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TITLE NEWS

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INSIDE STORY

A fundamental precept of public relations and advertising necessarily involves explaining the nature of one's business. In the title business this is just as basic as in any other. Mr. Laurence J. Ptak, President of the Cuyahoga Title & Trust Company, Cleveland, Ohio, did an excellent job in a 3x5 pamphlet which he distributed to customers and made available to the public. "Why a Title Plant?" carried here with permission is a fine example of public relations and advertising, not to mention it as an interesting explanation of the beneficial reasons for a title plant.

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It is not often we are privileged to carry discussions on title insurance losses, their causes, and what can be done to avoid them. It was a pleasant surprise to come upon a panel discussion of this and related problems carried in the 1956 convention proceedings of the Idaho Land Title Association. A formidable panel of title experts presents some sound discussions and we are pleased to be able to carry them in this issue. We recommend "Losses — What Causes Them and How to Avoid Them."

* * *

Through the courtesy of the Louisville Title Insurance Company and particularly Mr. J. C. Graves, Vice President, we carry a paper which we entitled "Reflecting on Easements Appurtenant." It is taken from a bulletin published and distributed by the company to agents and customers and presents a compact treatment of a comprehensive subject of interest to all.

From our capable chairman of the ATA Judiciary Committee, Mr. Wendell Audrain, of the Security Title Insurance Company in Los Angeles, we are privileged to present his observations of interesting law problems and recent court cases. It is the "Report of the Chairman of the Judiciary Committee" and contains points of interest for title people everywhere.

* * *

From the publication known as "Title Comments," issued for the use of attorneys by the Realty Title Insurance Company, Newark, New Jersey, and edited by Maurice A. Silver, we are pleased to carry "The Immateriality of the Index." This paper by Mr. Silver presents some lucid and provoking observations about what we know to be the "record chain of title."

* * *

The late Melvin B. Ogden, of the Title Insurance and Trust Company, Los Angeles, was ranked among the most outstanding authorities on real property law in the country. And many considered him without peer. We recently discovered his paper on "Encroachments Upon Adjoining Land as They Affect Marketability of Title" which for some unknown reason we have not published before. We are proud to include this paper in this issue, though it was prepared and delivered in 1952. It concerns a regularly recurring problem and is the type of writing which belongs in every title library.

WHY A TITLE PLANT?

LAURENCE J. PTAK, *President*
The Cuyahoga Title & Trust Co., Cleveland, Ohio

(An explanation of the title plant operation in pamphlet form sent to customers with the following letter:
Dear Friend:

"PLANT" is a most interesting word.

To the palaeontologist, PLANT describes the primitive mosses and lichens, the earliest life on earth.

To the geologist, PLANT represents the vegetation that was impounded ages ago into our present coal and oil deposits.

To the botanist, PLANT means all the myriad forms of flowers and fruits and grasses and grains which the good earth nurtures.

The manufacturer sees in his PLANT the buildings that house the engines that turn the machines that spin out his products.

Even J. Edgar Hoover has his PLANTS in the persons of those who are "Communists for the F.B.I."

But to the Title Man, PLANT means something quite different from these. The enclosed booklet tells a little bit about it.

I hope you will find time to read it.

Sincerely yours,

LAURENCE J. PTAK
President

A Title Plant, in the generally accepted sense, consists of the transcript of all public and many private records affecting the title to real estate so arranged, filed and indexed as to make them readily and precisely available for use in the examination of any particular title.

The public records which are transcribed for use in the Title Plant are necessarily filed chronologically and indexed alphabetically in the public office without reference to the land affected.

Perhaps an example of the principle involved in a properly constituted Plant will be helpful in understanding why it is built as it is.

Every single parcel of land on earth is altogether unique. While one lot may be very similar to another in shape, dimensions and appearance, it is distinguished from all others by LOCATION. Regardless of all other similarities, no two parcels of land can be confused with each other because they differ in this one salient characteristic.

Therefore it is altogether natural and feasible that, since each parcel of land claims individuality because of its location, and since the Title Plant contains records relating to every parcel in the overall area covered by it (in our case, all of Cuyahoga County), each item of record is identified to the particular parcel of land it affects and to no other.

For example: If one proposes to find John Smith, who lives in a large city, one determines where he lives or where he works—goes to that geographic place and there he finds John Smith. The seeker after John Smith does not walk down the streets of the city asking each man whom he meets "Are you John Smith?" This would be an altogether impractical way to find the gentleman.

Title examiners working out of a Title Plant examine titles in this very practical way. They go to a designated place in the Plant where all of the records affecting the parcel of land in which they are interested are located and there they find them. Such examiners are not confronted with the laborious and monotonous running of alphabetical and chronological indexes to find the particular references which they seek and which frequently escape them because of the monotony of such an operation.

The various items of public record by which the title is transferred, encumbered and otherwise dealt with are collectively known as the "chain of title". A Title Plant assembles that chain of title as to a particular parcel of land in anticipation of an examination of that title, and consequently time is saved when that examination is required. The examiner of the public indexes to the record necessarily looks at the indexes as to the names appearing in each succeeding link in the chain of title; consequently, he has no opportunity nor ability to find an instrument affecting his title indexed to other than the then current owner during the time which he is examining. As a result, so called "interloping deeds" which may have been filed for record to correct an error in a previous deed or to replace an omitted link in the chain are indexed out of name sequence and are not found.

This situation offers no problem to the plant examiner since all instruments relating to his parcel are indexed to his parcel regardless of name or time.

Since in the Title Plant instruments are indexed to the land they affect, it is necessary to determine what land they affect in order to decide where they shall be indexed. In the case of metes and bounds descriptions, this is done by reference to plats of the land affected, in the course of which it is readily determinable whether or not encroachments exist either by the subject title on an adjoining one or by an adjoining title on the subject one. This source of title trouble is by its very nature not ascertainable to the examiner of name indexes only.

Good Title Plant operation requires that the various functions of transcription, location, indexing and assembling be done by various specialists in those respective fields; consequently, the several operations are performed at a higher rate of skill than is used where a single person performs all of the functions of an examination from the public indexes, which is commonly the case.

Moreover, since the highest rate of skill is required of the title examiner, the plant operation eliminates from his duties the maximum of clerical operations which in turn permits, as a matter of economics, the employment of the highest type of examiner.

The simple transcription of the public record and housing it in the office of the title company is only the lesser part of maintaining the proper plant. The essence of the plant principle is the fact that the records contained therein are located and indexed to the precise parcel which they affect. Indeed, as between the preparation of the transcript of the record and the geographic indexing thereof, the latter is the most costly but the indispensable part.

When it is understood that in Cuyahoga County there are millions and millions of items of record affecting some half-million parcels of real estate, it can be readily seen that the process of assembling the items relating to a particular parcel is largely a matter of excluding from consideration all references not affecting the subject parcel. The examination out of a Plant, therefore, logically and naturally eliminates all other items of record except those needed, since they are indexed to the subject parcel, whereas an examination from the public indexes produces a similar result by a far more lengthy and haphazard method.

It is, of course, true that there are many items of public record which affect the title to land but are in no way identified with a particular parcel of land. These consist of judgment liens, divorce actions, estates, guardianship, etc. These items must necessarily be identified in the Title Plant by the name of the person affected since the item contains no reference to any particular land in which he may have an interest.

Here again the use of a Title Plant proves advantageous because of the impact of the long established legal doctrine of "Idem Sonans" (same sound). This principle of law requires anyone concerned to take notice of a reference to a name having the same

sound as the name being examined regardless of its spelling.

Public indexes are considered entirely in order if they accurately reveal a correct reference to the name of the person as it appears on the item being indexed. A proper title examination, however, requires that notice be taken of all references to a name of the same sound regardless of its spelling.

This problem is particularly pointed in a cosmopolitan area like Cleveland where many European names have slightly dissimilar spellings (Boczik —Bozyk—Bosek) but the same sound, and the situation is further aggravated when many such names are partially anglicized (Feingold—Finegold). Even some of the well known Anglo-Saxon names suffer from this affliction. Robert Ripley in one of his books quotes several dozen variants of the spelling of Shakespeare. Another common example is Burke, Burk, B u r c k, Berk, Berck, Birk, Birck, Byrk, Byrck, Bourke, etc., etc. It should be noted that while the above examples all have the same sound many would appear in quite different places in a strictly alphabetical index.

A Title Plant affords the opportunity of grouping all references to the various spellings of the names, indexed in adherence to the doctrine of "Idem Sonans", and in an orderly premeditated way which very few persons running a public index could be expected to have in mind at the particular time such an index is run.

Having custody of its own copies of the public records, a Plant Title Company can maintain those records on a current basis by culling from them such obsolete items as dismissed suits, paid judgments, etc. This culling results in a lessened volume of record to be examined and consequently expedites the production of any title order. No such culling of the public record is possible.

Altogether aside from the technical aspects of a plant operation, the existence of a Title Plant does afford, particularly in these times, a high degree of protection to the public which would be realized in the event of destruction of the public records as a result of some catastrophe.

Of like import, since the photostatic transcriptions for the Title Plant are made immediately after the instrument has been filed, the danger of loss due to future tampering with the public record is to a large degree precluded.

Finally, a Title Plant is a very expensive mechanism to build and to maintain. The very fact that a title company has invested in this costly aid to its operations is graphic proof of its purpose to produce the most accurate title evidence possible. It spends its money in this way so that it may afford the owner or investor in real estate the very highest degree of security rather than to spend it in the payment of the increased number of claims which necessarily result from a less exhaustive examination made without benefit of a Title Plant.

Nevertheless, most Plant Companies maintain generous reserves from which to pay losses arising, for the most part, out of errors induced by the human failings to which we are all heir but which a Title Plant minimizes.

LOSSES—WHAT CAUSES THEM AND HOW TO AVOID THEM

A Panel Discussion

Before the 1956 Convention of the Idaho Land Title Association

Members of Panel:

John B. Bell, Moderator, The Title Insurance Company, Boise, Ida.

C. A. Webber, Title Guaranty Company, Yakima, Wash.

Mark D. Eggertsen, Security Title Company, Salt Lake City, Utah.

Rhes H. Cornelius, Phoenix Title and Trust Company, Phoenix, Arizona.

John D. Binkley, Chicago Title and Trust Company, Chicago, Illinois.

Ivan A. Peters, Title Insurance and Trust Company, Los Angeles, Calif.

Mr. Bell: Ladies and Gentlemen: Of course we are all familiar with the most typical cases involving loss. These arise from missed judgments, missed taxes, missed mortgages and occur for a variety of reasons, most of them carelessness. Our own Company operation has been plagued with more from the standpoint of number of these cases this year than in prior years, though the amounts have been relatively small. Whether or not your own experience in connection with your operation parallels ours, I wouldn't know. Many of you people choose to pay this type of loss yourself without even reporting it to us. I have requested you in the past to always permit us to pay them where the primary obligation to the client is ours and then reimburse us if it is an ultimate liability of yours under our agency contract. This is the better practice from the standpoint of insurance statistics and should be followed.

For carelessness or human error, I know of no foolproof method of correction. People who are habitually careless should be fired, or moved to a job less critical, but we are all human and mistakes of one sort or another are just bound to occur—some of them causing loss. It is not with reference to this type of loss which this panel is to concern itself. We intend rather to deal with those sources of loss which might be apparent from an examination of the record if a more careful exam were made or if the examiner were vested with an insight amounting to clairvoyance.

For instance, we are presently defending an action upon this set of facts: "A" who had previously agreed to sell a 50 foot strip across his property for a roadway approached our agent with the statement that he was selling his farm and the agent should get ready to issue a preliminary report. He explained to the agent that the sale of the 50' strip was pending and that shortly he would present him with a description thereof which was to be excepted or deducted from the sale of the balance of the farm. Before this description was brought to him, demand was made upon the agent for the preliminary report on the farm by the seller's attorney. Having no description of the roadway, our agent reported on the farm as shown by the current condition of

the record. The seller's attorney prepared the deed from the report, the seller executed the deed, delivered it and it was sent to our agent for recording and our policy issued. Thereafter, the seller discovered his mistake. Thereafter, our assured sold to another on contract and while the record is not entirely clear as to whether or not our assured had notice of the proposed sale of the roadway, it is very clear that the subsequent contract buyer did not have notice. The seller instituted a proceeding to set aside the conveyance to our assured alleging that the execution and delivery of the deed was based upon a mutual mistake. Under a reservation of liability, we have assumed the defense.

I suppose the question of whether or not we could have avoided this loss in the first place goes to whether or not our agent owed a duty to the original seller or to his attorney to disclose to him facts which had once been told to the agent, but which on the subsequent date of the demand for the report may or may not have been true. For instance, how was our man to know that the seller hadn't changed his mind about selling the 50' strip apart from the rest of the farm? What could have been done to have prevented this litigation? Certainly the seller executed the deed conveying all of the property. If he didn't intend to sell the 50' strip he shouldn't have signed.

Mr. Peters: He certainly should have had his eyes open.

Mr. Cornelius: What's the theory under which he's bringing this action to have the deed set aside?

Mr. Bell: Mutual mistake.

Mr. Cornelius: You mean the buyer and seller both knew about this?

Mr. Bell: There is some indication that the buyer knew of the 50' strip.

Mr. Cornelius: Then I don't see how you have any liability under those conditions. If you can prove that the buyer had knowledge of this

Mr. Bell: Yes, that's true. As soon as it is so proven, we're going to withdraw from the case, but up until that time we're in the action—maybe we're stretching our duty to defend.

Mr. Peters: Is he trying to set aside the whole conveyance or set aside the conveyance only as to the 50' strip.

Mr. Bell: It will result in setting aside the conveyance only to the 50 feet, if they're successful in reforming the deed.

Mr. Cornelius: Did the seller make the contract to sell the 50 feet to someone else so he's obligated to perform?

Mr. Bell: That's right. So I think maybe if the buyer had notice, we wouldn't be liable at all.

Mr. Cornelius: I wouldn't defend it.

Mr. Peters: Inasmuch as it goes to the whole title, it seems to me that you have to stay in it until such time as it narrows itself down to the 50' strip alone.

Mr. Bell: We would prefer to defend it on broader grounds. We'd kind of like to control the defense—keep control of the action, so that if we lose the case, we can lose it in such a way as to preclude liability.

We have pending another case illustrative of the duty to defend. Off record facts developed that "X" was buying on contract a large part of a subdivision from the owner and reselling. A deed was placed of record by the seller's lawyer vesting title in the contract buyer, who in turn contracted to sell to others to whom we issued a purchaser's policy. By an action started early this year, the original seller brought suit against the original buyer to cancel the deed on the grounds that it was erroneously delivered for record by the seller's lawyer and had not been paid for. The purchasers named in the purchaser's policy issued by our agent were not named parties defendant. On the other hand, one of the assureds under such a policy, having notice of the pendency of the act, advised us of what was going on and we felt that because this deed was a necessary part of our chain of title, it would be wise to appear and defend.

In what manner could such a loss be avoided by no matter how careful a search of the record?

Mr. Cornelius: Well, there's only

one way and that's to have sent this business to your competitor. . . .

Mr. Bell: Unquestionably you fellows operating in Chicago and Los Angeles have had similar circumstances to set aside conveyances, haven't you? What do you do? Do you defend?

Mr. Peters: We have a little bit of an advantage in that usually they're handled by escrow. We look pretty carefully at that escrow. In this case the contract of purchase would be in it and if it was based upon value, we would make inquiry of our insured under that purchasers policy. We would go ahead and stand on the defense of the fact that he had no notice of the failure of consideration in the previous deed.

Mr. Bell: Of course that's our defense—no notice.

Mr. Cornelius: Don't you think, Ivan, that you have to defend this case because of the fact that the attack is made upon the delivery of the deed which is a matter I think we insure under our policy?

Mr. Peters: That's right, but your purchaser here is not named as a defendant in the action.

Mr. Webber: From a practical stndpoint, shouldn't you defend? Supposing the deed was set aside and you've already had a judicial determination of the facts setting the deed aside and then he moves in against your assured as contract purchaser, you don't have much of a defense in that second suit because you've already had determination of the . . . the deed has been declared void. You've got a whale of a tougher defense then.

Floor: The attorney who delivered the deed is the attorney who is now trying to set aside the deed.

Mr. Peters: Certainly to set aside as between those two original parties is one thing and it's another against bona fide purchaser who had no notice of the lack of consideration. Your doctrine of bona fide purchaser would protect the assured.

Mr. Cornelius: That's correct.

Mr. Peters: You'd have to investigate the facts behind every conveyance if this weren't the law.

Mr. Bell: That's right. Well, we felt we should be in there in the original suit because we're going to have a loss suit one way or another and we might just as well settle it initially.

Mr. Peters: Well, if there's any doubt at all as to whether or not this purchaser is a BFP, then you should be in the action all along the route.

Mr. Bell: That's right.

Mr. Cornelius: John, I have a situation which fits this pretty well I think. We had a case where Uncle John gave some land to his niece and the niece then borrowed some money on it. We insured the mortgagee. Later on, the Uncle came in and changed his mind and brought an action to set aside the conveyance to his niece, on the grounds that it was forgery, that he had never signed the deed to the niece at all and in that action the mortgagee was not made a party. We had no knowledge at all of the pendency of that action. That action was not very well defended we feel sure, and the jury held that there was a forgery, that he had not signed the deed and set aside the conveyance. Subsequently the mortgagee brought an action to foreclose the mortgage and of course the same defense was raised—it was a forgery and that the mortgage was no good too. We got into that case real fast and we bought the mortgage as soon as the question was raised and we proceeded to attempt to foreclose and defend this charge of forgery. We brought in some very good handwriting experts and the result of that decision was that the jury held it was not a forgery—it was a genuine signature. After that decision was handed down, the other parties moved for judgment notwithstanding the verdict on the theory that the thing was res judicata. The Court granted that motion. Here we were now with two separate juries going two separate ways. of course we have the matter on appeal before the Supreme Court right now but we bought a $8000-$9000 mortgage. We had to get in that case of course, but the peculiar thing is the matter you

mentioned where our assured was not made a party to the original action.

Mr. Bell: Rhes, wouldn't it have been better for you to have been in there in the original case? We're going to have to face the issue—we might just as well be in it now.

Also illustrative of our duty to defend is another case. A deed from a Father to a Son was placed of record in March, 1951. The recited consideration was $1 and other valuable considerations and the deed bears $13.20 worth of revenue stamps. On the 2nd of March, 1953, our agent issued an Owners policy to the grantee in the deed and a Mortgagee policy to the Federal Land Bank. In 1955, the grantor died and a few months subsequent thereto the Son was appointed his administrator. In December of 1955, a Sister of the grantee brought suit in the Federal Court to set aside the conveyance on the grounds of no consideration, duress, over-reaching etc. The grantee, our assured in the Owners policy, is the only party defendant; the Federal Land Bank not being named.

Had the Federal Land Bank been named a party defendant, we feel there would have been no question as to our duty to defend. Feeling that our policy does not go so far as to guarantee a man against the results of his own fraud, we originally tendered this defense back to our assured with a statement that in order to prevail the plaintiff in the suit would have to prove facts bringing us within an exclusion contained in the policy. More sober reconsideration considering the identity of the parties etc. etc. led us to believe that for a variety of reasons it would be better for us to involve ourselves initially and we are now defending.

How could our agent have avoided this apparent loss? Must he question every deed from a parent to a son? Would not the exposure have been identical had the deed gone to another than a son, and what do you do about that?

Mr. Cornelius: That's one of the insurance features of our policy I think. You have to defend it.

Mr. Bell: You agree that we should be in there in the initial case.

Mr. Peters: I don't.

Mr. Bell: You don't—you'd wait for the F. L. B. to make demand on us.

Mr. Webber: Don't you as a matter of fact when parties come in and ask for an Owners or Mortgagee policy think they have this in mind? Here he held title for 6 or 7 years. Certainly if the title isn't good your policy isn't going to make it good. We look with suspicion on such an order and as a matter of fact we steer away from them. You've got an entirely different defense for a mortgagee than you have in insuring an owner.

Mr. Bell: That's true, Chet, but you must remember that you're not on the counter in this case—the agent wanted the extra premium for the owners policy—but he shouldn't have written it.

Mr. Peters: Chet, what are you going to take for an answer? Let's assume that he asks him—did you pay your Father a consideration for this. He says yes.

Mr. Webber: That's right, but we just try to sell him on the idea that all he needs is the mortgagee policy and we avoid issuing an owners in these cases.

Mr. Bell: They don't need it—it doesn't help them any.

Mr. Peters: It's in your policy that you won't undertake to d e f e n d against his own fraud . . .

Mr. Bell: That's right, but we will have to defend the F. L. B. ultimately.

And then there is our famous Indian case with which most of you people are familiar and which has yet to be settled. In that case a hearing was held by the Indian Agent to determine the identity of the heirs of a deceased squaw, the owner of the subject property. This hearing resulted in a determination that "X" was the widower of the squaw and as such entitled to the land in question. Before issuing the Mortgagee policy, our agent was advised by the Indian Agent that the period of appeal from this interim decree, if it can be called that, had expired, and a day later our $10,000 Mortgagee policy was

issued. Unknown to us the Department of Interior in Washington had telegraphically granted a 20-day extension of time and within the period of extension an appeal was perfected resulting in a new hearing. At the hearing, a finding was made that not only was "X" not the widower of the deceased squaw, but that she'd had at least 4 or 5 other husbands since, if in fact she had ever been married to "X" at all, and that the property should have been awarded to "Z" and "Y".

I really don't know what moral could be drawn from this set of facts. Certainly I suppose you could conclude that you shouldn't deal with Indians at all or with Indian lands, but that if you have to, certainly, more than extra-ordinary precaution should be taken. On the other hand, it really wasn't an Indian that fouled us up. It was the Department of the Interior or some other branch of the Government and perhaps we should extend the precaution to include dealing with the Government.

Mr. Cornelius: We've had some of this sort of thing. We have had cases involving divorces granted by the Indian tribes.

Mr. Bell: That's right, that's exactly what happened here. They found that "X", if he was ever married to the squaw, had been divorced by tribal custom and she'd had 4 or 5 other husbands since.

Mr. Cornelius: Well . . . we just have a 15 minute prayer meeting every Wednesday morning in our office and pray that these things don't happen.

Mr. Bell: Now there's another interesting fact that arises in connection with this—this is now up on appeal before the Bureau of Indian Affairs and our assured now wants us to buy the mortgage. He says, "You're either going to lose the appeal in which case you owe me $10,000 or you're going to win the appeal in which case it's a good $10,000 mortgage and our people want the money now. We don't want to wait for the settlement of this appeal." Would you entertain such a tender of buying the mortgage?

Mr. Peters: Under these situations you never know when it's going to be final.

Mr. Bell: That's right. I haven't any idea it's going to be final when the ruling comes out of Washington. We can start out all over again in the Federal Court . . .

Mr. Cornelius: I think you're just stuck on this, John.

Mr. Bell: You think I should buy it. Well, he hasn't suffered a loss yet, has he?

Mr. Cornelius: Strictly speaking, no, but it would sure make your assured feel happy about it. It's going to be a good mortgage or a bad mortgage . . .

Mr. Bell: Pending that final ruling, it's just an investment for us. How about us making an investment on a bid title? Do you think we're permitted to do that under the insurance law?

Mr. Cornelius: No, but you could buy it on the theory that it's a loss . . .

Mr. Bell: But it's not a loss yet. You'd buy the mortgage?

Mr. Cornelius: I'd buy it. I want to say, John, that talk about carelessness of employees and making mistakes, I want to say this, that we don't have a single employee who has made a careless mistake. There many be a lot of ex-employees who made mistakes, but we don't have any present ones . . .

Floor: We wouldn't have any employees at all . . .

Mr. Bell: Formerly, most of our examiners were vice presidents—now we no longer make them vice presidents—they're just ordinary examiners. We made that change in the office for just this reason—we just can't afford having our vice presidents making mistakes . . .

Ivan told us all about Easements this morning and I am sure that without what I am about to say we're all conscious of them as being a source of exposure. Early this year we paid a loss on an easement for a pipe line omitted from the policy. The description of the easement was rather indefinite and the poster had done none too good a job of the post-

ing. However, it was on the books and a more careful searcher or one looking for trouble should have or at least could have picked it up. At any rate, the easement was there on the record and the pipe was in place and nothing was said about it in the policy. We therefore paid the difference between what our assured would have been able to get without the easement and what he was able to get with the easement excepted. It seems to me the settlement was $1500.

Another argument concerning an easement is pending, so far without result. The state of the record is this: A conveyance appears of record to two 40' strips joining in a "T" to the City. Nothing is on record with reference to any easements over the strips, nor is there any indication in the record at all either at the Court House or at the City Hall for what purpose the two 40' strips were acquired. "X" wanted to buy the property on both sides of the leg of the "T", so to speak, so the seller was induced to have the City vacate that portion of the strip. Our agent examined the minute entry of the council meeting and found the strip to have been vacated as a road and made no further examination of the vacation proceedings. Thereafter, the City executed and delivered a quit claim deed to this strip which was placed of record. The deed is silent with reference to any easement.

After the policy was issued, it was discovered that the City had a pipe line down the middle of this strip and had the agent make an examination of the vacation proceedings, he would have discovered that the ordinance vacating the strip as a roadway reserved the easement for the pipe line. Moreover, no pubilcation of the ordinance was made as by statute required, nor was the ordinance of vacation recorded in the County Records. Demand has been made upon us for the loss, if any, occasioned by the reservation, if any. I'm not sure how much reliance we're going to be able to place upon the quit claim deed from the City. Certainly any investigation as to the procedures preceding the issuance of the deed would disclose the existence of the easement, albeit nothing is in the county records. I am not sure this easement is "on record." Nor am I sure that it isn't. This loss could have been avoided by a more careful examination of the vacation proceedings, but with the quit claim deed from the City, is such an examination necessary at all?

Mr. Webber: Is that an ATA policy?

Mr. Bell: No.

Mr. Peters: I don't see anything in these facts that says the deed from the city was on record. Are we assuming that that was done according to proper resolution etc?

Mr. Bell: The minute entry in the council meeting authorizes the execution of the deed, and this is property for which there is no indication in the record that it was acquired for governmental purposes. It's just a conveyance to the city of two forty foot strips—maybe we should assume because it's a 40 foot strip that it's for a road.

Mr. Peters: Why a quit claim deed?

Mr. Bell: That's the practice—almost a universal practice in Idaho for the city to convey following the vacation proceedings. I don't think it does anything . . .

Mr. Cornelius: I don't know, we have always established a practice of actually reading or looking at the ordinance or resolution of vacation.

Mr. Bell: Certainly that should have been done and unfortunately had that been done, we would have discovered the easement which is now the subject of the controversy, but is the thing on record?

Mr. Peters: You mean the vacation proceedings?

Mr. Bell: No, the easement.

Mr. Peters: You say that conveyance appears of record for the two 40 foot strips?

Mr. Bell: The conveyance does, but you see our policy excepts from liability any easements not of record —not established of record. Now is this on record?

Mr. Peters: I certainly think so.

Mr. Bell: The ordinance isn't re-

corded.

Floor: The ordinance wasn't published.

Mr. Bell: No, the vacation proceedings are void.

Mr. Peters: If the vacation proceedings are void, thus any reservation must be void. Assuming that the deed is valid, that clears whatever interest the city may have, but they still have the pipe line on it.

Mr. Bell: It's in there on the ground.

Mr. Cornelius: You can't force a removal of it.

Mr. Bell: We're trying to arrive at a different solution in this case. We think that the pipe line that the city now has on this 40 foot strip is no longer necessary to their system and we're in hopes that we'll be able to convince them they should abandon it . . .

Mr. Binkley: How would you have avoided the loss?

Mr. Bell: Well, we would have discovered the pipe line had we examined the ordinance. We would also not have insured because of no publication — the thing was void. We wouldn't have done anything at all had a better examination been made.

Mr. Peters: Generally, John, they have an ordinance of intention to abandon and then there's a publication which sets a hearing and then they have the final abandonment. They usually set out the reservation in the intention ordinance and then reiterate it by reference back.

Mr. Bell: Well, our vacation proceeding is a little different.

Mr. Cornelius: John, I don't know what your vacation proceeding is here but the quit claim deed is no good is it, unless there is some proceeding in back of it?

Mr. Bell: It was authorized . . .

Mr. Cornelius: Yes, but you should have examined that authorization and not having done that, aren't you stuck with anything you would have discovered in the resolution? The quit claim deed by itself isn't worth a nickel.

Mr. Bell: I don't know. We're going to have to contend it is good because we haven't anything else to stand on. Unfortunately in examining to pick up the easement we would also have found that the vacation proceeding was void, so it makes it worse instead of better.

Mr. Wetherell: I'd like to elaborate on this thing a little more if I may. I can't accept the gentleman's idea about discharging employees who make errors because I'm it! Under these circumstances here I'd have to buy a hamburger stand. But here's what happened. We have a pipe line just out of the city and there was an L shaped strip that went down there which was deeded to the city in 1906. I was born in that town and I didn't know there was a pipe line down the strip. I thought the pipe line went the other way because I built a subdivision of 26 houses near there and I asked the City Engineer at that time about the main and he said I could hook on the main line which was a block away from this line in question. When this man came in wanting me to make a title search, (he was buying it under escrow), I did, and I told him those 2 pieces are divided by this old deed which grants that strip to the city. I had assumed that this was an egress and ingress for the water tank. He said, "I'll go to the city council and get them to vacate it," and I said I think that's the correct thing to do. He went to the city council and the city engineer told they vacated it. So later I went and examined the minute entry and here it was—the ordinance number so and so authorized by such and such and directing the city to execute a quit claim deed to the adjoining property owners. The city clerk has been in there 15 years. The city attorney is very competent. They conducted this proceeding. The mayor is perfectly reliable and as John said I didn't go any farther. The city clerk publishes an ordinance just as a matter of course as a grocery store stocks the shelves. That's simply a matter of course I know because I was city clerk in the City of Boise under 4 different mayors, so I didn't check on it and later he came in and he said, "Is that thing straightened out yet?" This was about 3 months

later. I said, "No, there is nothing yet of record to show that the vacation has taken place." The Assessor gets his information from me for his plats and therefore a deed is always given to evidence the vacation.

There was no easement of record and I didn't go behind that minute entry because I know those fellows had been in there and were perfectly reliable. Then I found about a month or six weeks after I'd written the title policy for $10,000 that there was no ordinance in the book. The number of this ordinance was 442 and the book jumps from 441 to 443—there is no ordinance No. 442. We looked all over the city hall for this but couldn't find it, so finally I ended up over at the city attorney's office. He had it in his file. I said, "Now what is the reason for holding this thing up—why wasn't it published?" He said, "We didn't know exactly where the pipe line was." So then after I found this out I went to the purchaser of the property and told him that he should notify—I mean the seller should notify the purchaser of it.

Another thing that had me fooled was that before I could insure the title the highway had been changed. I knew that the old description was inaccurate, and should be surveyed. This survey was made by a surveyor who has surveyed the entire town in the lower end many times and if anyone knew of that easement—and he was hired by the purchaser—he did because he knows every water line in town. So in my own mind I simply **knew** that there wasn't anything wrong. I wrote the title policy on the basis of his survey and the other investigations. Another thing, I've talked to 4 or 5 different attorneys including the city attorney of Boise and they claim that the quit claim deed is valid.

Mr. Peters: You're not going to get the pipe line out of there in any event, are you?

Mr. Wetherell: You may see me out there with a shovel one of these days . . .

Mr. Bell: I still think the proper way to cure it is to proceed to try to convince the city that they don't need it any longer and then let's do vacation proceeding all over again.

Mr. Wetherell: I've talked to the city council about that and I'm pretty sure they'll do it.

Mr. Bell: They don't need it now—in the new water system this easement no longer has any purpose.

Mr. Wetherell: In my mind that's ex post facto and it doesn't affect the present owner.

Mr. Bell: How do you mean?

Mr. Wetherell: I mean if they pass a new ordinance to vacate they'll have to show that easement.

Mr. Bell: No, not if they abandon the easement.

Mr. Wetherell: Well, they can't abandon it unless they change the center of the water system.

Mr. Bell: But they're in the process of changing. As soon as that's finished they no longer have any need for it. That, I think, is the best. At present the property is not being used, but sooner or later the buyer will use it and he doesn't want it burdened by this easement. Well, I sure hope we can get out of this one . . . Rhes, will you lead us in prayer?

Another case illustrating the danger of insuring too close to a decree vesting title involves an attempt to set aside an order confirming a probate sale. The facts were these: The husband died, his estate was probated during which the property was sold by the administrator to our assured. Subsequent thereto a guardian was appointed for the widow and he moved to vacate the sale and the order confirming alleging the incompetence of the widow at all times prior to, during, and subsequent to the administration. What case law we have in Idaho is limited to an out of state incompetent in which case the Court has held no personal notice of the sale is required. We suspect the Idaho law to require notice of a probate sale to an incompetent heir. On the other hand, the record was silent as to the incompetence. How, if at all, are we to protect ourselves against this contingency? The only thing that I could suggest would be that we wait—not only until the period of

appeal has expired on all decrees, but wait for the expiration of the period during which we can set aside the decree for inadvertence or excusable neglect. Do you want to do that?

Mr. Cornelius: How are you going to do any title business?

Mr. Bell: That's the answer.

Mr. Peters: Don't you have some period after which you can not set aside a sale?

Mr. Bell: Yes, sure, but if notice was required the sale is void. You can attack it collaterally.

We have searched the case law without finding one involving a title insurance company's liability in connection with a usurious mortgage. Our facts are these: The mortgage on its face showed an interest rate of 12% which certainly is usurious when judged by the Idaho law. However, a Mortgagee policy to the mortgagee was issued. Our policy insures against loss, among other things, "by reason of any defect in execution of said mortgage." Is usury such a defect?

In this particular case, I am sure I have discovered exactly how the loss arose. About 4:30 the agent for the mortgagee and the mortgagor came to our agent's office insisting that the mortgage be recorded and the policy be written that night. Because he was the only one in the office not already busier than the cat on the tin roof, he, our agent, undertook to record the mortgage himself, make the necessary court house search, returned to the office and wrote the policy himself. Had the recording been done by any of his employees, the usurious nature of the instrument would probably have been discovered. So, I am sure the moral of this case is—let the shoemaker keep to his last. That's something management shouldn't do isn't it? We're defending . . . I wish you experts would tell me whether we're liable on the usurious mortgage or not. The loan is good. He's just not going to be able to collect as much money as he thought he would collect in the mortgage.

Mr. Webber: Supposing he'd insured it for $10,000 and on execution sale it brought $200.

Mr. Bell: We don't insure that . . . Another thing, the mortgage was executed in Washington, the money was delivered in Washington, it's really a Washington transaction with Idaho security. Now, it's valid in Washington, and being valid in the State where it was made, we think it's valid in Idaho. But is usury within the terms of our policy?

Mr. Cornelius: I certainly don't know, John. I am sure you should have noted the usurious rate of interest and made an exception in the policy. We have the situation where we're handling an escrow and where we know of the usurious nature of the transaction but the instruments themselves don't disclose it. We don't know what to do in that kind of a case.

Mr. Bell: Nor do we, but I think it goes to the question of the validity of the lien. Is not the **lien** of mortgage all we insure and is not the lien valid?

Or is this a defect in execution? Now here on the face of the instrument it said 12% so there's no question . . .

Floor: What is the legal rate in Washington?

Mr. Bell: 12%. The note is valid in Washington. Now do you fellows have any ideas on this? I think we have no liability at all where the interest rate isn't specified in the instrument. We have no knowledge of the usurious feature of it. But suppose it is disclosed?

Mr. Peters: The escrow situation is entirely different. John, I don't think we'd pay on this one or even defend it. The lien is valid and I think we'd let the assured sue us.

Mr. Cornelius: John, I have a problem which arises frequently in our jurisdiction with reference to ATA mortgages. We will put the mortgage on record and make an inspection of the property and find that no work has been started so that we feel our mortgage was of record prior to mechanics liens, and then everything will go along fine and finally liens will be filed, and then they will bring

an action to foreclose and in the action they will name the mortgagee as a party defendant claiming that their lien is prior to the lien of all the defendants including the mortgagee. In some of the cases, the lawyers are not serious about it at all and the mortgagee was named because he doesn't know the situation. In others, they insist upon litigating the question. Maybe his liens are ahead of the mortgage and he makes us prove they are not. It's quite a nuisance to us because we're asked to defend these actions until we prove our priority of our mortgage lien. Have you had any of that kind here?

Mr. Bell: We've had several arising just exactly that way. I think we have one pending, haven't we, where we are making a defense, where I think we're all right. We have had several others where we've taken an indemnity because the mortgage was recorded after work had started and we now find ourselves unable to collect on the indemnity.

Mr. Cornelius: This has cost us a lot of money and we think we've taken all the precautions we can.

Mr. Webber: You can't just talk to the attorney and get him to dismiss?

Mr. Cornelius: Yes, sometimes we can.

Floor: What could you introduce as evidence to show that at the date of your inspection there was no work done? Could the worksheet be introduced that the inspector makes? Wouldn't it be good practice to carefully fill out the inspection sheet in all cases?

Mr. Bell: We're all supposed to because this sheet can be admitted in evidence under an exception to the hearsay evidence rule—business records rule— and you should always in an ATA policy fill out that sheet and file with the case. Of course the best evidence would be the inspector himself on the stand, but by the time the loss arises he might not be there. If you don't make a record of that inspection you're out on a limb.

Mr. Wetherell: I have one over home—it was an ATA policy without an Owners policy, and the man that furnished the cement, I had him file a waiver of lien, at the time because the construction had started before the mortgage went of record and there were 4 or 5 others who signed the same document. The owner didn't pay for the cement and the cement man filed a lien against the property and I said, "You signed this waiver." He said, "My attorney tells me that your contention that a construction mortgage filed ahead of a lien doesn't mean anything. Consequently that waiver that I signed doesn't mean anything.", Well as luck would have it, the man that owned the property had about a $3,000 equity in the house and I went to him and I told him that he did not have an Owners policy and under his warranty I would come back on him anyway If I had to pay the lien off, so he paid it off.

Mr. Bell: Well, in California the law is that if any work has started then a lien waiver from those who have already worked isn't enough because the whole scheme is started and any one who thereafter works or furnishes material is ahead of the mortgage, albeit that he works 90 days after the mortgage goes on record. We operate on the theory in Idaho that the law is the same here. I don't know. I hope it isn't, but . . . It's an exposure that you know about—you either take care of it somehow and decide to insure or you decide not to insure.

Mrs. Lucke: A fellow hauled some lumber on a place. I objected so he hauled it all off again. Now is that all right?

Mr. Peters: In California that's commencing work and **all** liens would be ahead of the mortgage.

Mr. Cornelius: That's a commencement under the laws of our state too.

Mr. Bell: I suspect it's a delivery of material and a commencement of construction under Idaho law.

Mr. Cornelius: We operate on the theory that if a person goes out on the lot and spits on his hands, he has started work. That's about the way the law is.

Mr. Webber: Supposing that the mortgage was delivered and recorded on January first. You inspected January first, and there was no material delivered on the site and they delivered it January second we'll say, and you were satisfied that your mortgage was ahead. Now supposing the house bogged down and they had to file a lien and they had had an architect. Well now the fact that the architect had a lienable claim, would that make the lien of the delivery of materials retroactive to the hiring of the architect?

Mr. Peters: We have one case that's pretty strong in California that said that even though there are negotiations to purchase lumber, for instance, or the architect with the plans, it is the act which gives notice to the world generally which a reasonably prudent examination of the land would indicate that there is a commencement of work which gives priority to liens.

Mr. Bell: Now you people in Oregon and Montana aren't a bit concerned with this discussion because in Montana and Oregon mechanics and materialmen have priority over mortgages—I don't care when they go on record. The Vermont Loan and Trust case from Salem, I believe, held mechanics and materialmen's liens to be prior to a mortgage which was on record 8½ years before they started this remodeling.

Mr. Cornelius: What do they do up there, just wait the period out?

Mr. Bell: I don't know what they do—just don't write an ATA, I suppose.

Mr. Webber: We have a Washington case where the house was finished—oh along this time of year. The furnace man came in and completed everything and they decided we can't test this furnace until fall that is with the weather warm it won't give a proper test, so they waited until around October when it was cold. The bill was never paid and the court held that his job was not completed until the furnace was tested and his lien period started running in October.

Mr. Cornelius: The only solution we have to these problems is the one we have — the Wednesday morning prayer meeting . . .

Mr. Bell: That helps! If no one else has anything better to suggest, we'll stand adjourned.

REFLECTION ON EASEMENTS APPURTENANT

J. C. GRAVES, *Vice-President*
Louisville Title Insurance Company, Louisville, Kentucky

Often it is true that an easement that is appurtenant to one tract or lot may not be used in connection with another tract, although both tracts may be owned by the same person.

Although this is a recognized and settled principle of law, circumstances and facts sometimes are such that the problem is not easy to recognize. The following is a typical example of the principle of law mentioned above:

About two years ago the X Corporation purchased a tract consisting of four acres on which it built a small factory for the making of furniture. In the deed to the X Corporation it was given the right to use a way known as Larson Road, which Road was established for the benefit of the four-acre tract and other property constituting a portion of a 30-acre tract. After the factory was completed, it was discovered that, because of the sharp turns in the Road known as Larson Road, it was impracticable for large trucks to traverse this Road. In order to relieve this situation, the X Corporation purchased Lots 14 and 15, in Walnut Grove Subdivision, which lots adjoined their four-acre tract on the West, and extended out to a way known as Maryland Lane, which latter Lane had previously been established for the benefit of owners of all the lots in Walnut Grove Subdivision. It was not dedicated to public use. Maryland Lane, together with Lots 14 and 15 constituted an accessible means of ingress and egress to and from the factory, for trucks of all sizes. Thereafter, the X Corporation sought to borrow $140,000.00 to be secured by a mortgage on its four-acre tract and Lots 14 and 15 in Walnut Grove Subdivision. The question presented in the examination of title was as to whether the X Corporation, as owner of the four-acre tract, had the right to use Maryland Lane for its trucks, realizing, of course, that it also owned Lots 14 and 15 in Walnut Grove Subdivision. The question is answered in a rather interesting way by a statement to be found in Jones on Easements, paragraphs 360 and 361, which reads as follows:

"By the division of a farm one part owner became entitled to a right of way as appurtenant to a three-acre lot. This owner also acquired another lot of nine acres, adjoining to and beyond the three acre lot, by another title. Between these two lots there were no fences, and, being mowing land, the grass was cut and the hay made on both, without regard to the dividing line; the hay laid in windrows across both and a load of hay taken partly from one and partly from the other was driven over the way acquired in the division, passing last from the three-acre lot. It was held that such owner had no right to use the way as a way from the nine-acre lot. Taking the hay from both lots indiscriminately was, in effect, making use of the way as a way to and from the nine-acre lot, though the cart passed last from the three-acre lot, and such use was beyond the limit of the right reserved, and trespass quare clausum would lie for the abuse of the right."

This principle of law was quoted with approval by an Appellate Court in the case of Perkins vs. Jones, 284 S.W. page 1031. The same principle of law is to be found in 28 C.J.S., page 772, which reads as follows:

"An easement can be used only in connection with the estate to which it is appurtenant and cannot be extended by the owner to any other property which he may then own or afterward acquire."

It is reasonably clear, therefore, that whether the owner of the four-

acre tract sought to carry hay in its trucks over Maryland Lane or whether it undertook to carry lumber, in either event it had no right to use Maryland Lane for the benefit of its four-acre tract, notwithstanding its ownership of Lots 14 and 15 in Walnut Grove Subdivision. Conversely, no right existed to use Larson Road for the benefit of Lots 14 and 15.

In any examination of title, consideration should always be given to the Road or Way by which access to the property under examination is to be had, and care should be exercised to see that such way or road may properly be used by all of the property under examination and not merely part of it.

JUDICIARY COMMITTEE, REPORT OF CHAIRMAN

F. W. AUDRAIN, *Chief Counsel, Vice President,*
Security Title Insurance Company, Los Angeles, California

Many title men may feel that Indians and their lands have become somewhat stabilized matters. Probably not so in a few states, and certainly not so in California.

For example, between Palm Springs and the Mexican border, we have 25 Indian reservations. Some of them are occupied by different bands of a tribe, and there are several tribes. One block off the "Madison Avenue", "Lincoln Road", "Lake Shore Drive" or "Canal Street" of Palm Springs there is a section of land owned by a tribe of about sixty-five Indians— male and female, adult and minor. The improvements thereon are not impressive for Palm Springs.

The title is somewhat involved, the laws relative thereto are more involved and the natives (Indians) and the neighboring descendants of immigrants would like to negotiate sales and leases. Some of you have heard of "trust patents." These are fairly restrictive to all these hopeful parties. One Indian, being certain that he was going to move from a "trust patentee" status to a "fee patentee" (he did, in time) sold on contract, to be consummated when he had the unrestricted fee. When he got the fee, he had other ideas and was sued for specific performance. Held: contract void. Absolutely void. Not capable of ratification. No rule of estoppel applicable. *Spector v. Pete,* 157 CA (2/58).

If any of you ever wonder about the risks in being a builder of housing for military personnel under a certificate from the Secretary of the Army, on or near a military base, the case of *Deseret Apartments vs. United States,* 250 Fed. 2d 457 will be of interest. Seems as if there was not enough military men at the site to utilize the premises.

> "It is contended that there was in fact not sufficient need for such units to enable Deseret to rent them and thus meet its mortgage payments, and that because of this misrepresentation Deseret was misled to its detriment, and that equity will, therefore, not permit the Government to obtain a deficiency judgment."

After foreclosure of the real estate and chattel mortgage, the Federal Housing Commissioner recovered a deficiency judgment of $47,409.00 and this decision affirms that judgment. No rule here for title men, but I thought that maybe you might speculate on the perils of being an investor in military housing.

An Inter-Office Memorandum

"Bruce: Judiciary Committee again. Would you give me a terse, articulate, easy to understand, con-

cise, clear, abbreviated, closely stated summary of the case. Thanks. Wendell."

"Wendell: I could not summarize the 2410 discussion. I couldn't understand it.

The chronology of events was as follows:

1. Vendor conveyed to purchaser. State law gave him an equitable lien to secure payment of a balance due on the purchase price.

2. Federal tax liens against the purchaser arose and were recorded.

3. Purchaser-taxpayer reconveyed to vendor and the unpaid balance was cancelled.

4. Vendor sued the U.S. under 28 U.S.C.A. 2410 to quiet title.

H E L D: The equitable lien was inchoate and unperfected when the tax liens arose; hence, the latter are prior. The court went on to discuss the scope of the remedy available under 28 U.S.C.A. 2410. The discussion is not likely to clarify this subject and seems to represent what a dissent refers to as an attempt "to prescribe for ailments from which neither litigant is suffering." *United States v. Morrison,* 247 F (2) 285. Bruce."

Interim Title Insurance Binders

Gildenhorn arranged with Public Service T i t l e Company to invest $4,000.00 in property subject to 3 deeds of trust which were to be released and replaced with Gildenhorn's proposed new first. Public Service, a representative of Metropolitan Title Guarantee Company agreed to search the title and issue a certificate as to the new deed of trust. Intermediately, Metropolitan's interim binder was issued by Public Service showing the title vested in Yates (owner) Subject to the 3 trust deeds. Public Service secured the execution of the new trust deed, securing a note for $4,500.00, recorded the trust deed, and received $4,000.00 from Gildenhorn upon its assignment to him of the note. However, Public Service did not pay off one of the three notes, hence Gildenhorn's paper was subject to the encumbrances securing that note.

Gildenhorn later discovered this circumstance and was told of an 1889 defect that precluded issuance of the Metropolitan policy. Public Service after several demands and discussion of the 1889 defect and irregular money use became a bankrupt. No policy was ever issued by Metropolitan, but after Gildenhorn lost his investment, via foreclosure under the prior paper, he sued on the binder.

The case mostly involved a determination of what caused the loss—the 1889 defect or the trustee's sale under one of the 3 trust deeds described in the interim binder. The court found that the 1889 defect was not the cause of the loss suffered by Gildenhorn.

The case may be of interest to insurers whose agents issue the insurers' binders. For others the case will be of interest for its discussion of proximate cause of loss under a title evidence. Incidentally, the 1889 defect was of no real significance, for its status was evidently slight, if truly extant.

Metropolitan Title Guarantee vs. Gildenhorn, 249 F. 2d 933 (12-16-57).

I find on my desk a decision by the Supreme Court, Special Term, Queens County, October 7, 1957, (16 NYS 2nd 94) wherein the plaintiff sued to specifically enforce a contract of sale, in the face of a deed covenant relative to set back distances and the fact of violation of the covenant. The contract c a l l e d for a marketable title, covenants to be accepted if not violated and that "the seller shall give and the purchaser shall accept a title such as any title company will approve and insure."

The title company report showed the violation and also said "but the policy will insure that said encroachment may remain so long as the building stands". Plaintiff argued that this last commitment somehow met his vendor obligations but the court in denying specific performance, said:

"The law in this state is well settled, that the title to real

property is rendered unmarketable where covenants running with the land are violated and such violation may expose the purchaser of such property to actions by owners of adjoining land to enforce the covenant, restrain its violation, or recover damages because of the violation."

"While a change in the character of a neighborhood may afford grounds to preclude equitable relief for enforcement of the restrictive covenant, that, however, does not invalidate the covenant, restrain its violation, or recover damages because of the violation."

"Our Courts have consistently held that where as here, the contract expressly requires that the vendor shall give and the purchaser shall accept a title such as any title company will approve and insure, the vendor assumes the burden of delivering a title which any title company will approve and insure unconditionally and without exceptions."

In "The Business Lawyer" (November, 1957) (Section of Corporation Law, etc., American Bar Association), William C. Prather, Associate Counsel, Savings and Loan League, has an able article on "Federal Liens as They Affect Mortgage Lending." This is an informative commentary on the relationship of the federal tax lien, and the advances made or proposed to be made under loan paper having priority to the tax lien.

He quotes from correspondence with federal officials, which is quite specific as to federal agency policy on the subject.

THE IMMATERIALITY OF THE INDEX

MAURICE A. SILVER, *Editor Title Comments*
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The June, 1957 issue of "Columbia Law Review" carried an article by Harry M. Cross, Professor of Law of the University of Washington, under the startling heading, "The Record 'Chain of Title' Hypocrisy." It may be read with profit.

Professor Cross indicates the accepted mode of examining the public records to determine the soundness of a chain of title—tracing title from the present purported owner back "until the transfer from the sovereign is discovered, or in older states, far enough back until an apparently firm 'root' is located." Then the process is reversed—"the search is made as to each owner to determine what each of the various owners did with or to the title during the period of his apparent ownership." Here the index is used as the guide, whereas in earlier days this process required thumbing through the records.

This is the question propounded and the answer given by the writer:

"Since it is not now practicable to search in the actual record or transcription books, if it ever was for long, this then is the resulting proposition: A prospective purchaser can be confident he will get good title from his vendor if an examination of the indexes in the indicated manner, and a study of the transactions thereby discovered, reveal a chain of title without infirmity. But is this so? I suggest that to assert that such a 'chain of title' assures ownership in the vendor is sheer hypocrisy."

Among the weaknesses enumerated is the index—"The Immateriality of the Index"—for without a proper indexing the recording of the instrument loses its effectiveness. Where the courts hold that no indexing or faulty indexing is immaterial, that it is no part of the record, then there is indeed a weak and dangerous area.

What do we say in New Jersey?

New Jersey Recording Act R.S. 46:21-1 et seq. is headed "Operation, Effect and Use of Records," and provides under paragraph 1 that whenever any deed or other instrument of the nature or description set forth in Section 46:16-1, which shall have been or shall be duly acknowledged or proved or certified, shall have been duly or shall be duly recorded, or lodged for record with the county recording officer, such record shall be notice.

R.S. 46:22-1 et seq. headed "Failure to Record Deeds or Instruments" sets forth the consequences which follow the failure to record as against subsequent judgment creditors without notice and subsequent bona fide purchasers and mortgagees for valuable consideration, not having notice, whose deed or mortgage shall have been first recorded. Here, too, the key words are "duly recorded or lodged for record."

New Jersey Statute also provides for General Index Book, R.S. 46:20-1 et seq. It details what these books are to contain.

Nothing in the act regarding indexing makes it part of the recording plan, so that a purchaser who is misled by the failure to index or by improper indexing is not saved if the deed or other instrument is recorded or lodged with the proper official for recording. This is the weakness of which Professor Cross complains, and which he declares calls for correction.

In Semon v. Terhune, 40 N.J.E. 364, 2 A. 18, the omission to join a mortgagee in a proceeding was sought to be justified on the ground that the mortgage was indexed in the wrong place. But the court held that "had he consulted the record (the index is no part of it) he would have discovered" the mortgage. This appears to be the accepted rule, unless the statute declares to the contrary. The index allowed by statute may save the searcher the laborious task of paging the books page by page,

but it is indeed an illusion to feel that relying on the use of the index as a guide to the record assures a safe title.

It may be deemed surprising that when efforts are directed toward greater certainty in titles that this situation has been permitted to exist. Where the legislature directs an indexing system it is idle to say, as some courts do, that it is for the benefit of the searcher and the public, to facilitate the examination of the records, and not to be given any effective role in the scheme of the recording laws and systems. The utility, in fact, the indispensable necessity of the index to expeditious and accurate examination of records has long been recognized both in practice and theory, yet the law lags.

It may be argued that there is an obverse side to this coin. A grantee lodges his deed with the proper recording officers, pays the statutory fees, and departs Must he check the records to determine that his deed was properly indexed before he is assured that it is notice of his ownership of the lands involved? Not only may there be an absence of indexing but improper indexing; but, wrong names, mis-spelling, misdescription, interlineation which may destroy notice, entry in wrong place or column, may vitiate the effectiveness of the indexing. See 63 A.L.R. at page 1064.

But these objections, while valid, must be weighed as against the greater good. Actually errors by the recording officer or his staff have been committed before in the transcription of instruments. In our experience we found lots omitted, tracts omitted, courses garbled so as to render the description vague and uncertain. But these lapses are rare and so are the lapses in indexing as appears from the paucity of cases as compared with the volume of recordation, and from the practical experience of title men. More to the point is the fact that under the present recording acts the grantee or mortgagee is not completely in the clear by the mere act of lodging his instrument with the recording office. It is essential that it be recorder in the proper book. In Hadfield v. Hadfield, 128 N.J.E. 510, 17 A2 169 a mortgage recorded in the book for deeds was held not notice to subsequent judgment creditors. True in this case the mortgage was delivered to the register to be recorder as a deed; yet the net effect on subsquent purchasers and judgment creditors is the same. In Patsons v. Lent, 34 N.J.E. 67, cited in Hadfield, Chancellor Runyon indicated that it was the mortgagee's "business to see to it that it [the mortgage] was properly recorded."

The Commonwealth of Pennsylvania remedied this situation as early as 1875, 18 P.L. 32 now 16 P.S. page 9853 following the conclusion of the court in Schell v. Stein, 76 Pa. 398, decided in 1874. The Pennsylvania statute simply states, "The entry of recorded deeds and mortgages in said indexes, respectively, shall be notice to all persons of recording of same."

New Jersey is in need of corrective legislation—but something more definite than that of the short Pennsylvania statement. R.S. 46:21-1 et seq. and R.S. 46:22-1 should be amended to make not only the recording and lodging but also the indexing part of the record, and to include failure to index as part of the consequence of failure to record.

One answer to the problem is title insurance.

ENCROACHMENTS UPON ADJOINING LAND AS THEY AFFECT MARKETABILITY OF TITLE

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I. Generally.

The approach to this subject will be made from the viewpoint of a title insurer which is requested to insure against loss by reason of unmarketability of title occasioned by a specific encroachment of improvements onto adjoining lands or streets. Most standard form policies do not insure against such hazards because of an exception from the coverage as to "questions of survey," or "any facts which a correct survey would show," or similar qualifications. Many title insurers do, however, issue extended coverage policies which insure against encroachments not shown in the policy. And most title insurers issue the A.T.A. policy which, of course, insures a lender against unmarketability of the mortgagor's title because of any encumbrance (which would include an encroachment) not shown in the policy.

When we say "Is this particular encroachment of such a character as to justify a reasonable and prudent purchaser in refusing to accept title?" We have merely asked a rhetorical question which provides no guide for deciding whether the encroachment renders the title unmarketable. And we find that judicial precedent offers no mathematical formula for such determination. An encroachment of one inch upon adjoining property may result in an unmarketable title in one case; an encroachment of one foot may be regarded as unobjectionable in another case. The one positive statement seen in decisions is "Each case must stand upon its own merits."

The general rule may be simply stated: If the encroachment is **substantial** the title is unmarketable; if the encroachment is so negligible as to bring the case within the rule of de minimus, the title is not unmarketable. Inherent in this test is the thought that a purchaser should not be compelled to take title in the face of an encroachment if there is a likelihood that his use and enjoyment of the improvements as they stand on the land when purchased may be seriously interferred with. In applying this test, the facts and circumstances to be considered include the character of the encroaching improvement, the purpose for which the improvement is used, the expenses of removal, and whether rights to maintain the encroachment exist.

II. Encroachments upon adjoining lands.

The character of the encroaching structure as a determining factor is evidenced by decisions holding that even a slight encroachment by a **permanent** structure is fatal, but that an encroachment by a cheap or temporary building may be disregarded. Thus, title was held unmarketable where a four-family flat encroached one inch upon the adjoining land (Stevenson v. Fox, 40 App. Div. 354, 57 N.Y.S. 1094). But a four-inch encroachment by a dilapidated frame shed was held not substantial (Scheinman v. Bloch, 97 N.J.L. 404, 117 A. 389).

Agreed that a particular encroachment is substantial under the general test, the next question is whether long continuance of the encroachment without objection from the adjoining owner is sufficient to cure the objection of unmarketability. The vendor argues that, conceding no legal right exists to maintain the encroachment, the acquiescence of the injured adjoining owner in the en-

probability that he will challenge it. This reasoning has appealed to the courts in several cases (e.g., McDonald v. Bach, 29 Misc. 96, 60 croachment shows that there is no N.Y.S. 557, holding an encroachment of a wall by three-quarters of an inch was not material); but in each case it seems that there were other favorable factors and the encroachments were not actually of a substantial nature.

The argument which the vendor is most likely to advance as a cure to the objection of unmarketability is that rights to continue the encroachment have been gained by adverse possession. If the claim is to the fee title to the land encroached upon it will usually fail in those states where payment of taxes on land adversely held is an essential element. If only an easement for maintenance of the encroachment is asserted, the matter of taxes is immaterial. In some cases (e.g., Wildove v. Pappa, 223 App. Div. 211, 228 N.Y. Supp. 211, involving an encroachment of 4 feet) the courts have found an adverse title predicated on open, notorious, and long continued existence of the encroachment to be sufficient to support the vendor's assertion of a marketable title. But in other cases (e.g., Spero v. Schultz, 14 App. Div. 423, 43 N.Y.S. 1016) the courts have questioned whether the evidence would sustain an adverse or prescriptive title; specifically, the courts have asked, granting possession for a long period, was the possession hostile to the record owner of the land encroached upon, were there parties against whom the statute of limitations would not run, was there ever an agreement permitting the existence of the encroachment?

Estoppel as a cure is sometimes urged. Thus, the vendor claims that the long acquiescence in the encroachment raises an inference of an original parol agreement that the true boundary line is that which places the encroaching improvement wholly on the vendor's land, and that such line is a "practical" boundary which is conclusive on the parties as an estoppel. This theory of establishment of a boundary line by practical location to conform to lines of possession, thus eliminating the unmarketability objection, has been accepted in a number of cases, e.g., Wentworth v. Braun, 78 App. Div 634, 79 N.Y.S. 489).

A vendor seeking a foundation for his right to maintain an encroachment may find relief in the doctrine of **implied easements.** For example, suppose that the beams of the vendor's house are lodged in the wall of a building on adjoining land, but both lots had been owned at one time by the same person, who constructed both houses and thereafter conveyed the vendor's house to a predecessor of the vendor. A New York court (Schaeffer v. Blumenthal, 169 N.Y. 221, 62 N.E. 175) held that the vendor had an easement by implication for the continuance of the encroachment as long as his house should exist, and this right cleared an unmarketability objection to the encroachment. A California court (Navarro v. Paulley, 66 Cal. App. 2d 827, 153 Pac. 2d 397) recognized the implied easement rule where a garage encroached 5 feet on the adjoining lot and both lots were in a common ownership at one time, but refused to apply the rule because the garage could be moved to the vendor's lot at small expense.

These arguments of the vendor in favor of a marketable title despite an apparently substantial encroachment are mentioned here as a matter of information only; they should not be accepted as sufficient for title insurance purposes.

III. Encroachments upon public streets.

While encroachments upon public streets in their effect upon marketability of title are tested by the general formula, i.e., "substantial" encroachments affect marketability, while trivial ones do not, the vendor's argument that rights to maintain the encroachment have been gained by acquiescence, adverse possession or estoppel, is less persuasive in view of the paramount rights of the public and the restraints on acquisition of

rights by adverse possession or estoppel as against the sovereign.

The general rule of ancient origin is that streets for their full length and width are for the public use; that any permanent structure encroaching thereon is a nuisance per se, regardless of actual interference with public travel, and that it is the general duty of the city to keep the streets free from obstructions or encroachments by compelling removal thereof (City of Emporia v. Humphrey, 133 Kan. 176, 299 Pac. 950, sustaining injunction ordering removal of encroachment of building by 3 feet on street). In the absence of a grant of power from the legislature, a city cannot authorize or grant rights for the maintenance of obstructions in public highways.

This strict rule that no encroachment on the street can be permitted by a municipality is liberalized in many jurisdictions by judicial construction or local laws. If an encroachment is not unreasonable and does not interfere the public use, it is often held that it is not a nuisance subject to forced removal. More latitude is allowed as to minor encroachments above the surface (e.g., bay windows, awnings) or below the surface (e.g., vaults under sidewalks). Charter provisions often authorize municipal authorities to permit slight encroachments, and in a few states this power extends even to permanent encroachments by walls and the like. Other exceptions to the general rule are found in some cases where the courts have held that under the circumstances of the particular case the municipal authorities were barred by laches or estopped by acquiescence from compelling the removal of an encroachment. (For an exhaustive treatment of these problems, see McQuillan, Municipal Corporations, section 30.73 et seq.).

These rules as to the power of a city to force removal of encroachments on streets do not, of course, determine whether a title is unmarketable because of a particular encroachment. As will be seen, the vendor may defend the marketability of his title by admitting the right of the public to remove the encroachment but establishing that a reasonable man would accept the title because the cost of removal is slight or the risk of challenge is insignificant.

A long line of cases, most of them in New York, have declared titles unmarketable where the encroachment upon a street was such as to threaten the purchaser with substantial loss in the fee or in the rental value of the premises, or a burdensome expense in altering the building to meet the requirements of law (see cases cited in 57 A.L.R. 1451, annotation). Thus, title has been held unmarketable because of the following encroachments upon streets: store windows, 1 foot over, cost of removal being $5,000; pilasters, 5 inches over, cost of removal being $3,000; wall of the building, 2½ inches over, cost of removal being $10,000.

The cases in which encroachments on streets are held not to render the title unmarketable appear to be predicated on one or both of the following factors: (1) the cost of removing the encroachment is slight; (2) the encroachment is not violative of the policy of the municipality or has been recognized by official acts or ordinances. Thus in one case (556-558 Fifth Ave. Co. v. Lotus Club, 129 App. Div. 339, 113 N.Y. Supp. 886), the court held the title marketable where the encroaching portion of a basement of a residence could be readily removed at a nominal expense without injury to the building. In another case (Gilman v. Herman, 118 Misc. 390, 193 N.Y. Supp. 174), marketability was sustained where bay windows projected 1½ feet onto the street, the cost of removal and remodeling would be $300, the rental value of the building would not be impaired by removal, and the liklihood of interference by the city was remote because of the policy of the municipality to allow encroachments of bay windows 10 feet above the surface and extending not over 3 feet into the street. And a California court (Mertens v. Berendsen, 213 Cal. 111, 1 Pac. 2d 440) considered that

an encroachment of 2 inches upon a street did not defeat marketability where the cost of removal was $300.

It is significant to note that in New York the early decisions (e.g., Broadbelt v. Loew, 15 App. Div. 343, 44 N.Y.S. 159) held that even substantial encroachments on public streets did not affect marketability where the usage and municipal policy of acquiescence demonstrated that the possibility of the owner ever being molested was "exceedingly remote." But these cases was later overruled or disregarded because of a change in municipal policy, discussed in a case (Acme Realty Co. v. Schinasi, 215 N.Y. 495, 109 N.E. 577), in which the court said: "It is familiar recent history that these changed conditions have led to the compulsory removal of building encroachments from areas, streets, and blocks where they had always before been permitted. When the late Mr. Justice Patterson wrote the opinion in the case of Broadbelt there was nothing to indicate that there would ever be a radical departure from the early policy of the city with reference to building encroachments on the streets. Since then the change has become an accomplished fact, and its binding force has been recognized in later judicial decisions."

Acts of the municipal authorities sanctioning encroachments (e.g., an ordinance granting permission to maintain an encroaching building until demolished, or a building code authorizing overhanging cornices) have been regarded by the courts in some cases (e.g., Harrington Co. v. Kadrey, 105 N.J. Equity 389, 148 A 3) as proof that the encroachments in question were lawful, even though the municipal authorities were not empowered to compromise the public rights, and did not render the title unmarketable. However, it appears that these cases usually involved encroachments which were susceptible of removal at slight expense.

Conclusion.

It is suggested that the risk of unmarketability of title occasioned by an encroachment, whether upon adjoining land or a street, is one which a title insurer should not assume. If exceptions to such rule are made, they should be confined to cases where the title is clearly marketable under the test of cost of removal (i.e., the cost must be slight) or, in the case of encroachments on streets, the encroachment is expressly authorized by statute (not merely a municipal permit).

The preferred practice, it is believed, should be to show all encroachments in policies which insure against such matters (e.g., A.T.A. policies) and then insure, where appropriate, against loss by reason of any final court order or judgment requiring removal of such encroachment. The circumstances which would justify insurance against forced removal of an encroachment are not within the scope of this subject of unmarketable titles. It may be appropriate, however, to point out that, in considering an encroachment upon an adjoining owner's property, mandatory injunction will ordinarily issue to compel the removal of the encroachment, the exception to the rule being where the encroachment is the result of a mistake, the actual damage to the plaintiff is slight, and the cost of removal is great compared to the damage (see 96 A.L.R. 1287, annotation). The right to maintain an encroachment upon adjoining land may, of course, be supported by a prescriptive easement, adverse possession or estoppel (see 1 Am. Jur. p. 513 et seq.); but, on the other hand, the encroachment may be regarded as a continuing trespass or nuisance, for which successive actions will lie (see 76 A.L.R. 312, annotation). In any event, it would seem that insurance against forced removal should be predicated on a willingness to assume the cost of removal in the particular case as an insurance hazard, without reliance upon defense factors which may or may not be valid according to the facts proved in litigation.

(An excellent article on this subject is "The Effect of Encroachments on the Marketability of Land Titles," by Ross D. Netherton, Chicago-Kent

Law Review, Vol. 27, No. 2, March, 1949. Reference should also be made to an annotation on the subject in 57 A.L.R. 1451).

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April 5, 1958

COMING EVENTS

Date	Convention	Place
June 19-20-21	Colorado Title Association	The Crags Estes Park, Colorado
June 26-27-28	Idaho Land Title Association	Shore Lodge, McCall, Idaho
June 29-30 July 1	Michigan Title Association	Grand Hotel Mackinac Island, Michigan
August 1-2	Montana Title Association 50th Anniversary	Placer Hotel Helena, Montana
September 4-5-6	North Dakota Title Association	Ray Hotel Dickinson, North Dakota
Sept. 21-26	**Annual Convention— American Title Association**	**Olympic Hotel Seattle, Washington**
October 11-14	New York State Title Association	Galen Hall near Reading, Pennsylvania
October 12-14	Nebraska Title Association— 50th Anniversary	Town House Omaha, Nebraska
October 13-14	Indiana Title Association	Sheraton Lincoln Hotel Indianapolis, Indiana
October 23-25	Wisconsin Title Association	Oakton Manor on Pewaukee Lake, Wis.
October 26-28	Ohio Title Association	Commodore Perry Hotel Toledo, Ohio
October 26-28	Missouri Title Association	The Elms Excelsior Springs, Mo.
November 6-7-8	Kansas Title Association	Broadview Hotel Wichita, Kansas