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# TITLE NEWS

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# SOME DECISIONS CONCERNING ELECTRIC POWER LINE EASEMENTS

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This is the modern version of Jack and the Bean Stalk—only Jack is a farmer and the giant the high tension power line. You plant a bean and it grows—it's all as simple as that. But just how fat the bean can grow, the courts have tried to determine for the past forty years. Generally speaking, it can grow into a lot of trouble.

The right of way man does his best to honestly explain the easement form he submits to the farmer, and his sincere, frank discussion at this point of negotiations can do much to avoid possible future misunderstandings. However, there are frequently complex legal and engineering questions involved.

For instance, the ordinary power line easement grants "the right to enter upon the right of way (ordinarily a given distance on each side of the center line) and to survey, construct, maintain, operate, control, and us said transmission line and to remove objects interfering herewith." The farmer reserves "the right to cultivate, use, and occupy said premises for any purpose consistent with the rights and privileges above granted," and "which will not interfere with or endanger any of the equipment of the grantee."

But what about that word "consistent," the word "interfere" or the word "endanger"? Certainly the farmer can raise row crops underneath the line, or grain, even corn. But how about fruit trees or shade trees? Sometimes a farmer wants to build a shed, granary or house on the right of way. On the other hand, the power line operators may want to fence it, to cut trees down, to modernize their lightning protectors.

These are every-day problems in the operation of an electrical transmission line and relatively little precedent exists to furnish a satisfactory guide.

The Alabama Power Company[1] used an easement containing the general provisions (slightly modified) above quoted and "all the rights and privileges therein necessary or convenient for the full enjoyment of the use thereof for the purpose above described," also "the right to cut and keep clear all trees and undergrowth and other obstructions on said strip." Everyone was happy until farmer Collins (no relation to Tom) built himself a house 25 feet long, of which 15 feet was on the right of way. The wires cleared the top of the house by 25 feet. Farmer Collins didn't object to having the lines over his house and couldn't see why the company did. But it did. The court required the removal of the house, saying:

> "We think that there can be no doubt that the dwelling house resting in part upon complainant's right of way is an obstruction such as complainant sought to guard against when it took a grant of its right of way from Evans (landowner). It involves not only an obstruction to complainant's movements along its lines, but also is so located in its relationt o its power lines as to constitute a hazard of no small concern to both the complainant and the occupants of the building. Moreover, the situation shown by the agreed statement of facts is one which if acquiesced in by complainant may be expected under the peculair status of the law declared in S. A. L. R Company vs. Banks, 92 So. 117, to invite controversy as to the right and title of dfficult solution, such as any prudently managed business corporation would seek to avoid."

With reference to general farming purposes, the court said the owner "has the right to use such strip of land for any purpose which does not conflict with the paramount right of complainant, and subject to such rights, may cultivate the same, pass along, and across it and generally use it in any way which does not affect the right of the complainant herein."

Not all obstructions are houses. A farmer can certainly lay a loose wood plank on the right of way, or two or three, but when his pile of lumber gets to be 15 feet high, he has troubles. At last Kesterson did.[2] The wires broke ,and a fire resulted, destroying Kesterson's lumber. He sued for damages. The power company secured an easement from the owner containing generally the provisions above noted and also "to maintain gates at all fences crossed by said lines and to keep private locks thereon." Owner reserved "right to cultivate said right of way and otherwise use and enjoy the same." The court, refusing damages, said:

"We cannot conceive that any ordinary power line will stand perpetually without repair. This involves the necessity of hauling upon the right of way materials with which to maintain the line, such as posts, etc. How can this be accomplished if the right of way is obstructed by piles of lumber 15 feet high * * *? The phrase 'otherwise use and enjoy the same' should not be construed to let in every kind of occupancy 'otherwise' than cultivation for that would defeat the very deed. The 'otherwise' enjoyment clause cannot be construed to nullify or destroy the provisions of the deed itself."

Sometimes jurors ask embarrassing questions. In the trial of a condemnation suit in Kentucky,[3] where the power company sought a right of way, the jury asked the court if the land owner would have the right to bring coal and timber out over the strip of land condemned. The trial court answered the question, saying the company had "the exclusive right to said easement and privileges if it sees fit to exercise them." The appellate court reversed the case because of the answer to the jury and said:

"Use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and object of it will permit * * *. The land owners had a perfect right to use the strips sought to be condemned * * * in any way they saw fit, * * * including the removal of coal and timber from the remaining lands."

In Alabama, the Keystone Lime Company[4] maintained it had a right to remove minerals from the right of way for the power line. This contention was sustained by the court, saying:

"The condemnation proceedings do not touch the land ownership of the minerals on the strip, if there are minerals there, nor do they preclude the land owner from taking minerals therefrom, provided this is done in such a way as not to obstruct the use by power company of so much of the surface as it may now need or need in the future for the proper maintenance of its appliances for conducting electricity."

So far as the farmer is concerned, it may be stated that he is entitled to use the right af way, provided such use does not impair, obstruct or endanger the power line. What constitutes impairment or obstruction is, however, a question largely of fact, dependent on the facts of each case. No general factual observation or rule can be laid down.

On the other hand, the power company, too, is retricted in the exercise of its rights. The question sometimes arises whether the right of way for the line can be fenced where no specific provision for fencing has been sought or obtained. This point arose in Alabama Power Company v. Keystone Lime Company,[5] and the court said:

"Land owners have the right to cultivate the land, to go across it and generally * * * to use it in any way which does not affect the paramount right of the power company. Power company has no right * * * and there is in the nature of things no reason for it * * * to fence either side of the right of way."

And in Alabama in another case,[6] the court left no doubt in the jurors' minds when it said, "I charge you, gentlemen of the jury, that the A. P. Company acquires no right to fence either side of the right of way involved in this case."

Fencing is a matter which may be governed by state statute, hence the

statutes of each state must be consulted, regardless of decisions in another state. Generall speaking, unless the fee title to a definite strip of land is acquired, no right of fencing exists.

For crossing a lake, a lineman's dream is a bridge across the lake and immediately under the power line. For a while the dream came true, but the Public Service Gas and Electric Company's employees now have to row because a court required it[7] and the bridge was torn down. The power company used a general form of easement, and the lake owner reserved the "fee simple and full and complete enjoyment of and domination over the granted premises for any use or purpose not inconsistent." In the middle of the lake was an island which the power company connected to the mainland by a board walk 5 feet wide and 2,600 feet long, 3 feet above the surface of the lake. The bridge interfered with boating. The lake was too shallow for the power company crews to use a boat all the way. Result—the bridge was required to be dismantled and a channel under the line dredged for maintenance boats, and in return, the lake owner was required to keep the lake at a constant level. The moral to the story is that when a bridge is contemplated, specific permission for its construtcion and maintenance should be secured.

Trees cause trouble. Adam and Eve got in a jam because of a fruit tree, but the Wisconsin and Minnesota Light and Power Company had their day in court because of 108 shade trees.[8] Instead of the ordinary easement, the company took an option to buy a 50-foot strip of ground which contained the restriction, "trees to be trimmed as not to interfere iwth the lines." The contract provided that the money paid by the power company "is in full payment for all damages caused by the cutting of timber on all lands owned by us (landowner) which may be found necessary in order to leave the lines safe rfom falling timber." The court in sustaining the right of the farmer to recover damages for cutting trees, said:

"We think the provision with regard to the trimming of trees * * * is not unreasonable * * *. They unquestionably desired to retain the trees as far as was consistent with the opening of the electric transmission wires, and this desire was expressed in the words 'trees to be trimmed so as not to interfere with the lines'."

Where numerous trees are to be cut, it is advisable to specifically provide for the cutting, and omission of any reference to trimming is desirable. The case is of interest in another point in that the court indicated that a ten-foot clearance of trees by power line was a safe practice.

Apparently the court didn't have the same trouble in reading a contract in Texas.[9] The easement read, "to remove from said land all trees and parts thereof or other obstructions which endanger or may interfere with the safety or efficiency of said line or its appurtenances and the right to exercise all other rights hereby granted," and the court said, "Under that instrument, the company had the authority to remove trees or parts thereof that obstructed its right of way across said land and there would be no ground for recovery unlessit was sown ahat company had unnecessarily destroyed the trees." Of interest also also is the statement in the case that merely because the owner fears the wire might break and injure him does not entitle recovery of damages because of such fears.

Some states have specific statutes permitting the power company to remove all timber on the right of way and outside of the right of way such timber as may endanger the line by falling. This is the situation in Alabama. Few, if any, such statutes exist in other states.

The problems of a power company are not limited to trees and bridges. Frequently, it is necessary to modernize transmission lines by installing lightning protectors. This was the situation of the Pennsylvania Water and Power Company.[10] The company held an easement which did not describe the width of the right of way or the center line, but included the right 'of entry, construction, and operation, right to cut or trim trees,

and the right to build from time to time on said right of way such additional lines as they (power company) wish." The number of structures was limited to one. To decrease lightening trouble, twelve years after the line was built, the company buried in the ground 20 inches deep two wires connecting towers and outside of the former right of way (in part) and also static wires on top of towers but inside the right of way. The company sought an injunction against interference by the farmer. The court said:

"Where limits of right of way are not set by instrument, parties by acts can establish it to mutual consent, but once set, it cannot be changed at pleasure of grantee. It is clear that the placing of counterpoise in the ground and beyond the limits of the right of way as established imposed an additional servitude on defendant's land."

As to overhead wires,

"They do not interfere with the use of the surface and are located within the limits of the span of the power line. * * * These overhead lightnin resistors are within such limits and add no real burden on the land."

Other companies have left the description of their right of way uncertain.[11] When the company tried to alter the location of the line after it was constructed, the court said, "An indefinite right of way description once made certain by reason of location and construction of a line cannot be thereafter altered at mere pleasure of grantee."

In conclusion, it is suggested that the right to fence, to cut or trim trees, to construct a bridge, or to exercise any unusual powers in connection wtih a power line should be specifically provided for. Caution should be exercised in using one standard form of easement for all tracts of land crossed. In case some unusual structure is contemplated or a variation from the general scheme, the attorney in charge of right of way should be first consulted before contacting the landowner.

The foregoing cases referred to constitutee most of the decisions in the United States concerning line easements. Generally speaking such easements are subject to the same interpretation and subject to the same limitations as apply to easements of other types. Because of the relatively few years that power lines have been in use, little specific judicial precedent exists to guide the right-of-way engineer and attorney.

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1 Collins v. Alabama Power Co., 214 Ala. 643, 108 So. 868, 46 A. L. R. 1459 (1926).

2 Kesterson v. California-Oregon Power Co., 228 Pac. 1092 (Ore. 1924), rev'd on other grounds in 114 Ore. 22, 228 Pac. 1092.

3 Kentucky and West Virginia Power Co. v. Elkhorn City Land Co., 212 Ky. 624, 279 S. W. 1082 (1926).

4 Alabama Power Co. v. Keystone Lime Co., 191 Ala. 58, 67 So. 833, Ann. Cas. 1917 C. 878 (1915).

5 Ibid.

6 Alabama Power Co. v. Sides. 212 Ala. 687, 103 So. 859 (1925).

7 Lidgerwood Estates, Inc. v. Public Service Gas & Electric Co., 113 N. J. Eq. 403, 167 Atl. 197 (1933).

8 Brown v. Wisconsin-Minnesota Light & Power Co., 170 Wis. 288, 174 N.W. 903 (1919). (1919).

9 Central Power & Light Co. v. Johnston, 24 S. W. (2d) 762 ,Tex. Civ. App. 1930).

10 Pennsylvania Water & Power Co. v. Reigart, 127 Pa. Super. 600, 193 Atl. 311 (1937).

11 Tennessee Public Service Co. v. Price, 16 Tenn. App. 58, 65 S. W. (2d) 879 (1932).

# REAL ESTATE TRANSFERS AND THE TITLE BUSINESS

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*Here is a usable speech before almost any type audience. The Author, Mr. Dozier, has delivered this talk before service clubs and other groups. It has been well accepted and with some local adaptations, can be used by other members of the association who are called upon to "sell" the title business. Our thanks to the author for making this available to us.*—Ed.

I have been asked to come here today to tell you about the title business, a business in which I am engaged, that at sometime during the life of almost every individual affects them very materially.

The title business is connected with and a part of real estate transfers, that is to say the passing of title to real estate from one party to another. We often hear the question asked, why is the transfer of real estate sometimes complicated, and why are there so many laws affecting it? Automobile transfers and other similar transactions are very simple. The answer to these questions are very obvious. Land is about the only permanent property that man possesses, and there are many uses to which it can be subjected and many different kinds of interests that persons may have in it.

### Title to Real Estate

Throughout this talk I will refer to word TITLE or TITLES, therefore I should possibly explain what I mean by this term. Title to real estate means the interest or extent of the claims or right that a party has in a given piece of land. When we buy land we do not buy so many loads of dirt or buildings. We buy the right to use the land. We cannot totally remove or destroy it, but we can subject it to such use as we may see fit. However this use is conditioned upon the interest or title that we have. Interests in land that were created many years ago may still be just as alive and good as those created yesterday.

I am not much of a historian, and a mere history of dates, kings and wars has little of practical interest to me. But so much of history as shows the origin of the things that we do and affect us every day is, I believe worthy of mention.

Who invented deeds, wills etc. is unknown, but this we do know, that the transfer of real property in almost modern form can be traced to the very dawn of written history.

Written transfers of real estate can be traced to about 3000 years B.C. In those days deeds and other similar documents were written on clay tablets. Most persons could not write their names and they used seals for signatures, and in cases where the individual did not have a seal he used the print of his thumb nail.

These clay tablets were, after being laboriously written and signed or sealed, baked in order to avoid changes. Many of these have been found in historic ruins and are now in museums.

The form of these early instruments were strikingly similar to present day forms; for instance listen to this form of a recently written will.

I John Brown of ..... County, Kansas, do hereby declare this my last will and testament.

I give devise and bequeath all my property to my beloved wife Mary as her own absolutely to hold or dispose of as she may see fit so to do.

I hereby nominate James Smith my partner as the Executor of my estate.

Witness my hand this ..... day of ....., 1935, at Topeka, Kansas.

With this short modern form of will note the similarity of this will executed in Egypt in 2548 B.C.

"I, Uah, give to my wife Sheftu, the woman of Gesab, all things given to me by my brother, Ankhren. She shall give it to any she desires of the children she bears me. It is the deputy, Gebu, who shall act as guardian of my son. Done in the presence of these witnesses, Kemen, decorator of Columns; Apu, doorkeeper of the temple. Second year, Amendment IV.

Plato, the philosopher of ancient Greece, seems a hazy sort of figure until we read his will a very real and human document which took effect at his death in 347 B.C.

"These things has Plato left and bequeathed. The farm of Hephaestiades, it is forbidden to sell or alienate, but it shall belong to my son Adimantes. Further, I give to my son three mines in cash, with three due me from Euclid the gem engraver. I free from slavery Diana, but Tychon and Appoloniades shall continue the slaves of my son, etc.

In present day wills there is often inserted what is known as a contest clause the purpose of which is to prevent certain persons from contesting the will. This can also be traced to early wills. The following will written in about 600 A.D. contains a contest clause:

"I Flavious Pauli of the school of couriers, son of Paul of blessed memory, wish and direct that Cyria, the wife who has been joined to me, shall inherit her clothing and ornaments found in my house, together with the half share of the said house which was sold to me by Epiphanius. I wish Manna shall have the remaining share and the small spoon and two chests. (I wish that if Cyria my wife proceed against this, my will, she shall take six solidi of gold.) I have requested these witnesses to insert their testimony after my signature."

Early deeds were somewhat similar to present day forms. Notice in the following Greek deed executed in the first century B.C. the modern way of describing property, you will also notice a careful description of the parties:

"In the Reign of Ptolemaios there was sold by Pamonthes, aged 45 years, red haired and with a scar on the cheek, out of piece of level ground 8000 cubits of field, bounded South by Royal Street, North and East by lands of Periclides, West by the house of the Tagai. It was bought by Nicheldes, the less son of Azos aged 40 bald headed for sixty pieces of brass, the seller securing the validity of the title etc."

Quite recently I ran across a modernized story of a transfer by King Solomon dated 1110 B.C. which read something like this:

"And it came to pass in the land of Israel when all the earth was smeared with the Begats, that the Queen of Sheba a right Royal Jane and fair to look upon withal, did signify her intentions of paying a visit unto Solomon, and great were his preparations therefor. He dug deep into his coffers for gold and oilver and precisus stones wherewith to pay the fiddlers and dancers. And lo, in thus putting on the dog, Solomon became exceedingly low in jack as he called unto him a Scrivener cunning in the ways of the law and said unto him I have sold unto Hiram, King of Tyre the timber lot in Section 16 Canaan Township in order to replenish my coffers. And the Scrivener did thereupon prepare a deed in the form prescribed by law. And King Solomon signed the deed and told the Scrivener, go ye unto Hiram and deliver unto him the deed and bring me the jack forthwith. Wherefor the Scrivener delivered the deed unto Hiram who summoned his counselors and bade them give the deed the once over. The counselors did so, and advised Hiram that the spouse of Solomon should unite in the deed and relinquish her dower. These tidings the Scrivener brought unto Solomon who was exceedingly wrought thereat and raged and tore his hair and bitterly cursed the counselors of Hiram whom he called cheap schysters and jackleg lawyers, because Solomon had 700 wives and 300 concubines, and the right of dower was scattered all over the length and breadth of the

land. And Solomon bade his Scrivener to obtain deeds from all these skirts to satisfy these scurvy lawyers, and shake a leg for bill collectors do haunt my palace. And for forty days and forty nights the Scrivener drove his chariot through all the land and gathered all the signatures of the wives both legal and otherwise, all of whom did sign except Sarah an Ammonite who held out for one hundred shekels and a new hat. And Solomon was greatly incensed at Sarah as he summoned his chief headsman and said unto him, put on thine axe an edge keen, even as the blade of Gillette, and go ye unto Sarah, the Ammonite and cut off her inchoate right of dower. And thus the title was quieted to the timber lot in Section 16."

I mention these Ancient Transfers of Title to show that the rights of private ownership of real estate has been firmly established since the beginning of written history.

**Transfer of Title In England**

As most of our laws and customs came from England or were made to avoid some condition that existed under British rule, it might be well that we glance briefly at the condition of real estate titles existing in that country about the time of the Birth of America.

Since the Norman conquest in 1066 the title to all the land in England was vested in the crown. In the 16th century or about the time that America was being founded England was operating under a system known as the FEUDAL SYSTEM. Under this system grants of land were made by the crown to various persons of nobility who were known as over-Lords. They in turn parceled the land out to the common people in small tracts. The over-Lords were paid for the use of the land by service and produce. These grants were made to the over-Lords by the King for military service. The common people were merely tenants or what we might speak of today as leaseholders, and seldom did a commoner ever become the owner of real estate.

One of the principal determinations of our forefathers was that in this new world every man should have the right to own property as his own absolutely to do with as he saw fit, which has proven, through a period of three centuries of American history, to be an essential to an independent and free people.

In the early days the transfer of real estate in America was quite a simple thing. Communities were small and most people were acquainted with one another and with each others business affairs. If the owner of a tract of land decided to sell, all he needed to produce to prove his title was his deed from the original owner who was commonly known to everybody. And in this transaction a deed was made to the purchaser and the deed from the original land owner was also delivered. Ownership of real estate was thus proven by the possession of various deeds beginning with the deed from the original owner. In a very few years this system became inadequate because old deeds were lost, misplaced or destroyed and title had to be proven by persons in the community acquainted with the ownership of the particular property. Another problem that made this system unsafe was the question of mortgage. There was no way to prove the existence of a mortgage other than accepting the word of the seller. It was discovered early in American History that some method must be devised to insure safety for those dealing in real estate. In 1640, in the Commonwealth of Massachusetts, there was passed an act which was the beginning of our present day system of title evidence. This act was known as the public recording system.

**The Public Recording System**

This act provided that every person who acquired an interest in real property must record the instrument through which he acquired title in a public recorders office if he desired to protect his interest, and that every individual desiring to purchase real estate or to acquire an interest therein had a right to rely upon the title as disclosed by the public record. The purpose of this system was two-fold,

first, to give notice to the world of ownership, mortgages or other claims on real estate. Second, to preserve the instruments themselves.

After the passage of this act if a person desired to purchase real estate he would go to the public recorders office and examine the various deeds, mortgages, etc., recorded there to determine the condition of the title to the property that he was about to acquire. In the first few years there being only a few instruments recorded, the task of examining the public record was not difficult. However, after a few years had passed, it was difficult for the average layman to determine the validity and meaning of the various deeds and other instruments of record affecting the particular piece of property in which he was interested. Therefore, it was necessary for him to call upon his attorney to examine the public record and to render him an opinion as to the condition of the title as disclosed by the public record.

This system of Attorney examining the record for prospective purchasers, mortgage lenders, etc., continued for a number of years. Finally, however the records became so voluminous that the attorney spent a great amount of his time in searching through the public records. Therefore, the Attorneys employed persons in their offices to search the records for them and to make copies of all instruments affecting the title to the particular tract in which they were interested, from which copies the attorney would render his opinion. This procedure naturally was expensive because each attorney who practiced the trade of writing legal opinions on real estate titles had to bear the expense of maintaining a party in his office for the purpose of examining and copying the record. The expense of this system retarded its use. Few attorneys examined titles because they could not afford the time of personally examining the records nor could they afford the maintenance of experienced persons for this purpose. therefore, many persons purchased real property without legal advice. and, in many cases, these unadvised purchasers suffered financial losses.

**First Abstracters**

Finally some enterprising young men founded the idea of setting up an office for the purpose of preparing transcripts of the public record for all the attorneys, mortgage lenders or other persons interested in real estate transactions. And this was the birth of the present day Abstract Companies and title men. Although many years have passed and many changes have been made, this system is practiced on virtually the same theory.

The abstracter of today is still a person or a company experienced in the art of examining the public record, and prepares for his clientele a transcript of the public records into a manuscript known as an abstract of title, which shows a complete and concise take-off of all the legal instruments and proceedings appearing upon the public records that affect the title to a given lot, tract or piece of land.

The public record of today is of considerably greater magnitude than that in the days of the early settlers. We still have the public recorders office, which, in this State, is known as the office of the Register of Deeds, in which all Deeds, Mortgages, Leases and hundreds of other legal instruments are filed and of record. In this County there are on file and of record some three quarters of a million instruments in this office.

The record of the courts have also become a part of the public records. In the office of the Clerk of the District Court of this County there are on file more than 57.000 cases of a civil nature, about 16.000 criminal cases, several thousand Mechanic's liens, and numerous other proceedings such as attachments, foreign executions, statutory tax liens, etc., any one of which may affect the title to any tract of land in this county.

The Office of the Probate Court is also a part of the public record in which office there are on file many thousand of each of the following cases: Estates of deceased persons; Estates of insane and incompetent persons and Estates of minors and cases of insanity proceedings, any one of which cases may affect the

title to any tract of land in this county.

The Records of the United States Court are a part of the public records. And there are many thousand civil and criminal cases, also Bankruptcy cases on file and of record in this court.

**Present Day Sale**

In order to more fully understand the present day picture, let us suppose John Jones is about to purchase a house and lot. The first thing we should advise him is that he is not buying a house and lot, HE IS BUYING TITLE THERETO and title is the right to use property in the manner that best suits the owner thereof. The manner in which he can use this property will depend upon the nature of the title that he purchases. Should it develop that the party from whom he buys has only a life estate, then he will be able to use the land only so long as his grantors shall live. If he intends to use the property for business purposes, a careful examination should be made to determine if the property is restricted against such use. These are merely two examples out of hundreds that may affect the use of a piece of property. Therefore, John Jones should examine not only the property but the title thereto.

As has been stated before, a purchaser of real estate or any party dealing in real estate has the right, subject to certain exceptions, to rely upon the public records. He must also remember that in relying upon the public records, he is charged with knowledge of every instrument or proceeding on the public records, whether he has actual knowledge of the same or not.

Therefore, our purchaser must examine the records in the office of the Register of Deeds, the office of the Clerk of the District Court, the office of the Probate Court, the office of the Clerk of the United States Court, and for the condition of taxes the office of the County Treasurer, in order to determine the condition of the title to the property that he is about to purchase. It goes without saying that he could not examine these records himself. Even if he had both the time and experience to make such an examination, he would not desire to risk his investment upon his own examination against which there would be no recompense, should he make a mistake.

Therefore, under present day custom, he is furnished with an abstract of title prepared by some responsible abstract company which is, as we heretofore stated, a complete and concise transcript of all instruments and proceedings on record in all the public offices heretofore enumerated. **You are to keep in mind, however, that the abstract company neither certifies nor expresses an opinion as to the condition of the title. The company merely certifies and guarantees the correctness of its showing of the public records.** If the abstract company has omitted or mis-shown the records, he is liable for damages resulting therefrom. After receiving the abstract of title, the prospective purchaser must satisfy himself as to the condition of the title. Most purchasers, because of the lack of legal training, are not capable of determining the condition of title as disclosed. Therefore, he should, in all cases, deliver his abstract to his Attorney for an opinion of title. And upon the opinion and advice of his attorney he makes his investment.

**My business, as you see,** is that of maintaining a comprehensive and complete system of indices of all records in the public offices heretofore enumerated so that we may, from time to time, when called upon, furnish our clientele with a responsible, complete and dependable title service. In every real estate transaction where an Abstract of Title is used, it is required that the Abstract be extended to the date of the transaction. In many abstract extensions there is nothing shown except a new Certificate re-dating the Abstract as of the time of the new transfer. The fact that there is nothing shown upon the Abstract does not indicate that the abstracter has not performed a service. A search must be made in all the offices of public record and the search is just the same whether anything is found or not.

In this explanation of the abstract

system, I have spoken to you only on the general rules. There are exceptions in all cases. Even though we have operated in some communities for nearly 300 years under the abstract and attorney's opinion system with reasonable safety, there are many things against which this system offers no protection. The right to rely upon the public records has some exceptions such as rights of parties in possession, easements for roads, passageways, sewers, etc., forgeries, falsification of records, missing and undisclosed heirs, undisclosed husbands and wives, questions of survey, mechanic's liens, violation of restrictions, instruments executed by minors, deeds delivered after death, false returns of service in court actions, interpretation of wills, and many other conditions that may not be disclosed by the public records. Losses by reason of such questions as these are frequent in large urban communities. In the older communities, abstracts have become rather lengthy and voluminous and naturally require considerable delay in examination. For many years there has been a demand for a more adequate system, first, for better protection against losses, and a system to dispose of old questions that constantly arise in the early part of the title. Also, to dispose of a complete re-examination of the entire title at the time of each transaction.

About 50 years ago there was instituted a new system designed for this purpose, this system is known as Title Insurance. Under this system, the whole responsibility of title is undertaken by the title company and the title company, instead of preparing abstracts, issues a policy of insurance guaranteeing the title, which protects the owner or the mortgage company against losses whether they are disclosed by the public record or not. Title Insurance Companies are always under some State supervision and must maintain a certain capital stock and reserves as may be provided by the statutes under which they are operating. The Title Insurance Company maintains indices and a title plant the same as an Abstract Company. They examine the records and obtain opinions from approved Attorneys and make investigations of matters outside the records that may cause losses. And when they are satisfied that the title is marketable and safe from attack, they issue a policy of title insurance in an amount equal to the value of the property guaranteeing the party insured against attack or losses by reason of defects in title, reserving unto themselves the right to defend in court at their own expense any attack made upon the title and should they lose, they will pay off the successful claimant or the party insured up to the face amount of the policy.

After a title is once insured, it is never re-examined back of the date of the original policy and old objections in title are eliminated. This system does not remove either the Abstracter or the Attorney from the title field. It merely shifts their responsibility from the public to the title insurance company.

Quite often persons remark that the Abstract and Title business must be a dry and uninteresting business. However, those of us in the business find much of interest which I think is fairly well explained in an excerpt from a poem written by a member of our profession, which reads as follows:

Making abstracts is a dry—prosaic
calling well we know,
Delving daily into records—made a
century ago,
Tracing wearily the title—from the
Patent to date,
Thru the maze of suits and transfers
—that obscure and complicate;
Yet for us there's fascination — in
thus working in the past,
And on all the seemingly drudg'ry—
there's a kind of glamour cast,
For there's poetry and romance—
running thru the tangled chain,
And there's written in the record—
much of human joy and pain.
For, like Gibbon and Macaulay,—
we're Historians, in our way,
And we bring to light transactions—
of a gone, forgotten day,
True, we only sketch the outline,—
but behind it all there lies

Quite a bit of human interest—that
our fancy well supplies;
And we love to let that fancy—
freely roam and weave a tale
About every deed and mortgage,—
into each judicial sale;
Delving thru the Court proceedings
—we find interwoven there,
Couched in formal, legal lingo,—much
or sorrow and despair,
And we live again thru all the trials
—of folks of long ago—
Running thru the chain of title—
there's a deal of human woe.

# EVEN UNTO THE PERIPHERY OF THE SKY

By CHARLES F. FENNELL, *Manager,*

*Savannah Branch Office, Lawyers Title Insurance Corporation*

*Savannah, Georgia*

The "Jet Age" may cause title men to look skyward, but how high we cannot predict. The "Air Age" brought with it many legal problems and the "jet age" consequently involves the title lawyer to a greater extent than he has heretofore visualized. With the advent of the B-47 jet bombers and other jet propelled planes, claims for damages to property have resulted in recoveries against the Government because of the damage from the flight of those planes over the property of the claimants. As a result, avigational easements are being obtained by the United States of America over property adjacent to airfields.

Not long ago we read "Lots of Air—A Subdivision in the Sky" which presented the problems of the title men in determining rights in air space. The United States Government is now faced with the problem of acquiring rights to fly B-47 bombers and the newer B-52 bomber over adjacent properties from airfields such as we have at Hunter Air Force Base at Savannah, Chartham County, Georgia, and title men are helping to acquire the easement rights and title companies asked to guarantee them.

As the residential area of metropolitan Savannah grew toward the south, the moving of Hunter Air Force Base brought it into the vicinity of some nice subdivisions. With the coming of the jets and the B-47 bombers, the need arose for longer glide paths at the end of longer runways. Then about 1953 the United States Government began the acquisition of avigational easements over those adjacent properties within the flight path, with the specific purpose of removing the tops of some tall pine trees which might obstruct the free passage of aircraft. The Government did this by selecting the properties concerned, obtaining title evidence and filing its notice of condemnation and declaration of taking.

In those proceedings it sought to take the following interest:

> " . . . the right of ingress to and egress from and passage on and over the lands . . . along with the right to cut, trim, fell and remove trees extending above a glide angle plane . . . . . for the flight of aircraft at an angle of fifty (50) feet to one (1) with the ground in those portions of land . . . . . which lie in an approach zone surface area having the shape and location . . . . . all as set out in said complaint."

Apparently there was no plan at that time to extend this procedure to all property lying within the flight path that might be affected by the flight or passage of planes. However, other property owners filed actions for damages against the Government, some of which have resulted in settlements or stipulations of agreements between the parties. The agreements specify that an easement is to be granted the Government for a stated consideration, which easement grants


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to the Government the right of way for the free and unobstructed passage of aircraft over the approach zone area, more particularlyy described in the following instrument between the owners and the United States.

The estate granted is a perpetual and assignable easement and right of way for the free and unobstructed passage of aircraft in, through, and across the air space about the approach zone surface area and glide angle plane, hereinafter described; also, the continuing right to clear and keep clear the said land of any and all obstructions infringing upon or extending into or above the glide angle plane. The easements and rights hereby granted include the continuing right to prevent the future construction or erection of any building, device or structure or the future growth in height of any tree or trees, or of any and all constructions of whatsoever nature, built, constructed or created by any future act or action of any person of said described land, infringing upon or above the approach zone surface area as hereinafter generally and specifically defined; and for this purpose that is, for any trees planted or transplanted, or structures erected or created subsequent to tis date, to remove same, that is the right to remove such trees and underbrush, and to demolish and remove such buildings, structures or obstructions infringing upon or extending into or above said zone, whether located on or extending over and amove described land as lies within said approach zone; together with the right of ingress to and egress from and passage on and over said land for the purpose of effecting and maintaining such clearance; reserving to the Grantor such use, rights and privileges in said land as may be exercised and enjoyed without interference with or abridgment of the rights hereby granted.

The runway approach zone surface area and glide angle, within the provisions of this easement are definitely defined as follows:

**Approach Zone Surface Area:**

The runway approach zone surface area, being the area for which this easement is granted, is a trapezodial area lying beyond the eastern end of the runway and more particularly described as follows:

Beginning on a 1500 foot base line lying equidistant on and at right angles to the projection of the center line of the runway 1,000 feet from the East end thereof, and extending upward and outward as hereinafter described for glide angle, and increasing in width from 1,500 feet at the base line to a total width of 4,000 feet at a distance of 10,000 feet, measuing horizontally from the base line, the width being equally divided between the projected center line of the landing strip affected.

**Glide Angle:**

The glide angle plane or the ascending line of demarcation defining the extent of this right of flight and easement rights in the Grantee, commences at the base line of the above described approach zone surface area at the ground, or specifically at an elevation of 27.7 feet above mean sea level, rising upward and outward at a ratio of 1 foot vertical to every 50 feet horizontal for a horizontal distance of 10,000 feet.

Lawyers Title was called upon to guarantee to the Government that it had title to such easement rights whether acquired under the condemnation proceedings, by purchase or acquired by stipulation in the suits for damages. Originally, the Government was satisfied to obtain those easements where possible obstructions in the flight path might exist. Since a number of suits for damages to property in the flight path have resulted in recoveries in favor of the plaintiffs, the Government has begun what seems to be an extensive acquisition of easement rights over additional lands lying within the flight path of the planes, even though the

area defined in the easements is much above the height of the tallest pine trees. But even the acquisition of such easement rights by the Government might not free it of liability for damages to the property over which the easement is acquired or free the Government from liability for damages to the remainder of the property owned by the individuals, which damages result to the remainder from the taking of a part of it.

There is a leading case on this subject of passage of planes over adjacent property which explains briefly the doctrine of law concerned. It is the case of United States vs. Causby, 328 U. S. 256 and the following is quoted therefrom:

"Under the old common law doctrine a landowner not only owns the surface of his land, but also owns all that lies beneath the surface even to the bowels of the earth and all the air space above it even unto the periphery of the sky.

"Under this doctrine any erection over the land of another, or any passage through the air space above it, is a trespass . . . . .

"However, especially since the days of airplanes, this common law doctrine has received substantial modification. But even so, there can be no doubt that today a landowner owns the air space above his land as completely as he does the land itself or the minerals beneath it, at least insofar as it is necessary for his full and complete enjoyment of the land itself. So, he may erect buildings on his land to any desired depth or height, subject, of course, to necessary police regulations, and, subject, of course, to the right of eminent domain, he may prohibit the erection over it of any structures of any character or the passage over it of anything that interferes with his right to light, air, view, or the safe and peaceful occupation and enjoyment of his land. **Smith v. New England Aircraft Co.,** 270 Mass. 511, 170 N. E. 385, 69 A. L. R. 300 and others.

"Under the facts of this case there can be no doubt that defendant has committed numerous trespasses upon plaintiffs' property. It has traversed many times the air space above their property at such an altitude and with planes of such a character as to seriously interfere with plaintiffs' use and enjoyment of their property, even to such an extent as to make it necessary for them to abandon it as a chicken farm.

"A trespass upon the property of another, however, does not ordinarily constitute a taking, but if it is sufficiently frequent or if there is otherwise shown an intention to continue it at will, such continued trespasses or intention may amount to a taking, if they destroy the owner's use and enjoyment of his property. **Hurley v. Kincaid,** 285 U.S. 95, 103; and others:"

We are entering into a phase of titles that will ever become larger as our country becomes more and more populated with airfields, missile bases and other types of aircraft. Although it was easily discernible that the easements acquired by the Government as mentioned above were unencumbered, it is conceivable that there will come a day when we will need to be highly skilled mathematicians or engineers to determine whether the air space is free of encumbrances and whether it is an exclusive right-of-way with which we are concerned.

MID-WINTER CONFERENCE

AMERICAN TITLE ASSOCIATION

Claridge Hotel, Memphis, Tennessee

Feb. 9-10-11, 1958

# CLOSING THE DEAL

*This amusing account of the impressions emanating from a real estate closing came to us from L. W. McIlvaine, Vice President of Louisville Title Insurance Co., Louisville, Kentucky. It is taken from their regular monthly bulletin, THIS TITLE INSURANCE BUSINESS. We are appreciative of the opportunity to reprint it here together with the introduction as contained in the bulletin.—Ed.*

Mr. B. M. Atkinson, a columnist for The Louisville Times, closed his real estate transaction in our offices and shortly thereafter wrote a most humorous article in his regular column concerning "closing the deal." We thought that perhaps his article would be of interest to you and we are therefore reproducing it in full.

**DOWN DRAFTS**
**By B. M. Atkinson**

I've just gone through a mysterious ritual known in real estate circles as "closing the deal." In other circles it's known as "knotting the noose." I'm not sure about what transpired but I gather that in 20 years I will own a house, if I'm not careful. The only change in my status is that I can stop worrying about the landlord and start worrying about the sheriff.

There were five of us seated around this table peeking at one another over the mountain of legal documents that were going to make me the exclusive property of the F.H.A. for a couple of decades. From the amount of paper on hand it looked like we were going to renegotiate the Louisiana Purchase instead of transfer a house and lot.

My agent, Gordon Denny, 1926 Winston Pl., wasn't much help. He has been suffering from mental ulcers ever since he tried to explain to me how a thing called "interest" worked; so rather than have his condition aggravated we agreed beforehand just to ignore one another during the ceremony.

* * *

The presiding lawyer — a Colonel Hough — seemed to be representing the Louisville Title Co., the F.H.A., the United States of America, the Commonwealth of Kentucky, the welfare of Jefferson County, the natives of Clarendon Ave., and the people opposed to the peddling of malt beverages and vinous liquors in residential areas. I represented the housing shortage.

After Denny assured Colonel Hough that I would be able to sign my name despite the dazed expression on my face, we got down to mortgages. Just as a gesture they let me look at the papers before I signed them. Of course, if you read every paper that you have to sign the mortgage will be overdue before you get through.

The best thing to do is just go ahead and sign anything they shove at you—unless it has a dollar sign on it some place.

* * *

But even after you've read it, you have to have eight years of law school and an apprenticeship under Frankfurter to know what's going on. No document is legal unless "wherefores," "therefores" and "pinafores" are playing leap frog across the page. If the document comes out so that a layman can understand it, its author is disbarred.

My average was one out of 50. I understood the one that asked whether I was an American citizen. If some of the previous papers I signed didn't deprive me of my citizenship, I answered that one right.

* * *

While the discussion involved sums of four figures, I managed to curb my stupidity. When it got down in the two figures bracket—the fees involved in "closing the deal"—I asked "why" despite frowns from my intellectual superiors.

All I got for my answer was something about if an Indian would show up and claim that I was on his land I would be backed to the hilt by the Government. Provided, of course, the Indian didn't belong to the United Mine Workers.

When it was all over, everybody seemed to get papers to take home except me. I wound up with a certified check for $1.20. I don't know what it's for and I'm not stupid enough to ask.