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VHMCP ALTERNATIVE TO DIRECT GOVERNMENT LENDING

JOSEPH B. GRAVES, *Executive Secretary,*
National Committee Voluntary Home Mortgage Credit Program
Washington, D.C.

One of the fields in which the threat of Government intervention looms large is in the market place of mortgage finance. The abatement of the threat of direct Government lending is the most pivotal problem confronting the private lending industry. There is no prescription for how this may be accomplished save by deliberate directioning of mortgage funds by lending institutions. To this end the Voluntary Home Mortgage Credit Program was proposed to the Congress by private organizations active in the home financing and home construction fields. VHMCP came into being with the Housing Act of 1954.

The grand design of VHMCP is to expand the availability of Government insured and guaranteed loans by private institutions to credit worthy applicants in small communities and to minority groups, and thus to eliminate any need for direct mortgage loans. Its operational focus centers upon a more equitable flow of mortgage funds to credit starved areas and classes of Americans. Thus, inherent in VHMCP are vast potentials for serving the needs of special groups, thereby making special lending by Government unnecessary.

Until recently, many there were who wondered whether VHMCP, involving as it did voluntary lending by private lenders, could ever survive. An assessment of past achievement and VHMCP's potential renders an unmistakable verdict. That verdict is that VHMCP holds the promise of staving off direct Government lending by equalizing housing opportunities in credit starved areas. A basic objective of VHCMP is to demonstrate that private lending institutions can be relied upon to make mortgage credit generally available throughout the country and that, therefore, no real justification exists for direct Government loans. Generally speaking the Program has been remarkably successful in achieving this objective. Referral by the Veterans Administration of direct loan applications to VHMCP—and resultant VHMCP loans in credit worthy cases—has largely rendered it unnecessary for VA to make direct loans.

The VHMCP has now been operating for nearly three years. Through December 31, 1957 the Program received 85,825 applications for mortgage assistance. As of December 31, 1957 the VHMCP had been instrumental in locating over $280 million of FHA-insured and VA-guaranteed loans. It had helped 30,305 families obtain a home. Through December 31, 1957 the Program placed 5,516 loans amounting to $50,000,000.00 mortgages for individual members of minority groups in metropolitan areas.

The income of home buyers who secured financing through VHMCP and the prices of the homes they bought indicate that the Program has been of service primarily to families of modest means who buy low priced homes. The purpose of the loans which have been placed also indicates that the Program has been providing the type of home financing which is generally difficulty to obtain through normal channels and would be most difficult to obtain in small communities or by minority group members.

All loans made under the Program are made by private lenders. It is clearly understood that lending institutions participating in the Program are not expected to make such mortgage loans unless the loans meet sound credit standards. It is also understood that the amount of mort-

gage credit available throughout the country depends upon the flow of national savings. Accordingly, the Program is not designed to produce an increased overall supply of mortgage credit, but rather to see that a more adequate share of the existing supply of mortgage credit is channeled into small communities and to minority groups.

The Program is administered through an organization consisting of a National Committee and 13 Regional Committees. The National Committee has the HHFA Administrator as Chairman and includes two representatives each from life insurance companies, mutual savings banks, commercial bankers, savings and loan associations, mortgage companies, builders, lumber dealers and real estate boards. It also has advisory members from the Federal Reserve Board, Federal Housing Administration, Veterans Administration and Home Loan Bank Board.

In addition to loans placed directly through the Program, another major accomplishment is that VHMCP has done a great deal to change the lending patterns of the nation's financing institutions. Areas and groups served for the first time through the VHMCP have gained access as a part of many lenders normal business. Once a lender goes into a small community to make VHMCP loans, there is a natural tendency to be interested in other loans there in order to reduce cost.

The mortgage lending dimensions of VHMCP lenders are challenging and rich with promise. It is, I think, an auspicious omen of profound significance to the future of private mortgage lending that VHMCP is having a strong influence in meeting one of the real problems of present day home mortgage financing; i.e., how to bring mortgage funds and financing facilities into small communities.

The success of the VHMCP is due in large measure to the intelligence and zeal with which industry representatives have directed the Program. VHMCP's success has required the cooperation of financing institutions. In participating in the Program, lenders have not been fulfilling a duty, but making the best possible investment to insure their own security and that of the whole private lending industry. Widespread participation in VHMCP by all types of private lending institutions is the strongest possible bulwark against Government lending. I have enough confidence in the spirit of American enterprise to know that mortgage lenders in the future will pursue policies which will hold the promise of fulfillment of VHMCP's purpose; i.e., alternative to direct Government lending.

The VHMCP, like the private investment market it reflects, cannot be expected to provide much VA money so long as the 4½ percent interest rate for these types of mortgages is retained. At that level, VA mortgages are not competitive with other forms of investment. The FHA rate of 5¼ percent is certainly more attractive to private lenders. For this reason, a significant shift to this type of financing on the part of home buyers is under way. VHMCP can play an important part in this movement toward FHA financing and can guaranteee that small communities and minority groups will get a reasonable share of FHA funds available.

Title companies, abstracters and attorneys specializing in real estate law should know about VHMCP and should make every attempt to take advantage of its services. Of course, VHMCP is not designed to interfere with established loan connections. Requests for FHA loans should be submitted to VHMCP only when loans from local lending institutions are not available.

The Lawyers Title Insurance Corporation, The Chicago Title and Trust Company, The Title Insurance and Trust Company of Los Angeles, the Title Guarantee and Trust Company of New York and the Union Title Company of Indianapolis have already publicized VHMCP to their various offices and examining attorneys. By utilizing VHMCP's facilities these title companies have been able

to obtain FHA loans for their clients from VHMCP lenders.

It is VHMCP's desire that every title company, abstracter and attorney specializing in real estate law be acquainted with the real value the Program can be to them in locating FHA loans in small communities and for minority groups. American Title Association members who want to learn more about VHMCP and its mortgage assistance functions should: (1) write directly to the Executive Secretary of the VHMCP Regional Committee serving their state; (2) ask the Executive Secretary for a list of eligible VHMCP areas and a supply of applications.

VHMCP has demonstrated that it is a needed and effective mortgage tool in the housing field. There are many in the country who do not have access to Government backed loans. As members of ATA you can contribute to the growth of your own business and at the same time assist VHMCP in making a strong case for the proposition that private resources are serving credit short areas.

The appropriation of public funds for mortgage lending cannot as a practical matter reach proportions which will solve anything. On the other hand, an intelligent directioning of private capital can provide a very workable solution. This is the job that the VHMCP has undertaken. VHMCP's record is a proud one and one that both Government and private industry can be proud of fostering.

VOLUNTARY HOME MORTGAGE CREDIT PROGRAM

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REPORT OF JUDICIARY COMMITTEE

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The plethora of case law and other-writing about federal tax liens, private liens and state and local tax liens in the last few years should leave no title man, be he lawyer or layman uniformed about the general impact and relationship of these liens, one to the other.

As committee chairman my recent disposition has been to mainly note those that seem to fill out some former areas of speculation (that is, mostly my own speculation).

For example, there has been some comment about the rights of the mortgagee, senior to a U.S. tax lien to claim priority over the U.S. lien as to fire insurance premiums and taxes which the mortgagee deemed needful to pay. In U.S. v. Lord, 155 F. Supp 105 (11-25-57), a district court found that the mortgagee could have his interest accruing after recording of the U.S. lien but that the latter lien had priority as to the premiums and local taxes. The case also mentions a related situation where the mortgage lien is prior to the U.S. lien, the mechanics is senior to the mortgage, and the U.S. lien is senior to the mechanics lien. For this spider web of U.S. and state law and public and private liens you will find of interest the case of Sams vs. Chicago Title & Trust Company, Ill. NE 2d 172-176.

Reminiscent of those loans junior to the H.O.L.C. loans of another era, which junior loans were held invalid, are those loans sometimes taken after a V.A. loan. In a recent California case, the maker of the note and encumbrance junior to the V.A. loan sued to cancel this paper, which represented an excess above the V.A. appraisal.

The owner of the junior paper claimed that since the maker thereof had become aware of his rights (i.e., that he did not have to honor the paper) in 1949, that the statute of limitations and laches barred his action filed in 1955 to cancel this paper.

The court, viewing the fraud and illegality as merely incidental, held that the gravaman of the action was one to remove the cloud of the illegal or voidable trust, and thus the statute of limitations did not run until a claim therein was asserted.

In Jefferson Standard Life Insurance Company vs. U.S., 247 F. 2d, 777, (Sept., 1957) the court, in reviewing a "free and clear" bankruptcy sale, and a referee's order as to the allocation of proceeds among lienholders held as follows:

(1) Jefferson Standard should first have the principal and interest secured by a deed of trust, (including post bankruptcy interest) and that

(2) The taxes of the county which came on as a lien after the trust deed, were junior to Jefferson, and should not be deducted from Jefferson's proceeds.

(3) That Jefferson's claim had priority over the later attaching U.S. tax lien.

The lower court had sought to deduct the county tax lien from Jefferson's funds. This all led to a discussion of lien priorities under California statutes and cases, and a determination that absent and statutory purpose or enactment by the legislature to allocate priority to tax liens over pre-existing mortgage or other contract liens, that such priority did not exist. The court said cases involving the effect of tax deeds were not relevant here.

I have earlier expressed my appreciation in Title News for the substantial help I am given by my Associate Council, Bruce M. Jones. I must again restate this apprecia-

tion for he selects and calls to my attention most of the cases in the U.S. District and Circuit Courts which are found in the judiciary committee pages. It is also my pleasure to call to your attention his contributions to the Saturday Evening Post such as the one on page 86 of the issue dated November 16, 1957.

In **Kirsch v. Barnes,** 153 F. Supp. 260 (1957), the landowner and a vendee executed a contract of sale as to the land. Acknowledgment did not occur as to the vendor. Thereafter, during vendor's efforts to sell the land to another party, the vendee caused a notary to affix his certificate of acknowledgment by the vendor to the contract and have the contract recorded (the acknowledgment as to the vendor sufficing in the state, to qualify the contract for recordation and constructive notice).

This recordation caused nearly two years delay in consummation of the record sale negotiated by the plaintiff, plus monetary recognition of the first vendee.

Plaintiff was not pleased by the recordation; hence this suit. To find a theory of damages, plaintiff hit upon the contention that it was not the valid contract that hurt him, but that the untrue acknowledgment that caused the delay in the record sale, and the consequent loss of interest on the sale price that he might have had.

The Court said in part:

> "But in setting forth his claim in this fashion, plaintiff misconceives the role of a certificate of acknowledgment. It, by definition, bears no relation to legal interests in property, but serves only to lend to the document, to which it is affixed, the aura of authenticity. As such, the false certificate of acknowledgment, by itself, could impart no disparaging imputation or innuendo against plaintiff's interests in the timber. To conclude otherwise would be to indulge in a series of tenuous syllogisms unwarranted by the California law.
>
> Futhermore, on the facts alleged by plaintiff, no legally protectible interest was lost by him as a result of defendants' activities. His rights against the defendants were no greater before the certificate of acknowledgment was drafted, or before the recordation of the contract, than they were after. That the defective recordation of the Barnes' contract hastened the discovery by plaintiff's prospective vendee of its existence, is of no aid to plaintiff; all that he lost as a result of such recordation was his power to conceal the existence of the Barnes's contract, which, so far as the record shows, was valid and binding as between the parties to it."

LEGAL DESCRIPTIONS AND THEIR EFFECTS ON ABSTRACTERS LIABILITY

RICHARD G. HARBERT, *Vice President,*
De Kalb County Abstract Company, Sycamore, Ill.

It was very flattering to be asked by the program committee to discuss a legal subject at this convention. However, after the invitation was accepted I realized that while a small town abstractor may be chief searcher, biller, janitor and bottle washer, he probably does not classify himself as a legal expert. Abstracter's liability as affected by legal descriptions was finally chosen as the topic of this discussion. This makes it legal as far as the Committee requirement is concerned, while still allowing a great deal of illegal room in which to navigate.

You are all aware of the general rules of conveyancing and description. Taking judicial notice of this fact, this discussion will be limited only to the potential liability of abstracters when dealing with latent defects. By this is meant such descriptions as appear regular and complete on their face, but because of extrinsic matters become ambiguous in actual practice.

The well established practice in real estate transactions today finds a seller or a borrower applying to the abstracter for such title searches as he may require in the particular situation. Because of this procedure, many abstracter's feel that there is a very slight risk that they will ever be held liable for errors or omissions in the abstract.

The Courts have been generous to us in their decisions and have consistently held that our liability is based upon contract, extends only to those persons with whom the contract is made and persons in privity therewith, and is subject to the time limitations imposed by the statutes of limitations for actions on contract. This contract, the Courts say, obligates us to compile the abstract with reasonable care and skill.*[1]

A leading case on this subject is that of Phoenix Title and Trust Company vs. Continental Oil Co., decided in 1934 and reported in 43 Ariz. 219; [29 Pacific Reporter 2nd Series, page 1065.] In this case the court summarized all the important cases on abstracters liability and concluded, "So long as it is held that the liability of an abstracter is in contract and not in tort, we are of the opinion that a third party, whose very existence
is unknown to the abstracter at the time he issues his abstract, may not sue for the negligence of the letter in preparing it."

In reaching this conclusion, the Court cited several cases where it was urged that if the Abstracter knew that it was the custom that abstracts were used for the purpose of making sales or loans, he was liable to an unknown party who did make a purchase or loan on the strength of the Abstract. The Court went on to say that in all of the cases where this was urged it was held that custom can explain but cannot make a contract and that under such circumstances the unknown third party had no right of recovery.[2]

Although the weight of authority is clear on this point, the Courts in some States immediately expanded the doctrine of privity of contract by various fictions and in so doing held the abstracter liable to a limited class of 3rd parties.

In the case of Brown vs. Sims decided in 1899 in the Supreme Court of Indiana and reported in 53 N. E. Reporter on page 779, the Court held an abstracter liable to a Mortgagee, who was not the applicant for the title service. The court arrived at its decision by virtue of statements by the abstracter to the Mortgagee and

1 (80 Iowa 237 (45 NW Rep. 539) Thomas vs. Schee.)
(See Hart McKillop Article "Title Insurance"—Title News—March, 1957.)
(Chase vs. Heaney 70 Ill. 268.)

2 (National Iron and Steel Co. vs. Hunt (1924) 312 Ill. 245 & others cited.)

actual knowledge of the Abstracter as to the person relying on the search.

The Court went on to say "It is very well known that the owner of real estate seldom incurs the expense of procuring an abstract of the title from an Abstracter except for the purpose of thereby furnishing information to some third person or persons who are to be influenced by the information thus provided. If the abstracter in all cases be responsible only to the person under whose employment he performs the service, it is manifest that the loss occasioned thereby must in many cases, if not in most cases, be remediless. Where the Abstracter has no knowledge that some person other than his employer will rely in a pecuniary transaction upon the correctness of the abstract, the general rule that his duty extends only to his employer must be maintained. How far exceptions ought to be countenanced we will not now undertake to say."

In the Phoenix Title Case, the Court concluded that custom and usage could not make a contract where none existed. It is not hard to agree with this. However, in the case of Currie vs. Syndicate Des Cultivators reported in 1902 in 104 Illinois Appellate on page 165, the Court stated "usage is a method of dealing adopted by those engaged in a particular vocation or trade, which acquires legal force because people make contracts with reference to it. The fundamental principal upon which the law as to usage is based is that it entered into and was part of the contract of the parties. Usage is evidence of the contract but cannot create a contract." The Court then said, "Custom is that length of usage which has become law."

In 1899, when the Brown Case was decided the Court quoted the then familiar procedures whereby the seller (who really needs no service) orders the Abstract which the abstracter knows is going to be relied upon by a 3rd party. This is still the common practice today.

I submit that we having acquiesced in this usage for over a period of 60 years, this usage has become the law by custom. Further that our contract with our employer is in fact to prepare an abstract in a skillful manner for his benefit and for the benefit of those with whom he may become linked in the chain of title to the real estate abstracted and who were in fact induced to accept the title relying upon the Abstract and the Abstracter's reputation for skill and accuracy.

When a seller contracts to sell realty and to deliver a merchantable abstract of title of that realty, to the contract purchaser, it is not the actual delivery which is the essence of this contract, but the Abstract and the title. Both must be merchantable. Hasn't the buyer complied with the maxim of "Buyer beware", by insisting in the contract upon the delivery of an abstract from a reputable and skillful operator?

I believe he has and that if such a case were properly argued in our courts today, an abstracter should properly be held liable for his errors and omissions to both his employer and those 3rd persons whom he might reasonably expect to rely thereon, and who in fact did rely thereon to their injury. In reality, this is our contract and therefore it is not a question of unknown 3rd party beneficiaries but rather what is the contract. We cannot hide behind technicalities and hope to stay in business very long.

I am not alone in this belief. In the Case of Bank vs. Ward 100 U. S. 195 in a dissenting opinion delivered by Chief Justice Waite and concurred in by justices Swayne & Bradley, it was said, "if a lawyer employed to examine and certify to the recorded title of real property gives his client a certificate which he knows or ought to know, is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find of record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found."

Assuming therefore, that we may be liable to the world at large and for all time when we compile an abstract, we should be very careful when describing the property to which our search is limited.

A search of the record implies not only an inquiry into the fact whether any instrument, purporting to be a Deed, mortgage or other conveyance of land, is on record, but also as to the legal effect of such instruments as found of record.[3]

When interpreting descriptions the Courts of this State hold a description sufficient if it can be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence.[4] It is the duty of the Court to give meaning to a Deed so far as the intention of the parties can be gathered therefrom.[5] But since the doubt in the application of the descriptive portion of a Deed to the actual land conveyed usually arises from the latent ambiguity which has its origin in parole evidence, such ambiguities must be solved by the Courts in the same manner. By resorting to such parole evidence, the meaning is made clear and understandable.[6]

Our duty as an abstracter is more stringent, however. The reasonable skill required of abstracters is measured as against the skill of other operators in his profession, rather than the skill of a reasonable man. This is tantamount to the highest degree of skill attainable.[7] We should describe the property under examination in such a way as to negate the possibility of any ambiguity, either latent or patent. It must be our purpose in describing the property abstracted to eliminate all others from consideration and to point this out by appropriate notes or in such a way that it is clear and unmistakable to the Attorney examining our Abstract.

One very d a n g e r o u s problem caused by poorly defined boundaries is that of overlapping descriptions. When dealing with metes and bounds descriptions, the danger seems to be so apparent that the surrounding reference Deeds are inserted by most abstracters as a matter of course and captions are generally drawn very carefully referring to boundaries and monuments contained in the reference deeds. This is good practice.

Overlaps may also be caused by reliance on surveys and plats. In the case of Westgate vs. Ohlmacher, 251 Ill. 538 our Courts said "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the Government Surveys as of any." Because of this situation there are hidden risks of which many are not aware. Let us assume, an owner of a quarter section purportedly containing 160 acres as shown on the Government Survey decides to sell it off in halves. Since the consideration for the conveyance would usually be dependent upon acreage, it would be natural to see Deeds conveying the North 80 acres of the quarter Section to one purchaser and the South 80 acres to another. If the quarter section in fact has only 158 acres, the second conveyance will overlap upon the property first conveyed. The same problem exists in subdivisions of lots, blocks and smaller tracts.

As an abstracter, we usually encounter the problem after the harm is done. When abstracting the second parcel conveyed, we should protect ourselves by inserting the earlier conveyance as a reference deed and following it with a note limiting our searches only to so much of the caption as does not fall within the tract first conveyed.

The problem of overlap would not arise if the second conveyance had conveyed the entire quarter section, but excepted the property first conveyed or had conveyed out the North half and the South half respectively.

But w h i l e conveyances of the North half and South half may eliminate the problem of overlap, they

3 (Lusk vs. Carlin (1843) 5 Ill. 395).
4 (Schmitt vs. Heinz — S. Ill. 2nd 379 — 1955).
5 (360 Ill. 518—Brunotte vs. DeWitt—1935)
6 (Patterson vs. McClenathan 296 Ill. 475 —Horn vs. Thompson—389 Ill. 176).
7 (Parker vs. Platt 74 Ill. 430, Ritchey vs. West 23 Ill. 385.)

may give rise to another problem. What is the intent of the parties?

If the tract in question is irregular in shape and not a perfect rectangle or parallelogram, the description of the North half, although legally sufficient as a description is ambiguous because the dividing line is not exactly fixed. Are we talking about the North half as

(a) measured along either or both side lot lines;
or (b) by quantity
or (c) by a line drawn at right angles to the altitude at the mid point in said altitude?

All of these methods of determining the property conveyed are correct. The resolving factor is the intent of the parties.

In still another situation, a description by halves is not clear. Supposing we find a government survey of fractional Section 7, which shows 100 acres in the Northwest ¼, rather than the full 160 acres. A conveyance of the West ½ of the Northwest ¼ will carry 20 acres while a conveyance of the East ½ will carry the full 80 acres.[8]

When dealing with lots in business districts or other areas where the property when improved can be expected to be completely covered by the improvement, a further word of warning might be appropriate regarding the use of descriptions of the North ½ and the South ½, even when lots appear regular, since by building to all lot lines, as the measurements appear on a plat of the lot in question, a person may find himself in fact, overlapping upon the property of another. In this regard, the rule applied by the Courts in Illinois is that if there is a surplus or deficiency in the actual measurements of a block, regardless of what the recorded plat shows, the surplus or deficiency is pro rated to all lots in the block. In the case of Nilson Bros. vs. Kahn, 314 Ill. 275, the Court held that since there was a proratable deficiency of 14 inches to the land of the complainant, and since, by reason of this deficiency, the plaintiff had in fact erected a wall on the land of the defendants, the defendants were entitled to make use of the wall in the erection of their building.

Any time we run into a description of this type, we should show reference deeds and devise appropriate notes. Each case will be different so there can be no standard treatment.

Another common problem arises when a description uses a monument, containing width, such as a Street or Railroad right of way as one of the boundaries. We all know that in this type of a description, if no contrary intent appears on the face of the Deed, and no other circumstances refute the intent the monument is the center of the Street or right of way. However, the Public, as a whole, is not necessarily aware of this fact. Therefore, they often interpret a Deed which starts at a Street and runs West one hundred feet as giving them a hundred feet of usable land. We know that this is not how the Courts would construe this Deed. In the Deed I am about to read, this exact problem was apparent, and because of the small size of the tract involved, the pinpointing of this tract was of the greatest importance. This particular Deed was recorded December 29th, 1869, in Book 114 Deeds, Page 183, in the Recorder's Office of Kane County, Illinois. It conveyed a small tract of property which obviously was of great value and importance. The tract was roughly 12 feet by 7 feet, rectangular in shape. The description used was as follows:— Commencing at a point 47 feet North from Fox Street and 68 feet West from Broadway on Lot 3, Block 12, running thence Westerly along J. C. James South line 12 feet to lands owned by William Treman and H. A. Albee, thence South along said Treman's and Albee's East line 7 feet, thence Easterly parallel with J. C. James South line 12 feet, thence Northerly to the place of beginning. It appears from other portions of the Deed that the parties involved at that time had trouble in describing

8 (Clark on Surveying and boundaries. 2nd Edn. Sec. No. 158.)

the use of the tract as well as the boundaries. The Deed continues: The parties of the second part agree that they shall build or cause to be built a three story brick privy 4 feet by 12 feet on said premises and that said privy should contain four distinct and separate apartments in each story, but that if said privy should not or could not be used as a privy for want of proper drainage or from any other cause, then in that case, the said premises were to revert to the parties of the first part.

I don't think any one will argue with me when I state that the location of everything described in this Deed should very definitely have been pinpointed.

Another problem occurs when we find lot lines running to the center of abutting streets or streams. This is usually indicated on the plat by dotted lines extending the side lot lines into the street or stream. When this situation exists, descriptions dividing the lot must be carefully drawn to express the intention of the parties.

It goes without saying that we must be as careful when describing exceptions from our captions as we are with any other description.

I have tried to highlight a few of the situations where, unless constant vigilance is maintained, we may find ourselves in trouble. The abstracter limits his search only to those matters which affect the property described on the caption of the Abstract. In the greatest number of cases, however, we are asked to abstract property as described in conveyances already in the record chain of title. Although an Abstract of Title is defective where the description of the land is inconsistent with the descriptions contained in the conveyances included in the chain of title,[9] an abstracter should feel free to construct a caption which is consistent, (if not identical) with the descriptions in the chain of title, but more important, a description which is consistent with the expressed intent of the parties. The title to realty depends not only upon the public records but also upon facts external to the records. We should, therefore, endeavor, when an order is placed to ascertain from the applicant the exact location and boundaries of the property which is intended to be abstracted. It then becomes the abstracter's responsibility to develop a caption in a brief and unambiguous manner which caption should conform to the record and the intent of the parties. It is our duty to include recorded plats in their entirety, insert reference Deeds, and such abstracter's sketches and notes as may be necessary and appropriate to place the inexperienced on guard as to the potential problems involved in the particular case.

Any thing less than this will be a failure to exercise the skill required of us and may very well result in liability.

9 (52 A. L. R. 1475.)

APPLICATIONS OF THE RULE AGAINST PERPETUITIES

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Akron, Ohio

A few years ago I did some research relative to the validity of a "limitation over" in connection with the conditions contained in a deed from A. and B. to the XYZ Church. The restrictions and provisions for forfeiture of title as contained in said deed were as follows:—"It is further understood and agreed that aforesaid Church the property hereby conveyed, to have and to hold for the use of the XYZ Church, and upon the express conditions that no organ or other musical instrument be used in connection with the worship or to be kept on said premises; also that no fair, show or festival be held on or about said premises for entertainment or raising money for the Church purposes, and that no society other than that of the XYZ Church, whatever their character shall be adopted by those using said premises. In the event of the introduction of any of the aforesaid items or any other not authorized by the The Testament the title to said premises shall be forfeited and same shall be and become vested in the person or persons of said XYZ Church who may be opposed to these things; and in the event of all the said congregation being in favor of any of these items the title of said property shall be forfeited and vest in the nearest brother in the brotherhood-at-large who may be opposed to the items herein referred to. This preceding clause to obtain regardless of anything in this deed that might seem to the contrary."

The XYZ Church outgrew the facilities of the Church building and had an offer from another Church for the purchase of the premises. But the purchasing Church did not want to take title to the premises unless the restrictions and provisions for forfeiture could be removed.

A and B would have done anything in their power to remove the restrictions and conditions, but as no right of re-entry or of reversion were reserved to them in said deed it was considered that any conveyance from them would be of no effect.

My brief on the subject, prepared for an attorney interested in the case, and which is written in the present tense and my beliefs as to what a court of equity would decree are as follows: "The question arises as to the nature of the conveyance created by said deed. There is no doubt but that a condition of some kind was created. Is it a condition subsequent or is it a conditional limitation? It seems to have more of the characteristics of a conditional limitation than a condition subsequent.

By common law, a condition subsequent annexed to real estate can be reserved only to the grantor or devisor, and his heirs. (See 10 R.C.L. pg. 664). In the instant case the grantors in said deed did not provide that the title would revert to them or their heirs, but did provide that upon the happening of certain events that the title would pass and be vested in certain persons other than the grantors in said deed. One of the characteristics of a conditional limitation is that, if the condition is not fulfilled, the title will pass to a third person. (See Thompson on Real Property, (Permanent Edition) Vol. 4, pg. 706). Some of the expressions commonly used in creating a conditional limitation were not used in the deed. Generally, the words "so long as" or "until" are used in creating a conditional limitation. These words are not used as such in the above mentioned deed. However, it could easily be implied that it was the intention of the grantors in said deed that the Trustees of the XYZ Church should have title "so long as" they did not permit an organ on other musical instrument to be used in connection with the worship. (The same could

be stated with reference to the other conditions mentioned).

If the condition in said deed should be construed as a conditional limitation then nothing is required to be done by the person or persons entitled to take upon the non-fulfillment of the conditions such as a re-entry etc. Upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim. (See Thompson on Real Property, (Permanent Edition) Vol. 4, pg. 706).

Under the theory that the conditions created by the above mentioned deed is a conditional limitation the title never could vest in the person or persons of said XYZ Church being in favor of the "items" mentioned in the conditions in said deed. For immediately upon the happening of the contingencies mentioned in said deed the title would pass to the **person or persons opposed to the "things" or "items"** mentioned in the conditions. This would be true in all cases except "in the event of all the said congregation being in favor of any of these "items" then the title would "vest in the **nearest brother** in the brotherhood at large who may be opposed to the items herein referred to." It would seem highly improbable that if the creed of the XYZ Church is opposed to the "items" mentioned in the conditions of said deed that there ever would arise a case where "all the said congregation would be in favor of the items opposed by the XYZ Church."

It seems to the writer that it would be almost impossible to determine who might be the "nearest brother" in the brotherhood at large. It would seem to be so indefinite that it would be impossible of performance and would therefore be void.

It will also be observed that the limitation over is to the person or persons opposed to the "things" or "items" mentioned in the conditions. It would seem that it would be almost impossible to determine definitely who such person or persons might be and that the conditions would be void for uncertainty.

It would also appear that the title would vest in said person or persons as individuals and not as trustees for the Church Society. This, evidently, was not the intention of the grantors in said deed. Thompson on Real Property (Permanent Edition) Vol. 4 pg. 706 states—

A condition followed by a limitation over to a third person, in case the condition is not fulfilled, or there be a breach of it, is termed a conditional limitation. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry of claim.

Thomspson on Real Property (Permanent Edition) Vol. 4 pg. 710, states the following:

A grant to a religious society to hold so long as the society shall support certain specified doctrines, the deed reciting that when the land is devoted to other purposes "then the title of said society or its assigns shall forever cease" creates a determinable fee. The grant in such case is not upon condition subsequent, and no re-entry is necessary; but by the terms of the grant the estate is to continue so long as the real estate shall be devoted to the specified uses, and when it shall no longer be so devoted, then the estate will cease and determine by its own limitation. Cited, among others,

First Universalist Society v. Boland, 155 Mass. 171.

The case of the First Universalist Society v. Boland, 155 Mass. 171, decided in 1892, was an action by the the Church for specific performance of a contract of sale (of certain real estate) made by the Church Society with the defendant. The defendant claimed the church did not have good title to the premises.

In 1854, Joseph D. Clark had conveyed the land to the Church Society by a deed which contained the following provisions:—"to have and to hold to the said First Universalist Society and their assigns, so long as said

real estate shall by said society or its assigns be devoted to the uses, interests, and support of the Christian religion embraced in the Confession of Faith adopted by the General Convention of Universalists held at Winchester, New Hampshire, in the year 1803. And when said real estate shall by said society or its assigns be diverted from the uses, interest, and support aforesaid to any other interest, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons, and such persons shall be the legal representatives of any of such persons at the time the same so vests as aforesaid in the following undivided parts and proportions, to wit: Stephen M. Whipple 140/1000, Alanson Cady 140/1000, John F. Arnold 114/1000, Joseph D. Clark 70/1000 (Here follows the names of 37 others after each of which was placed a fraction in thousandths)".

The Court held: That a qualified or determinable fee only was conveyed to the society, with a limitation over which was void for remoteness, then leaving the possibility of a reverter in the grantor and his heirs; and that the society could not convey a clear title.

It will be noted that in the Boland case, supra, in which the facts are similar to the instant case, the court held that the limitation over was void for remoteness.

19 Amer. Jur. 579 states:

It is well settled that an executory limitation tending to create a perpetuity is in point of law void. The test by which to ascertain whether a limitation over is void for remoteness is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. The character or nature of such contingency may be varied to any extent. But it turns on the single question, whether the prescribed contingency or event **may not arise until the time allowed by law within which the gift over must take effect.** The future event or contingency on which the limitation over is to take effect must be such **as must happen,** if at all, within the period allowed by law.

Cited: Church in Brattle Square v. Grant 3 Gray (Mass) 142.

The case of Church in Brattle Square v. Grant, et al., 3 Gray 142 (69 Mass.), decided in 1885, gives a very fine description of estates on condition, etc. In discussing the difference between a fee on condition and a conditional limitation the court in the opinion says in regard to the possibility of reverter which is left in the grantor in a grant of a fee on condition the following: "The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates, so as to prevent their alienation, and thus contravene the policy of the new which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature.

The limitation over being executory, and **depending on a condition, or an event which may never happen,** passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect."

The syllabus from which the facts can be inferred is as follows:

A limitation by way of executory devise, which may possibly not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years (adding, in case of a child then en ventre sa mere, about nine months) afterwards, is void, as too remote, and tending

to create a perpetuity. A devise, subject to a conditional limitation void for remoteness, **vests an absolute estate in the first taker.**

A house and land were devised to the deacons of a church, and their successors, forever, "upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and d w e l l in said house, during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew, J. H. and to his heirs forever." Held, that the devise over to J. H. and his heirs was a conditional limitation, and not upon condition; that it was void as being too remote; and that the deacons and their successors took and absolute estate in fee.

In the opinion, the Court states the following:

If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period (rule against perpetuities) the limitation is void.

The devise over to the heirs of J. H. is therefore void, as being too remote. The event upon which the prior estate was to determine, and the gift over take effect, might or might not occur within a life or lives in being at the death of the testatrix, and twenty-one years thereafter. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all.

(Note. The same situation exists in the instant case).

The Court cites and follows Welch v. Foster 12 Mass. 97 in which case the grant was by a deed instead of a will.

In the above case the church decided it was expensive to maintain the house and land in question and wanted to sell the same. The heirs of J. H. claimed if a sale was made the conditions would be broken and the house and land would be vested in them.

Note: The above case would be very helpful in preparing a petition to declare a limiation to be void.

70 C. J. S. 575 under the heading "Rule against Perpetuities" states the following:

The rule is in force in all of the jurisdictions in which the common law prevails except where modified or superseded by statute, and is the same both at law and in equity.

It has sometimes been said that, in order to avoid ambiguity and to express more clearly the nature of the rule against perpetuities, it should m o r e properly be designated the "rule against remoteness."

At page 581 the following is stated.

It is not sufficient that a future interest may or probably will vest within the limits of the rule against perpetuities, nor on the other hand, is it necessary, in order to call for the application of the rule, that it will probably or certainly vest beyond such limits; a possibility that it may do so is fatal to its validity.

The common law rule against perpetuities which was applied in the case of Church in Brattle Square v. Grant, supra, is in effect in Ohio.

R. C. Sec. 2131.08 (G.C. 10512-8) states in part the following:

No interest in r e a l or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. X X X X. It is the intention by the adoption of this section to make effective in Ohio what is generally known as the c o m m o n law rule a g a i n s t perpetuities. (Eff. Jan. 1, 1932).

I believe a court of equity could and would decree that the restrictions and conditions set forth in said deed, were imposed and created only to endure so long as the real estate was owned by the Trustees of the XYZ Church and that in case the real estate was sold by said Trustees the restrictions and conditions would not follow the land.

I also believe that a court of equity

will decree that the limiations over mentioned in said deed are void for remotness.

I also believe that the decree in an action in equity, brought by the present Trustees against the grantors in the above mentioned deed and a few persons who are opposed to the things mentioned in the conditions including the minister and including some one who might represent the nearest brother in the brotherhood opposed to such things, would be binding upon future members. (See the case of Graham v. Ransahous, post.)

In the case of Graham v. Ransahous, 11 O.C.C. (N.S.) 145, decided, March 23, 1908, by the Circuit Court for Scioto County and approved without opinion on March 8, 1910 in 82 O.S. 394, the court held:

> 4. Where one of two existing factions in a church society, or the trustees or representatives of said such faction obtains a judgment of a court having jurisdiction of the parties and subject-matter against the other faction, determining the rights and interests of said parties in and to the church property of such society, such judgment if unreversed is res adjudicata as to all matters so determined in all subsequent suits between said two factions so long as they continue substantially the same, and this is so notwithstanding the trustees, representatives and individual membership of said factions may change.

14 Amer. Jr. 615 under the heading of "Duration" of restrictive covenants states the following:

The restrictions will not be construed as extending for a longer period of time than the nature of the circumstances and the purpose of their imposition would indicate as reasonable for the duration of their enforcement without undue and inequitable prejudice to the property rights purchased and acquired by the original grantee and his successors in title, subject to the restrictive covenants.

Cited: Barton v. Moline Properties 121 Fla. 683, 164 So. 551, 103 A.L.R. 725.

It would seem that an action in equity should be instituted by the present constituted trustees of the XYZ Church against the persons mentioned above to construe the conditions set forth in said deed.

If the Court should determine and decree that the condition mentioned is a conditional limitation and that the provisions relative to the vesting of title in the "person or persons of said XYZ Church who may be opposed to these things" or the nearest brother or the brotherhood at large are void for remoteness and that the restrictions and conditions mentioned in said deed should only operate so long as the premises are owned by the Trustees of said Church, then it would seem that the present Trustees could maintain an action to sell the premises in question free from the said restrictions and conditions.

Note: An action in equity was had in which the Court found and decreed that the "limitation over" contained in the above mentioned deed was void for remoteness and that the XYZ Church was the holder of the fee simple title to the premises subject only to the restrictions in said deed and that the restrictions, because of the unusual nature thereof, should be operative only so long as the premises were owned by the XYZ Church.

The names have been changed in the above brief to avoid any unnecessary publicity as to the Church involved.

COMING EVENTS

Date	Convention	Place
April 8-10	California Land Title Association	Biltmore Hotel Phoenix, Arizona
April 11-13	Oklahoma Title Association	Western Hills Lodge Sequayah State Park
April 17-19	Texas Title Association	Brownsville, Texas
April 27-29	Arkansas Land Title Association—50th Anniversary	Arlington Hotel Hot Springs, Ark.
May 4-6	Iowa Title Association	President Hotel, Waterloo, Iowa
May 4-7	Atlantic Coast Regional Title Insurance Executives	Skytop Club Skytop, Pennsylvania
June 19-21	Colorado Title Association	The Crags Estes Park, Colorado
June 29-30	Michigan Title Association	Grand Hotel Mackinac Island, Mich.
August 1-2	Montana Title Association	Helena, Montana
Sept. 21-26	**Annual Convention—American Title Association**	**Olympic Hotel Seattle, Washington**
October 12-14	Nebraska Title Association—50th Anniversary	Town House Omaha, Nebraska
November 3-6	Mortgage Bankers Association Convention	Conrad Hilton Hotel Chicago, Illinois

TITLE NEWS, 1958 INDEX

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CODE OF ETHICS

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The Title Profession having become such a vital and integral part of our country's economy, there are imposed on each member of the American Title Association obligations above and beyond those customarily required of participants in ordinary commercial pursuits and a code of ethics higher and purer than ordinarily considered acceptable in the market-place, to the fulfillment of which the Title Profession is dedicated. Each member of the American Title Association shall be ever zealous to maintain and improve the quality of service in his chosen calling, and shall assume personal responsibility for maintaining the highest possible standards of business practices, and to those purposes shall pledge observance and furtherance of the letter and spirit of the following Code of Ethics.

FIRST

Governed by the laws, customs and usages of the respective communities they serve, and with the realization that ready transferability results from accuracy and perfection of titles, members shall issue abstracts of title or policies of title insurance only after a complete and thorough investigation, founded on adequate records and learned examination thereof, and shall otherwise so conduct their business that the needs of their customers shall be of paramount importance.

SECOND

Every member shall obtain and justifiably hold a reputation for honesty and integrity, always standing sponsor for his work intellectually and financially.

THIRD

Ever striving to serve the owners of interests in real estate, members shall endeavor (a) to facilitate transfers of title by elimination of delays and unnecessary exceptions and (b) to make their services available in a manner which will encourage transferability of title, provide adequately for obligations which they assume in connection therewith and afford a fair return on the value of services rendered and capital employed.

FOURTH

Members shall support legislation throughout the country which is in the public interest and will unburden real estate from unnecessary restrictions and restraints on alienation.

FIFTH

Members shall not engage in any practices detrimental to the public interest or to the continuing stability of the Title Profession.

SIXTH

Members shall support the organization and development of affiliated state title associations founded and maintained upon the Principles set forth in this Code of Ethics.

SEVENTH

Any matter of an alleged violation of the principles set forth in this Code of Ethics may be submitted to the Grievance Committee of the American Title Association.