federal tax liens. In short, I would think that the decision in regard to the open end mortgage is one which would apply here and the Government would win.

Now, if you will forgive a quotation, I have a short one from the Internal Revenue ruling which I think will throw light on this and also the prior question.

The ruling concludes in this way: "In the case of an open end Mortgage which covers further advances, it is possible that no further advances may ever be made. Therefore, until such advances are actually made, there can be no fixed and specific or perfected lien under the Federal laws as distinguished from a mere contingent lien or a caveat of a more perfect lien to come."

In this case we are speaking of here, it is possible, in fact it is probable, that so such advance will ever be made. I think it comes within that sentence of the ruling. Also, under the other sentence, until the advance is made, it is not a determined amount, nor is it specific or perfected in the Federal sense. I do not think there is any question about that one.

MR. PETERSON: We hope that that result does not necessarily follow. Harold Reeve is going to talk at length on this subject Saturday morning, and I think he will develop other aspects of this problem. We certainly hope, from the standpoint of the lender, that under the Federal law he is able to advance the necessary money to protect his lien and not have the Government obtain priority over that advance. However, I think Harold will demonstrate that the law is in somewhat of a state of confusion.

MR. AUDRAIN: All right, we will wait for an analysis of the confusion.

We have a senior mortgage lien of record, and a substantial U.S. income tax lien, which is clearly junior on the mortgage, and our mortgagor is adjudicated bankrupt. The trustee proposes a sale free and clear of liens. The sale free and clear procedure is an equity procedure rather than statutory. He gives adequate notice to the Director of Internal Revenue, and the notice of sale states that the liens will be transferred to the proceeds. We have our sale, and the sale price falls substantially short in producing funds sufficient to discharge the tax lien. No appeal is taken from the referee's order on the sale. The new owner comes in and requests title insurance and your title search develops these facts.

What would be the test or inquiries you would make, Edmund, in insuring or ignoring that tax lien?

MR. PETERSON: Well, of course, sales free and clear in bankruptcy are a product of the depression. Prior to the thirties, they were virtually unheard of. The only sale of the bankrupt's estate was of his right, title and interest in the property. However, under the existing bankruptcy law, there cannot be any question about the power of the Bankruptcy Court to direct the sale free and clear, providing proper notice is given. So far as I know, there are no definite rulings with respect to Federal tax liens. There are at least three or four cases involving sales free and clear of local or state tax liens, and in those cases it was held that where proper notice was given to the proper public officials— and of course that poses another question as to who the proper public officials may be the sale would effectively discharge the lien with respect to the real estate.

At least in one case it was held that with respect to a state lien, service of notice on the State Treasurer was adequate. In the case of the Federal liens, unfortunately, there is no

definite provision for the service of notice.

Of course, process generally against the U.S. where permitted under the Federal law, is had by service of process on the Attorney General.

There is no similar provision with respect to notice to be given in a bankruptcy proceeding. Consequently, you do have a problem when the Government fails to file a claim in the bankruptcy proceeding. Where a claim is filed, it is generally filed by the local District Attorney and in such a situation, if notice were given to the District Attorney and the notice clearly stated that the sale was to be free and clear of all liens and that the lien of the Government would attach to the proceeds rather than to the land, I would feel fairly safe in guaranteeing it.

MR. AUDRAIN: Although the tax lien was not fully discharged?

MR. PETERSON: That is correct. Now, of course, there is this about it. The cases indicate that there should not be a sale free and clear unless the proceeds are sufficient to discharge all liens; but it has also been held that an order directing such a sale is merely erroneous, and if not appealed from, would be a final order.

MR. AUDRAIN: It is not a matter of jurisdiction but a matter of error?

MR. PETERSON: That is my understanding.

MR. AUDRAIN: Ray, any comment?

MR. POTTER: Assuming the propriety of all the proceedings involved, I would see nothing shocking about having property sold free and clear of a Federal tax lien, even though the proceeds would not be enough to pay off the lien. After all, we assume that the property is being sold for a fair and honest price. The Government is no worse off being left with a lien which attaches only to the fair proceeds of the sale of the land, instead of the land itself. I see nothing frightening about it.

MR. AUDRAIN: William, suppose that you were advising a title man in a county which was where there was not a Federal Court, and your local title man was going to have to rely on the report of the regularity of the bankruptcy proceedings made by a title company in the city in which the bankruptcy court was located. Would you have any recommendations to make to him as to how complete an examination should be made? That is, do you assume for your title man who has to rely on a report on the proceedings from a title company in the city, that the latter company can be counted upon to cover the matter of the contents of the notice to creditors, that such company will look to be certain that the United States is advised by the notice that its lien is to be transferred to the proceeds of sale, or would you suggest to your local title man that the report from the city give express assurance that these matters were regularly covered in the proceedings?

MR. WOLFMAN: First, let me say, I assume that you are going to have an order directing the sale. Your question did not mention that.

MR. AUDRAIN: I assume that.

MR. WOLFMAN: The trustee himself cannot determine if the sale is free and clear. The court order itself determines whether the sale is free and clear of all liens. There must be an actual notice to the lienor. Just actually what notice is required has not been defined clearly. Notice by ordinary mail many never actually reach the lienor. The notice should be served personally on the person interested or a receipt should be obtained—perhaps a copy of the registered return receipt—so that we are sure that the actual notice, not merely a constructive notice, was given.

The notice should show that the sale will be free and clear of liens in favor of the United States.

More than that, we require, in order to clean up the state docket, that after the completion of the sale, that the applicant for the title insurance make a motion on the notice to the U. S. Attorney again to have the county clerk in the State Court mark the state docket of the federal lien with an appropriate notation referring to the Federal court order.

As to the suggestion, does it make

any difference as to whether the Bankruptcy court is in one county or the other, where the property lies, I see no point in that. It does not make any difference in the procedure. It is just as strict whether you are in the county where the court is or not.

MR. AUDRAIN: I brought up the matter of the county because my company was involved in reporting a bankruptcy where a competent and careful title man did not realize all of the implications in all of the bankruptcy matters. And in that respect it would have been a happy experience if he had inquired first before he reported to another company.

MR. WOLFMAN: Of course, being in another county makes it difficult. If you have to send a man a hundred miles away, it is a nuisance. But the standard of title is the same whether it is in your county or another county.

MR. AUDRAIN: William, I have a question for you which arises from a surplus after the enforcement of a senior mortgage whether it is a judicial sale or non-judicial enforcement of the senior mortgage. This situation arose in California, where, of course, the sale can be and was non-judicial. After this senior mortgage there was a judgment lien which was clearly junior in time to the Federal tax lien, and the trustee who had the surplus by passed the tax lien and paid the judgment creditor out of the surplus, who was next in line. Or a variant of that could be a situation which occurred in Pennsylvania, a judicial foreclosure of a senior paper and the plaintiff did not name the United States as a party defendant, and there again there was a surplus. Your people come to you or you have a conflicting demand on you for the disposition of the surplus. How would you advise your people in a matter of that sort?

MR. WOLFMAN: Well, let us consider first the judicial foreclosure. The mortgage is foreclosed. Junior lienors, other than the United States, were served properly with process and the owner was served properly with process. The outside bidders bid substantially enough to pay the mortgage in full and leave a surplus for the junior lienors. Well, technically, the United States has no claim on that fund. The lien on the property is undisturbed. The problem has arisen in some states where no United States tax lien was involved. In New York, we have two ancient cases where the court tried to solve the problem by offering the surplus money to the lienor who was not named as defendant on the condition that he release the property from the lien of the judgment. Whether that is sound or not, I do not know, but that might be the solution. If there is enough money to pay the United States in surplus, no doubt the district director has the power to give a release. If he gives the release, nobody should object to his being paid out of that fund. But if there is not enough money to pay the district director in full, he can decline to give a release, and the court should decline to give him any part of the fund, and leave him only the lien on the property. It is not a satisfactory solution, but there isn't any satisfactory solution.

If it is a non-judicial sale of a foreclosure, again the lien is not wiped out, because the Federal courts feel that you cannot wipe out a United States lien under a power of sale on a mortgage. And there again, that gives him no share of the surplus.

MR. AUDRAIN: Edmund?

MR. PETERSON: Well, of course, in Illinois we do not have any sales under powers of sale, so I am not really equipped to discuss that. I agree with Bill on the proposition involving a judicial sale. Clearly, if the United States were made a party in the proper way, they would be barred, so far as the lien on the land is concerned, and would, under those conditions, be entitled to participate in the surplus after the payment of the prior liens.

MR. AUDRAIN: Suppose the United States, unfortunately, is not made a party.

MR. PETERSON: If the United States is not made a party, of course, they are not barred. The lien on the land continues; and I agree with Bill again that they have no right to the

proceeds of the sale unless the money happens to belong to the taxpayer, in which event they could reach it.

MR. POTTER: I was just going to say that I would suppose that in a non-judicial foreclosure, where the United States is involved in no way except there happens to be a tax lien, the surplus, as a matter of law, goes to the mortgagor. Of course, the tax lien continues to be effective against the land. The purchaser is in an unhappy situation, but he knows what he is getting into.

MR. AUDRAIN: In California the appellate court has said that the tax lien was not eliminated and in that matter approved the trustee's disbursement of surplus to the liens following the tax lien.

Here you have a former owner who owes the tax and he would be most happy to have this surplus used to reduce his tax obligation. We have a new owner who would like to see a reduction in the tax on the land he just bought. Some of us have had one, two and even all three of them come in, and everybody wants that money, and you would like to get rid of it safely. What would you do?

MR. POTTER: If your procedure is such that you can control the disposition of this money by the action of the trustee under the trust mortgage, that is a different problem. In our local practice there is no such provision. Money is paid in by the purchaser. Through the office of the sheriff, the money is disbursed to the holders of the mortgage lien, and after he has been paid in full, the rest is paid to the mortgagor. If the United States wants a part of it, the United States would have to come and get it.

MR. AUDRAIN: We have time for about one more. We have about thirteen or fourteen of these questions. I am going to aim this one at you, Ed. The lender initiates a judicial foreclosure of a paper at a time when there is no Federal tax lien and there is no record of lis pendens. Prior to the entry of decree of foreclosure, the United States tax lien is recorded. How would you advise your customer or your attorney or your own office about the possibilities of this situation?

MR. PETERSON: We had this precise question, Wendell. It so happened that it came about after the decision of the Supreme Court in the **White Bear** case. Consequently, I informed the attorneys to vacate the decree and to bring the Government in by process and re-enter the decree. If you will recall, at the midwinter meeting, we discussed the **White Bear** case, which involved a mechanic's lien foreclosure.

The claim for lien was filed in September of a given year and the suit was filed for foreclosure of the lien in November. A complete lis pendens was had in the chancery suit. Pending the suit, the Government filed a notice of a tax lien. They, of course, were not brought into the suit by reason of the fact that the claim was filed after the suit was lis pendens. A decree was entered in the case, the sale was made and we guaranteed the purchaser. A year or so after the deed was issued in the foreclosure suit, the Federal government instituted action to foreclose the tax lien on the ground that the tax lien was not barred by the doctrine of lis pendens or relation-back. The District court held against the government on the ground that, No. 1, the mechanic's lien claim was a perfected lien and consequently prior to the Federal lien, and, No. 2, on the further ground that the government was bound by the Illinois rule of lis pendens. The Court of Appeals affirmed, unfortunately, on the basis that the mechanic's lien claim was a perfected prior lien. The Supreme Court reversed the case, without opinion, unfortunately, so we do not know the exact basis for the ruling. We do know that in the Supreme Court it was argued that the doctrine of lis pendens should control. However, they saw fit to brush that aside and apparently reversed the lower courts on the ground that the lien was not perfected until the decree was entered affirming the lien.

Under those circumstances, I think that wherever any tax claim is filed while a suit is pending, even though

lis pendens was had, that the suit would not necessarily bar the Government lien.

MR. AUDRAIN: Supposing in this situation, to go back now and bring in the U. S. as a party defendant, in order to resolve the tax lien and to get rid of it, and in some states the bringing in of a new defendant who may call for the filing of a new action —the procedure varies in different states in bringing in a new party if you have any John Does, your plaintiff looks at it and says, "I can dismiss it and I can file a new action. But if I do that, I have this problem: I am filing after the Statute of Limitations has run on my Senior paper. Isn't that sort of awkward?"

MR. POTTER: I would be glad to agree with him that it is awkward, but I do not know the answer.

MR. WOLFMAN: I agree that you cannot pass a U. S. lien after lis pendens and before judgment.

MR. PETERSON: In the **White Bear** case, the government did have some tax liens that they had filed after the decree had been entered. They did not choose to argue that point in that case, but I have no doubt that they will argue it in some subsequent case, and you are not definitely protected until a deed is issued to the purchaser. Then that purchaser is protected under the terms of the Federal Code.

MR. WOLFMAN: Our rule of thumb is not to pass the lien between the lis pendens and the judgment, and not to pass the lien between the judgment and the auction sale, but we have passed it between auction sale and the deed.

MR. AUDRAIN: This concludes our program. We have enjoyed it and hope you have, too.

* * *

A TITLE DEED IN POETRY

I, J. Henry Shaw, the grantor herein,
Who live at Beardstown the county within,
For seven hundred dollars to me paid today
By Charles E. Wyman, do sell and convey
Lot two (2) in block forty (40), said county and town,
Where Illinois River flows placidly down,
And Warrant the title forever and aye,
Waiving homestead and mansion to both a goodby,
And pledging this deed is valid in law.
I add here my signature, J. Henry Shaw. (Seal)
Dated July 25, 1881.

I, Sylvester Emmons, who live at Beardstown,
A notary public of fame and renown,
Of the county of Cass in Illinois state,
Do certify here that on the same date
One J. Henry Shaw to me did make known
That the above deed and name were his own,
And he stated he sealed and delivered the same
Voluntarily, freely, and never would claim
His homestead therein; but, left all alone,
Turned his face to the street and his back to his home.
S. EMMONS, N. P.

Dated August 1, 1881
(Seal)

The above deed for the conveyance of a piece of land and one of the greatest legal curiosities in the world, was drawn up in 1881 by J. Henry Shaw, a lawyer at Beardstown, Illinois. The curio complies with every requirement of law, and has more than once been declared by the court of that state to be entirely valid.

OCCUPANCY AND USE REGULATIONS AND SOME QUESTIONS ON ANNEXATION

ALBERT S. ISBILL, Vice-President
The Title Guaranty Co., Denver, Colorado

In numerous areas of the country, growing cities and swelling suburbs meet with the problem of annexation. The author here discusses some of the legal implications involved and gives the reader an opportunity to consider in his own jurisdiction some of the questions presented here. The subject matter is not often covered and we are grateful to the author for giving us this embracive presentation of the numerous legal implications stemming from such matters.

It is not my purpose to attempt to cover all of the questions involved in connection with the annexation of additional territory to the City and County of Denver, but shall attempt to restrict myself primarily to the question of restrictive covenants, zoning regulations, their violation, and to some extent, tax liens and liens in connection with improvement districts.

The City and County of Denver requires either a portion of the annexed property for school or other purposes or the equivalent of the property in money. To date there has been no question of any unpaid portion of the annexation fee since there is no provision under the law for a lien against the property or any part thereof for such fee, so that the City has required either that the property be conveyed or the money paid. A typical situation is the annexation of the property known as Virginia Village. In that case, some of the property owners did not desire annexation, other property owners were either indifferent or unwilling to contribute either land or money. The final result was that the owner of most of the property which was to be developed contributed the entire fee and the other property owners got a free ride.

Before going into the matter of zoning regulations and restrictive covenants, and as a matter of interest to title examiners, I should like to dwell briefly on the matter of improvement districts, and more particularly, water conservancy and irrigation districts.

Chapter 89 CRS 1953 deals with local improvement and service districts. Insofar as taxation is concerned, this chapter deals with districts created and the method of raising funds for the purchase of necessary property and the construction of the district itself. Water districts so created usually involve a bond issue and under Section 89-1-18, the bonds and interest are to be paid by revenue derived from an assessment upon all the taxable real property of the district; the bonds are a general obligation of the district and all property remains liable for assessments until the bonds have been retired. As to sewer districts, Section 89-2-19 provides that the assessment which is made in proportion to area shall constitute a lien from the date of final publication of the assessing ordinance. The statute further provides for a thirty day period within which the assessment may be paid in full and in the event such payment is not made, the City or Town Treasurer shall return the local assessment roll to the clerk showing all payments made and that the roll shall be certified by the city or town clerk to the county treasurer. It is to be noted that after the assessment becomes a lien, there is a thirty day period before any information can be obtained from the treasurer's office.

Section 89, Article 3 deals generally with various districts, including water, sanitation, fire protection and

others. The normal procedure in the case of such districts is that the Board of Directors of the district on or before October 1st of each year shall certify to the Board of County Commissioners and the Board of County Commissioners levy the tax upon the assessed valuation of all taxable property within the district in addition to other taxes.

A further difficulty sometimes arises in connection with the assessment and collection of special assessments and special improvement districts in towns and cities by reason of the fact that the assessment and collection may be based upon the value of the property affected rather than the front footage or area basis. In other words, it is conceivable that assuming an alley paved covering an area of perhaps four blocks with an individual owning some vacant lots upon which he later builds a very expensive improvement, under such circumstances, he might be paying practically the entire cost of the paving of the alley on all four blocks.

In the case of water and sewer charges, Section 89-5-13, contains a provision under which the board may, from time to time, increase or decrease water and sewer rates, tolls or charges, and until paid all such rates, tolls or charges constitute a perpetual lien against the property served. In actual practice, however, with a very few exceptions, the districts have found it more convenient to certify to the Board of County Commissioners on or before the 1st of October of each year, the amount and the rate, and the Board of County Commissioners then makes a levy of the tax upon all assessed valuation of taxable property. In the latter case, the examining attorney may be advised of the lien through the treasurer's office, otherwise in every instance it is necessary to attempt to locate the secretary of the board of the district to determine whether or not there are any unpaid assessments.

Chapter 149 CRS 1953 deals with water conservancy and irrigation districts and in almost every instance, there is a bond issue for acquiring title to property and installation of mains, equipment, etc. Interest and principal are paid from annual assessments which are in addition to all other taxes. However, Section 149-1-42 provides for the exclusion of lands from a district but likewise provides that such exclusion shall not affect, impair or discharge any contract, obligation or lien. Section 149-2-32 provides for the relief of property from bonded indebtedness by payment to the district treasurer an amount of money sufficient to retire district bonds in such ratio to the total bonded indebtedness of the district as the acreage of lands which he owns within such district bears to the total acreage thereof, plus 15%. The problem of the examiner in every instance when examining the title to property which has been included in any such district is to determine such taxes or assessments as may have been levied and remain unpaid and also to determine whether the property is subject to a lien for bonded indebtedness. Unfortunately we cannot always rely upon a certificate of taxes due since, in many cases, the lien may exist without a certification to the treasurer's office.

Annexation of territory merely presents a further problem more especially since the annexed property may be subject to bonded indebtedness and yet water and sewer facilities be furnished by the City and County of Denver. What is the extent of the obligation of the title examiner to his client? If he is to sit in his office and examine the abstract, then what warning shall he include for the information of his client?

Whether the occupancy or use regulation be one of zoning or of contract, we cannot conclude that annexation constitutes any material change other than that the property has been removed from the jurisdiction of the county and enforcement of any zoning restrictions could come only by action from other property owners who might be affected by a violation of the regulations. Restrictive covenants remain unaffected and in this connection, strange as it may seem, a Texas case, Spencer vs. Mavrick, 146 SW 2nd 819, was taken to the courts on the matter of the power

of the city to zone and an argument that zoning could override restrictive covenants in existence at the time the zoning ordinance was passed. The court held that insofar as the restrictive covenants were more burdensome than the zoning, the restrictive covenants were still enforceable.

Before passing to the matter of the affect on titles of the existence of zoning regulations or restrictive covenants and existing violations thereof, let us consider for a moment the manner in which protective or restrictive covenants are created. In the newer subdivisions, FHA required restrictive covenants and unfortunately there have been too many cases where the subdivider or developer has failed to consult his attorney. Either he or his surveyor has had a sample form which had been approved by FHA. The form is copied, executed and recorded. We have one such case where both the subdivider and the surveyor were well aware that a certain portion of the property was to be set apart as commercial. Too late, and after many lots had been sold, they realized that they had restricted all of the property to residential use.

On the brighter side, however, and as the result of previous unfortunate experiences, more and more of the new subdivisions are carefully planned with considerable thought given to the future. The restrictive covenants, in many cases, are well considered with the idea of the possibility of future amendment and legal advice is sought before the covenants are executed. We still find, however, maps showing building plots or lots with a ditch running diagonally through the middle or easements reserved along all side and rear lot lines with lots only 25 feet in width and a provision for a minimum of 50 feet or more for a building plot. In such cases, the reserved easements must, of necessity, pass through the improvements. In actual fact, of course, no utilities have been placed over or through these easements and from the practical standpoint, we know that no attempt will be made to exercise any rights of such easements. These easements are often hidden within the protective covenants and are very easy to miss in an examination of title. Lending institutions normally will make loans in the face of such easements provided they are protected against loss or damage by reason of the use or exercise of such reserved easements. The buyer, however, undoubtedly would not be required to perform his contract if he desired to get out of the deal and even if the buyer is willing to perform, we quite often are faced with the requirement of the VA that the Veterans be given the same protection as that given to the lending institution.

We also find many cases where, with changing conditions, the owner of a large part of a subdivision desires to amend the plat, relocate lot lines and relocate easements. Immediately he is faced with the problem of how to get rid of the easements reserved in the original plat. Technically, the original easements are still in existence and constitute such a cloud on the title that neither the lending institution nor the buyer would be required to perform under a contract. In actual fact, a very simple answer exists provided that the subdivider will give his attorney a chance before, instead of after, recording the protective covenants and before executing the dedication on the recorded plat. The easements may be dedicated to the public, along with streets and alleys and, therefore, might well be the subject of vacation. In such case, however, we must still hope to avoid the super technical examiner who might question the power of the city or the county to pass an ordinance under the present statutes vacating easements which are not necessary to public use. Before passing from the execution and filing of a plat, I have a final suggestion which has been used in many cases and that is that the surveyor be required to include in his certificate an additional certificate to the effect that there are no ditches or other easements in evidence in, over and across any portion of the property, except as shown on the accompanying plat. One final reference to restrictive covenants and I shall pass to what was to have been the subject

of this discussion. Subdividers and the Federal Housing Administration have a pet phrase: "nor shall anything be done which may be or may become an annoyance or nuisance to the neighborhood". It sounds good and we have encountered no difficulty. However, some neighbors consider the children of other neighbors a nuisance, or to say the least, an annoyance. Draw your own conclusions.

The existence of either zoning regulations or restrictive covenants or both constitutes one category. Their violation constitutes another. The matter of the existence of such occupancy or use regulations does not require too much consideration except that there appears to be a rather marked difference in the decisions as between zoning regulations and restrictive covenants. During the last several years almost every city or town has adopted zoning regulations as the result of public planning and these regulations have extended to counties covering unincorporated areas. The fact that such regulations are in existence in almost every community has some bearing upon the fact that the courts do not consider the existence of zoning regulations as an encumbrance sufficient to render a title unmarketable. Such regulations are for the benefit of the public, the purchaser is presumed to have knowledge of their existence and it is quite generally held that the mere existence of such regulations will not permit the purchaser to refuse to consummate his agreement.

Restrictive covenants generally have been construed in a different light. The prospective purchaser is denied the full enjoyment of his property by private agreement and if the purchase contract is silent as to the existence of restrictive covenants, the courts generally have held that the purchaser will not be required to fulfill his contract. However, the drafters of the usual option agreement, both real estate men practicing law, as well as lawyers, are becoming more and more careful to insert as exceptions those matters against which the seller may not warrant the title and the printed form of option contract of many real estate brokers contains an exception of existing easements and restrictive covenants.

Cases on the subject of violations of zoning regulations or restrictive covenants in existence at the time of the purchase contract are not too numerous. In spite of the lack of litigation, however, the law seems to be fairly well settled and in this respect there is a difference between the violation of a restrictive covenant concerning the construction or location of improvements and the use being made or to be made of the property.

Pennsylvania Case, Moyer vs. Vincentis Construction Company, 107 PA Super 588 involved a contract in which an exception was made of existing restrictions and easements. The zoning regulation required a 25 foot setback, whereas the improvements as constructed violated the setback requirement. The vendor had agreed to furnish a good and marketable title, free from liens and encumbrances, excepting existing easements and restrictions, if any. In holding that the purchaser was not required to make further payments and was entitled to a refund of the amounts already paid, the court discussed at considerable length, the question of hazard of litigation and, generally speaking, if the existing violation is one which may subject the purchaser to the hazard of future litigation, the title is unmarketable.

The cases on use generally consider the question of representation or misrepresentation. The New York case, Morrow vs. Renmere Process, Inc., 225 NY Supp 250, involved the right of the purchaser at a foreclosure sale to be relieved from his obligation to purchase. The existing improvement was a ten family multiple dwelling which violated the occupancy standards of the New York Multiple Dwelling law. In holding that the purchaser was not required to complete his purchase, the following condition appears: "It is thus evident that the physical appearance of the property was sufficient to constitute a representation that the property could be applied to the use for which it ostensibly was designed."

The structure, itself, and the use being made thereof constituted a representation that the use was legal.

Another New York case, Hammer vs. Michael, 243 NY 445 involved the sale of a house which had three families in violation of the New York Multiple Dwelling law. One family vacated before the date of closing. The seller removed the kitchen equipment from one apartment and claimed that he was tendering the house without violation since a two family house was legal. In denying the vendor's request for specific performance, the court held that the buyer had purchased a three family house and not a two family house. From this case, it would appear that where the use being made is such as to constitute a representation, the seller does not have the opportunity of correcting the defect in title if the result is such that the value of the proprety may not be as great after the correction.

From the cases it becomes very apparent that careful consideration should be given to the initial purchase agreement and that any known violation should be disclosed in the purchase agreement itself. Otherwise, the seller may lose his deal.

A different situation from the case law may result from the actual practice in certain communities due to one of the definitions of a marketable title which is that the title is marketable if it is acceptable to informed buyers or attorneys generally in the community, and that certain violations are generally ignored. In Denver we have numerous subdivisions requiring a definite setback, as well as a definite distance from side lot lines or side building plot lines. Where all of the houses are set back in a uniform line, even though in violation of the restrictive covenant, adjoining property owners do not have a right to enforce and where the side lot line has been generally ignored by the builder, it would appear extremely unlikely that anyone would or could enforce the restrictive covenants. This is more particularly true where the restrictive covenant provides that no building may be constructed within X feet of a side lot line, whereas the building plot is such that the building must be constructed over the dividing line between two lots. This definitely is a violation of the restrictive covenant from the technical view point, whereas from the practical standpoint, it is apparent that there is no injury and that the intention must have been a requirement of X feet from the side line of the actual building plot regardless of lot lines.

In actual practice, if the buyer is willing to buy in face of the violation, the lending institution generally will make the loan provided it is protected against loss by reason of the enforcement or attempted enforcement of the restrictive covenant. In the case of VA loans, however, the Veterans Administration has generally insisted that the purchaser be given the same protection as that given to the lending institution. In determining whether such protection may be given, it becomes necessary to determine whether there is in actual fact, anyone who would be in position to enforce the restrictive covenant. This sometimes becomes difficult.

Another argument has arisen in some cases within the City and County of Denver where the building permit is issued on the basis of a plot plan submitted. The building is constructed in accordance with the plot plan but in violation of the zoning ordinance. After the improvements are completed, final inspection is made and a Certificate of Occupancy issued. In these cases the employees who issued the permit in the first instance and the inspector who caused the issuance of the Certificate of Occupancy did not have the power to waive the provisions of the law and, therefore, the city is probably not bound by the acts of its employees. The fact remains, however, that from the practical standpoint, there is little likelihood of an action to enforce the zoning regulations. Again, however, any conclusions from the issuance of the permit and the Certificate of Occupancy would not apply to a point in violation of zoning regulations. A discussion of occupancy and use regulation would not be complete without some mention of the duty of the title

examiner. In many localities the title examiner insists that he has no obligation other than to make a report based entirely upon the abstract of title. If such an opinion is rendered, it would seem that he at least has the duty of advising his client as to the possibilities of matters which may not be disclosed from the examination of the title as disclosed by the abstract. He should mention the possibility of any matters which might be shown by a survey or an inspection of the premises, as well as zoning or other restrictive conditions so that in the event the report is made from the record title alone, the purchaser at least is placed on notice that he must make a further investigation and an examination of the purchase agreement itself might avoid the embarrassment of including in the opinion a statement to the effect that a certain condition renders the title unmarketable, whereas the purchaser may have agreed in writing to accept the title subject to the existing condition.

As a concluding warning, it is generally held that an agreement to purchase, subject to existing restrictive covenants, is not a sufficient exception in the event there is an existing violation.

EXTRA COPIES AVAILABLE—

In anticipation of requests for reprints of the June, 1957 issue of TITLE NEWS containing, among other matters, the article, "Highway Laws Relating to Control of Access Roads" we have a supply available. Order from American Title Association, 3608 Guardian Bldg., Detroit 26, Mich. The cost: One Dollar per copy postpaid.

PARTNERSHIPS

The New Jersey Realty Title Insurance Company of Newark, New Jersey, puts out "Title Comments." It ordinarily is a short article prepared by a senior officer of the company, usually with Maurice Silver, Title Officer of the company, either writing the article or collaborating in its preparation.

It is issued monthly and carries the phrase "issued for the use for authorized attorneys," and is mailed to members of the Bar. Punched for a C-ring binder it is printed on paper which is BR *lb. ledger stock.*

We carry in this issue of Title News an article prepared by Mr. Silver on partnerships.

NEW JERSEY REALTY TITLE INSURANCE COMPANY
Newark, N.J.

Maurice Silver, Title Officer

In examining the definitions given to a partnership by court and writers, it will be observed that the emphasis is placed upon the individuals who form this business enterprise. But in the course of the evolutionary processes of the law the courts began to recognize that over and above the individuals there exists an entity. This concept was given additional emphasis after the Uniform Partnership Act was adopted by the various states.

Because the common law operated within restricted limits only partners were recognized and not a new entity created by this association of individuals. It followed that title could not be taken in the name of the partnership, but only in the name of the individuals forming the partnership. They held either as tenants in common or as joint tenants. Today we have new nomenclatures for the holdings by partnership. We may properly speak of "an estate in partnership" and the individual partner as a "tenant in partnership", and this is necessary, for the old terms did not describe the exact nature of the holdings by the partnership, nor the individual interest in the partnership, nor the various legal consequences, duties, obligations, conversions, etc. that flow from a partnership arrangement.

A deed to a partnership in its firm name before the Uniform Partnership Law had a wide range of treatment in the various jurisdictions—from an out-and-out declaration of "void" to an acceptance on the theory that that which can be made certain, is certain, (that is, since the members of the partnership are ascertainable — the intended grantees are established) and variations within these extremes. Riddle v. Whitehill, 135 U.S. 621, 34 L.ed 282, 10 Sup.Ct. 924. However, this restriction was swept away by the "Uniform Partnership Law" (1919) R.S.42:1-1 etc. Article 8 subsection 3 specifically provides: "Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name." Observe that where title stands in the partnership name it must be conveyed in like manner. And here we suggest that the deed be signed in the partnership name by all the partners with an appropriate recital that the signatories are all the members comprising the partnership firm. This latter suggestion is to obviate the "but" in Section 10 sub-section 1. This section provides that where title to real property is in the partnership name any partner may convey by a conveyance executed in the partnership name; **but** the partnership may recover such property unless that partner had authority to bind the partnership or the lands find their way in the hands of an innocent purchaser for value.

Where title is taken in the name of one or more, but not all the partners, here, too, the better practice is to have all partners join in the deed with appropriate recitals showing the composition of the partnership.

Problems have arisen after the death of one of the partners. It is universally held that during the partnership an equitable conversion takes place, so that realty becomes, in fact,

part of the personality. In some jurisdictions, as in England, it is held that after the dissolution of the partnership the equitable conversion is unchanged, while in other jurisdictions, and New Jersey is among them, it is accepted that this conversion is a temporary state to serve partnership ends. When that end is served the property recovers its former status. Campbell v. Campbell, 30 N.J.E. 415; Craighead v. Pike, 58 N.J. E. 15, 43 A. 424, affirmed 60 N.J.E. 443, 45 A. 1091; Flint v. Flint, 87 N.J.E. 560, 100 A. 754, affirmed 88 N.J.E. 346, 102 A. 1053; Hannold v. Hannold, 4 N.J.Super. 381, 67 A2 352. Where the death of a partner does occur—how should realty be conveyed? Shank v. Klein, 104 U.S. 18, 26 L.ed. 635, set forth the prevalent rule in the United States. The head note of the case prepared by Mr. Justice Miller reads as follows:

"1. Real estate, purchased with partnership funds for partnership purposes, though the title be taken in the individual name of one or both partners, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and to adjust the equities of the co-partners.

2. For this purpose, in case of the death of one of the partners, the survivor can sell real estate so situated; and, though he cannot convey the legal title which passed to the heir or devisee of the deceased partner, his sale invests the purchaser with the equitable ownership of the real estate and the right to compel a conveyance of the title from the heir or devisee in a court of equity."

This rule of law is obviously subject to criticism. If the surviving partner has the authority to sell real property to pay partnership debts, his authority is less than adequate if he can only dispose of the equitable title, even though the court will require the heirs or those others who hold the legal title to convey that title to the purchaser.

Does the Uniform Partnership Law change this situation? It seems not. The Appellate Division of Superior Court in Hannold v. Hannold, supra, adopted the language of Judge Haneman as to the nature of this equitable conversion and its limited application, citing Campbell v. Campbell, supra, and the other cases mentioned. Nor does the Uniform Partnership Act specifically answer the question, although Powell on Real Property Vol. 1. Sec. 139 cites an Illinois case which declared that the powers vested in the surviving partner are so complete and clear cut that a surviving partner's suit for an equitable decree defining his powers to transfer land and to release mortgages was dismissed as unnecessary. Wharf v. Wharf, 306 Ill. 79, 137 N.E. 446. But in the face of the Hannold case this pronouncement, while logical and practical cannot be accepted without an express interpretation to that effect by our courts.

Section 1-25 states that a partner is a co-owner with his partners of specific property, holding as a tenant in partnership. In enumerating the incidents of this tenancy, sub-section (e) provides: "A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin." This, too, seems a clear statement, but here again the court's statement is in conflict.

It seems to us that what is needed is a provision in the act setting forth the manner in which and by whom title to real property may be conveyed. The surviving partners should be vested in the legal title not only for the purpose of paying debts, but also for the purpose of winding up and distributing the assets. And in accordance with sub-section (e) the purchaser should be declared to hold partnership realty free and clear of any dower or curtesy of the spouse of or lien of a judgment creditor or mortgagee of the deceased partner. Further, it should provide that such purchaser should not be obliged to look to the application of the proceeds or inquire into the necessity for such a sale.

In the absence of such provisions

the present safe course to follow is a deed in which all partners, the spouse and successors in title of the deceased partner, join.

We are not unmindful that a partnership continues after dissolution until the winding up is completed, 42:1-30, but neither this section nor the subsequent section spell out the appropriate method of disposing of partnership real property by the surviving partner.

CHARLIE McCOFFUS

Charlie McCoffus, a title man by trade,
Worked like a trojan but little was he paid,
Working up titles and commitments, too,
Anything to please the builders he would do.

For the builders he rushed all through the day,
And when he closed the deal this is what they would say,
"You took too long and your price is too high,
From now on I'm taking my work to the other guy."

For the builders in their brand new cars,
Their expensive suits and their dollar cigars,
Care not for the worry and trouble you waste,
So long as they get their pay-off with haste.

To get back to Charlie, — he struggled along,
Till an ache in his head told him something was wrong.
He went to the doctor and "Doctor," said he,
"There's a buzz in my brain; what's the matter with me?"

Well, the medico thumped, as medicos do,
And he tested his pulse and his reflexes, too,
And his head and his heart and his throat and each lung,
And Charlie said "Ah" and stuck out his tongue.
Then the doctor said, "Good, what a narrow escape,
But a quick operation will put in shape."

"Your brain's overworked, like a motor run down,
And you're flirting with death every time you turn 'round.
I must take out your brain for complete overhauling;
In the interim, take a rest from your calling."

So Charlie McCoffus went under the knife,
He struggled home brainless and kissed his own wife.
While old Doctor Loomis and two other men
Were putting his brain back in order again.
The weeks rolled along and Charlie McCoffus
Never called for his brain at the medico's office.

The Doctor got worried, gave Charlie a ring,
Said, "You'd better come over and get the danged thing."
"Thanks, Doc, I don't need it," said Charlie McCoffus,
"I've just opened my own building office."

Adapted by Carlos Morris,
Title Guaranty Company of Texas

THE HISTORY OF LAND TITLES

(Miss) MARIAM C. MILNE
Security Land and Abstract Company, Sturgis, South Dakota

We are privileged to carry in Title News an article written by Miss Mariam C. Milne of Sturgis, South Dakota, daughter of Lynn Milne, President, Security Land and Abstract Company of Sturgis, a former Governor of our organization.

Miss Milne, now a Junior, spent one year at the University of Wyoming and then transferred to the University of South Dakota.

We carry this article for two reasons: (1) Because it reflects the studies and observations which can be made by youth; and (2) perhaps this will promote other articles written by youngsters working in the offices of member companies in vacation time or otherwise. We believe these will make for some constructive improvements.

Every square inch of land in the world is owned by someone, and although the possession is sometimes very hard to determine; nevertheless ownership exists. It is the business of a title company to trace the ownership of the property.

Since mankind's early history, he has been vitally concerned with land titles and their importance in relation to the parties involved and the effect on the community as a whole. The first recorded real estate transactions date back to the Bible, with the earliest claim to land unquestionably being for use and occupancy.

One of the first assertions concerning land titles is found in Genesis, when Abraham asserts his right to a well situated in Abimlech, because "he had digged the well." Isaac claimed this well ninety years later, because it was on his father's property.

In the twenty-third chapter of Genesis the first land transaction appeared, and again it involved Abraham. Sarah, his wife, was recently deceased, and the grieving husband approached the Hittites saying, "I am a stranger and a sojourner among you; give me property among you for a burying place, that I may bury my dead out of sight." Ephron replied that he would give the care of Machpela to Abraham, but the mourning spouse insisted Ephron accept 400 shekels of silver. The pair finally agreed, and the transaction was completed in the presence of Heth's sons, who acted as a witness.

It is also recorded that women, as well as men, were allowed to purchase real estate. Entered in Proverbs 31:16 is proof of this: "She considers a field and buys it; with the fruit of her hands she plants a vineyard."

Landmarks were utilized during this ancient period, as set forth in Proverbs 22:28, which says, "Remove not the ancient landmark which your fathers have set." This fact serves as proof that even at this time, surveying of some type was carried out.

From the ancient Biblical accounts, history moves to Sumeria, where, in 3000 B.C., the oldest land contract was written. A sun-dried tablet made provisions for the payment of a certain amount of copper in exchange for a field, supplemented by an additional payment of a specified amount of bread, cloth, butter, and oil for the house that was to be built on the field.

After the transaction, professional scribes wrote a contract, complete with copies. The seals of the witnesses were then rolled on the tablets, or if a seal was not available, a mark was made by the thumbnail. To prevent an interested party from tampering with the contents, the tablet was then baked. For future reference, one copy was placed in he temple or some other public place, and the other was taken home by the purchaser and filed in a jar.

"MODERN" PRACTICE

Very little change took place from 3000 B.C. to the Christian era. The description of property was placed first in the contract, with its size and location, then the names of the seller and buyer, with a statement that the land concerned had been sold. A note was attached to the end which asserted the two parties had confirmed the purchase by oath (similar to our oath before a notary), and ended with the names and signatures of the witnesses. Because every witness was considered to be very important, the signature of each always appeared. This practice has been carried down to the present day.

The "dotted line" was used freely in Assyria after 2000 B.C., because, even at that early date, every sale of land had to be written in order to be legal. It was approximately 200 years later when a scibe included in a contract a provision found in most leases today—that which requires the lessor to keep the house in repair.

During this era it was very difficult to enforce the laws, as people were afraid of very little — except the wrath of the gods. When a contract transferring Babylonian lands was completed, a plea for the gods to inflict leprosy, drought, and famine to "anyone whatsoever who shall take away these lands" was included.

In 1500 B.C., the ancient City of Nuzi ruled it illegal to transfer land outside a family. This caused some shrewd Nuzian lawyer to find a loophole in the statute. People who wanted the property were legally adopted by the owners, and the transaction was carried out. The recently acquired relative claimed the land was an "inheritance," and in turn made a cash "gift" to the new family.

Records have been preserved from ancient Rome concerning the sale of lands, with the tenure being of use, occupancy, custom, and tradition.

Feudalism established a new system of transferring real property. All lands and tenures were in the hands of the king or ruler. He then portioned these out to lords or nobles, who in turn disposed of smaller tracts to slaves, servants, or vassals. A transaction of this type was always executed in the presence of witnesses, on the land involved, with the donor handing the donee a twig, stone, or clod of earth in token of the transfer.

In 1086, after William the Conqueror had dealt out parcels of land to noblemen, a census was taken to determine the quantity and quality of land held by each person. The results were compiled in the "Domesday Book," which we now believe was the first large-scale, official record of land estate. It was from this simple Norman beginning that we have arrived at our present-day methods of tracing land ownership.

The first record of tenure being held or based on public record by the state appears in Chapter nine of **Coke on Littleton,** where the great law commentator asserts that all tenants are so called by copy of Court Roll, because of a lack of evidence concerning their tenements except by the Roll.

The Enrollment Act, passed in 1483, brought title transfers one step farther along. This established some orderly recording system, as it required that real property ownership be listed at quarterly intervals.

The present recording procedure used in the United States is based on the old English law, with the main difference being in protective right. The English code was enacted solely for the protection of the king, while in America it was for the benefit and protection of the public.

America's first recorded sales were verbal in form, executed in the presence of witnesses. When the witnesses either died or moved away, disputes arose. This procedure evolved itself into a later form—that of a memorandum. This was made by the buyer and seller and then torn apart, each party retaining a part thereof. The "indenture," as it was commonly referred to, also failed.

Because of the Statute of Frauds, an approved office was required for safekeeping of the recorded instruments. This law set forth that no real estate transaction was binding unless a document was executed. The above

mentioned statute resulted in the effective recording system now in use, which was established by the Massachusetts legislature in October, 1640. The plan required that each instrument recorded be given a book and page number, the book to coincide with the contents of the document. We now have books containing mortgages, deeds, satisfactions, leases, and miscellaneous documents. Emanating from this system, the recorder is offered an orderly, organized plan with which to work.

The Congress of 1785 provided that no settlement could be made on public domain until the Indian title had expired and the lands had been surveyed. Another law was enacted the same year which stated that all public property could be freely transferred to a new owner.

To strengthen the Law of 1785, and keep settlers off all unplotted lands, the Act of 1807 was passed. This forbade settlers to locate on any unsurveyed property to which the United States had issued no patent, warrant, or certificate of purchase. The law failed dismally, as history records the results that occurred. "Squatters" took root on whatever land they wished, completely disregarding the statute.

In the course of time a movement started in the West which purposed to act as a cure for the pioneers' disagreements with the squatters. This remedy was born in the form of claim associations, which was the beginning of Western local political institutions, and the pioneers' first government.

The Iowa Land Club, organized on March 11, 1839, in Johnson County, Iowa, attained its purpose. The law of staking a claim was immediately adopted. This stated:

> "Land must be plainly marked by lines. The person making the claim must put his initials on a tree or stake at each corner of their claims."

To prevent a monopoly of land ownership, the law ruled that no more than 480 acres, or three quarter sections, could be staked out.

It was hoped that with the formation of the claim associations, the war with the claimjumpers would at last terminate, but this dream was empty and unfounded. Finally, in desperation, the following motion was presented before the club:

> "On motion of Mr. Wm. R. Miller that if any member of this club finds his or any of his friends Clames has been Jumpt that they inform this Club of the fact and that this Club forthwith put them off said clame without troubling the civel law."

Legislation of this type encouraged the pioneers to register their claims, and although the contracts that were recorded were extremely crude, and most often handmade, they served the purpose. Because the uneducated pioneers composed the documents themselves, it is interesting to note the construction employed:

> "The following claim I purchased of John Knight in February, 1839. & I wish it registered to me as a claim made as I have not got his deed with me the same being the SW qr. of S 14. & that part of the S ½ of S 15. that Lyes East of the Iowa River —T 79 N. R. 6 W.
>
> July 3rd 1840
>
> handed in July 3rd 1840
>
> Robert Lucas."

Description of the premises used in an early-day quitclaim deed is extremely amusing, but in the Records of Claim, the original purpose of the proceeding was accomplished. From Iowa's early records is this deed:

> "This bargen made and entered into by the following parties Viz this day I James Williams has bargened and sold to Philo Costly a certain claim lying on the E side of Rapid Creek boundrys of said claim as follows commencing at a White Oak tree standing about 80 Rods. below the upper forks of Rapid Creek thence running South ½ mile thence E 1 mile to a stake standing on the Prairie near 2 Trees. thence N ½ mile to a stake thence W 1 mile to the starting place—I the

said Williams gree and bind myself to defend. all rights & claims excepting the claim of the general Government and also singular all rights claims & interest to said claim for and in consideration of the sum of one hundred Dollars the receipt thereof I here in acknowledge said Williams agrees to put up a House and finish Except putting up the Chimney & dobing and also said Williams is to Haul out. Eight or ten hundred rails all included for the receipt above mentioned.

Receipt. Johnson County. I. T. January 25, 1841.

James Williams (seal)

Witness

Cornelius Henyan

Handed in February 3rd 1841"

On July 22, 1854, the Claim Club of Fort Dodge was organized, and at the first meeting a commitee was chosen to draft a code of laws. From this council came three essential motions:

"1st. That 320 Acres shall constitute a claim."

"2nd. A claim may be held one month by sticking stakes and after that $10.00 monthly improvements is necessary in order to hold a claim. Also that a cabin 16 x 16 ft. shingled and enclosed so as to live in is valued at $30.00."

"Resolved: That no mans claim is valid unless he is an actual settler here, or, has a family and has gone after them, in which case he can have one month to go and back."

Although not entirely without loopholes, the Frontier Claim Associations were significant because they permitted settlers to take root on public domain, surveyed or unsurveyed, and establish homes without immediately having to pay for the land. They also provided for improvement of public lands, or the purchase of the land from the United States at a minimum price of $1.25 an acre. Protection and security were offered to a bona fide settler on his land without fear of being molsested or ousted, and they fostered natural justice, equality, and democracy on the frontier by establishing order under a government expressing the community's wishes.

In 1862, the lawmakers of America enacted a policy that did more to assure a broad pattern of individual farm ownership than any other form of legislation. This was the Free Homestead Act, which gave free frontier land to those tenant farmers most lured by it—the Irish, English, Germans, and Scandinavians. Through this Homestead Act they could create successful farms for themselves and their children.

Through the centuries, land titles have passed through four distinct stages, arriving at the point where we now are. The beginning was the pre-abstract period, when the community as a whole acted as the witnesses. This procedure was effective during the early history of land transactions, because the villages were small and everyone was acquainted with all his countrymen.

The second stage concerned the abstract and attorney. The abstract was a methodically written or printed history of all title transactions to a designated tract of land, beginning with the original source and continuing to the present. An abstract consists of a summary of the essential parts of every recorded instrument or conveyance, and a brief statement concerning all liens and encumbrances affecting the said tract of land. An attorney was employed to check the title in the abstract to ascertain that the grantee was receiving the proper land from its rightful owner.

A certificate of title, or guaranteed title, was issued in the third broad period. This concerned an attorney who wrote an opinion of the title, not guaranteeing it to be good, but only that it was true of what appeared on record.

In Philadelphia during 1875, title insurance first came into existence. This form guarantees that the title is good, subject to the exceptions as shown in the policy, and its regular conditions and stipulations. This does

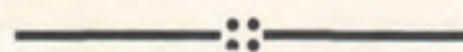
not mean that from what has been found on record the title is good, but it is good and so guaranteed with the backing of the company issuing the policy. It protects against loss by reason of errors committed by any of the company's employees, or outside parties who contributed in any way to the progression of the title. Title insurance also guarantees against forgery, fraud, incompetency, infancy, insanity, and perjury.

Finally, a policy of this type provides a good and marketable title. If the insured is unable to sell or mortgage the property, he is fully protected against all losses. Title insurance is the least expensive type of insurance, giving greater protection for less money. Lawyers generally recommend title insurance because it is the best protection obtainable.

It has been through the steady progress made for thousands of years that land titles have finally arrived at the point where they now are. No one could be prouder of the organization and system that has evolved out of the turmoil of the centuries than a conscientious titleman. By this progress, America now has the most correct and efficient type of recording and title searching in the world—a high standard of which to be proud.

DATES TO REMEMBER:—

OCTOBER 13 - 17, 1957

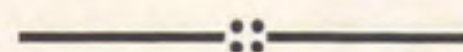


51st Annual Convention

AMERICAN TITLE ASSOCIATION

JOHN MARSHALL HOTEL

RICHMOND, VIRGINIA



A Visit to the Heart of Historyland

Coming Events

Date	Meeting	Where to be Held
August 2-3	Montana Title Association	Northern Hotel Billings, Montana
September 12-14	North Dakota Title Association	Clarence Parker Hotel Minot, North Dakota
September 13-14	Washington Land Title Association	Cascadian Hotel Wenatchee, Washington
September 15-17	Missouri Title Association (50th Anniversary)	Kentwood Arms Hotel Springfield, Missouri
September 19-21	Wisconsin Title Association	Northernaire Three Lakes, Wisconsin
September 20-21	South Dakota Title Association	Carpenter Hotel Sioux Falls, South Dakota
September 21-24	New York State Title Association	Shawnee Inn Shawnee-On-The Delaware, Pennsylvania
October 3-5	Kansas Title Association (50th Anniversary)	Baker Hotel Hutchinson, Kansas
October 7-8	Indiana Title Association (50th Anniversary)	Sheraton-Lincoln Hotel Indianapolis, Indiana
October 13-17	**American Title Association Annual Convention**	**Hotel John Marshall Richmond, Virginia**
November 4-7	Mortgage Bankers Association	Statler Hilton Hotel Dallas, Texas
November 10-12	Ohio Title Association	Sheraton-Mayflower Hotel Akron, Ohio