THE PROBLEM OF ABSTRACTS OF TITLE

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(Editor's Note: The material which follows is the report of a special committee appointed by Frank C. Olive, chairman of the Section on Property and Taxation, to study the problems involved in abstracts of title in the marketing of real estate. The importance of the subject to the legal profession and the exhaustive character of the report justifies its inclusion as a leading article in the Journal. There can be but little question that all lawyers of the State will find its content of great interest.)

Indianapolis, Indiana
January 6, 1945

Members of the Indiana State Bar Association:

At the last annual meeting of the Indiana State Bar Association, Frank C. Olive, chairman of the section on Property and Taxation, presented a preliminary discussion of matters pertaining to abstracts of title. It became obvious during the discussion that the problems with respect to abstracts of title and the marketing of real estate have become complicated and in some instances expensive.

Some of the local Bar Associations have, over a period of years, attempted to give relief to examining attorneys, real estate agents and grantors. Considerable work has been done along this line by the Allen County Bar Association and the Indianapolis Bar Association, but in neither case have entirely satisfactory results been reached. The Indianapolis group has recently suggested new rules and regulations and possible legislation on the subject.

At the close of last summer's meeting it was decided to continue the matter until the January meeting of the Bar Association for further consideration and discussion and the undersigned was appointed by Frank C. Olive to help steer this further procedure.

It is my belief that there is some possibility of finding more or less adequate remedies for the various troubles met by examining attorneys in the several counties of the State, but that it will take work, thought, and time. If the Indiana

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State Bar Association and its members are sufficiently interested to devote the necessary attention to this question, it is possible that considerable good can be accomplished, but satisfactory results cannot be obtained without close cooperation between members of the Association interested in the matter of real estate transfers.

Many of the suggestions made by the Allen County Bar Association as published in its pamphlet "Standards of Marketability of Titles" are equally applicable to titles throughout the state; others are peculiar to Allen County. It is to be expected that similar peculiarities indigenous to other communities will be found. Some of the difficulties will undoubtedly need to be corrected by legislation.

Without attempting to enumerate all the difficulties that are encountered by the examining attorney, we are listing some of the suggestions which arose out of the discussion at the summer meeting, out of the Allen County Bar Association experience, from the investigations made by the Indianapolis Bar Committee and from numerous other sources:

1. It is entirely possible that many of the difficulties in the abstract can be cured by a reconsideration of the statutes of limitations. If so, these statutes as they apply to titles to real estate should be thoroughly analyzed and proposed remedies made and suggested to the State Legislature. The following should be considered:
   (a) That the statutes of limitations for the institution of actions respecting real property be shortened.
   (b) That during the period of disability of any person through statutory incompetence while he had a duly qualified guardian acting on his behalf, the statutes of limitations shall not be tolled by his incompetence or disability.
   (c) That the statute of limitations with respect to rights of preferred stockholders and official authority of the officers executing deeds be amended.
   (d) That the statute of limitation on the rights of infants and aliens and non-residents or residents temporarily living outside of the state for the contest of wills be amended.
   (e) Limitation of actions with respect to officially platted areas to include title up to the time of platting be limited by legislation.

2. Some uniform provision with respect to the content of abstracts showing court proceedings, both with respect to probate and civil matters be established.
3. With respect to the preceding recommendation it is suggested that a model abstract be prepared disclosing the necessary practical items to be included by abstracting companies in commercial abstracts.
4. Legislation with respect to reversionary clauses in deeds which fall within that general scope of reversion which provides for return of the title to the grantor, his heirs and assigns, on the violation of such use restrictions as race ownership or possession, sale or use of intoxicating liquors, and building restrictions. This matter has, particularly in Indianapolis, been a difficult one to handle because of the law declaring that such a reversionary right is not vested as a property interest until there is a violation of the use restriction and consequently such right cannot be assigned nor an effective release given with respect to any anticipated violation of the restrictions.
5. It has been suggested that the title to a wife's interest in real estate vest in her immediately upon conveyance by her husband solely without her joining.

It has been suggested further that attorneys' signed opinions be permanently attached to abstracts for use of subsequent examining attorneys.

It has also been the opinion of a number of attorneys that if a uniform practice by abstracters with respect to the items which should be continued in an abstract were agreed upon, such uniformity of agreement by abstractors might save abstract cost and differences of opinion among examining attorneys.

It must be obvious that the problem of marketability of titles is a difficult and delicate one, but one which should find a more satisfactory answer than has thus far been obtained, if the Bar of the State of Indiana is going to advance in its general program of more intelligent service to the public with respect to legal matters in and out of court.

In order that attorneys may have ready access to the work done by the Allen County Bar Association, we are copying the resolution of that Association passed March 19,

1943, together with the foreword, which we consider an observation timely and succinct.

FOREWORD

Pursuant to authority and request of the Association, your undersigned Committee on abstracts of title has prepared this pamphlet for distribution to all lawyers practicing in Allen County.

It contains a list, revised to date, of various objections, more technical than real, frequently made by examiners, which by resolutions of the Association from time to time, have been deemed properly waived as not impairing marketability of titles.

Your committee finds similar resolutions being increasingly adopted throughout the country, and in some cases being presented to legislatures for enactment into law. They are premised on the public interest and the right of buyers and sellers of real estate that the negotiability of their titles be not impeded by objections to insignificant defects not in fact impairing marketability. They recognize the fundamental legal principle that a "marketable title," which is always the real issue, need not be and probably cannot be a "perfect title." That clients, buyers and sellers alike, are entitled to at least a reasonable degree of uniformity in opinions of examining counsel as experts as to matters which no expert would worry about in the title in his own hands, but raises for clients only in a measure of self-protection against the possible objection of future examiners, as if "the more the objections, the better the opinion."

From such a viewpoint, the examiner's clear insight and perception of the real issue becomes obscured by the flyspecks on the glass, detracting from the valuable purpose of avoiding defects harboring appreciable risks so common in title heir to so many of the troubles of mankind, which the profession is so necessarily and usefully employed to serve.

Resolutions of this kind, none being included herein without unanimity of adoption not only in the several committees but by the Association, in themselves create standards of marketability which will be promoted by adherence to them, for the benefit of clients and the profession alike. On these premises we hope that our work in the compilation may contribute something to the common good.

COMMITTEE ON ABSTRACTS OF TITLE

Willard Shambaugh, Chairman
James R. Newkirk
Ray E. McCall
A. W. Suelzer
John D. Shoaff
John C. Hoffman, President

Standards of Marketability of Abstracts of Title as Adopted by the Allen County, Indiana, Bar Association.

By resolution of the Allen County, Indiana, Bar Association the following objections to titles do not affect marketability and should be waived:

(1) Any break or hiatus in the chain of title which occurred over 50 years prior to the examination date provided a competent affidavit of adverse possession is provided.

(2) That a certificate of entry is not shown, where a patent from the Government is shown.

(3) That no assignment of the certificate of entry is shown, where the certificate of entry is shown, where the certificate itself is shown and contains a recital of the assignment of the certificate of entry.

(4) Failure to show a certificate from the Auditor of State as to number of trustees of the Wabash & Erie Canal at the time of the execution of a deed by such trustees and the requisite number of the proper signing of such deed.

(5) That the words "heir and assigns" are not contained in the habendum clause of conveyances made previous to 1853.

(6) That a deed is made by "Fort Wayne Trust Company, Trustee, by Henry C. Paul, President," where the terms of the trust and the power of the trustee to convey are not disclosed.

(7) That a deed is executed by Stephen B. Bond, as trustee or assignee of the State Bank of Indiana, and his appointment as trustee or assignee and authority to convey the title of the bank is not shown.

(8) That a conveyance is executed by a trustee without the joinder of the beneficiaries of the trust where the preceding deed to the trustee gives power and authority to convey free from the claims of beneficiaries and relieves any purchaser from the duty to see to the application of the proceeds

of the sale except where it is evident that the preceding deed was given as security.

(9) That a conveyance to or executed by a receiver, trustee, guardian, commissioner, sheriff, auditor, or other public or court officer does not contain the word "as" immediately preceding the word or words designating the capacity of such fiduciary, if the record title indicates that such fiduciary accepted held and/or conveyed said title in a fiduciary capacity.

(10) That a deed fails to disclose the marital status of the grantor if the defect is more than fifty years old.

(11) That marital status of grantors is not shown in the acknowledgment, where that fact is shown in the granting clause.

(12) That the acknowledgment does not show the grantor to be unmarried and over the age of 21 years, where the fact appears in the granting clause.

(13) That neither the body of the deed nor the acknowledgment shows that the grantor was over 21 years, where a sufficient time has elapsed after the date of the deed to bar any right or recision by a minor.

(14) That the grantor in a deed has signed by initials for first or second of both names, providing the granting clause of the deed and the notary's certificate of acknowledgment contains the full name as given in the deed by which the grantor obtained title.

(15) That there is a discrepancy between the spelling of the names of the grantee in the last preceding deed and the grantor in the deed in question; provided the notary's certificate of acknowledgment shows the name of the grantor to be substantially identical with the name of the last preceding grantee.

(16) Where there are discrepancies between the names of parties grantee in deeds and parties grantor in succeeding deeds, the deeds having been executed more than 20 years prior to the time of examination, the rule of idem sonans shall be liberally applied.

(17) That certain deeds are dated after acknowledgment or bear an acknowledgment dated after the date of recordation.

(18) That the notary public or other officer taking an acknowledgment has failed to affix his official seal, where

such defect was prior to the last Validating Act of the Indiana Legislature.

(19) That a certificate of magistracy as to the officer taking the acknowledgment is not shown, where the conveyance referred to was executed more than 20 years prior to the date of examination, or where the deed was acknowledged prior to the last Validating Act.

(20) That a deed is executed by the State Bank of Indiana by the president of the bank only, and his authority so to do is not shown.

(21) That articles of incorporation of local banks and trust companies are not shown of record in instances where title has been acquired by such institutions.

(22) That a deed or assignment duly executed by a corporation by its officers is acknowledged only by its officers.

(23) That no authorizing resolution to officers executing releases on behalf of corporate mortgages is shown where the subscribing officer is authorized or legalized by the statute, Section 56-709-10, XI Burns Anno. 133, page 68, or if released more than ten years prior to the examination date by any other officer, and the release is otherwise regular upon its face.

(24) That no authorizing resolution to officers executing deeds of conveyance on behalf of corporations is shown as to any conveyance made more than five years prior to the examination date by any corporation by its president or vice-president and secretary (or by a national bank, cashier in lieu of secretary) or president alone, otherwise regular on its face, or as to any conveyance made two or more years prior to the examination date by its president and secretary or cashier and otherwise regular on its face; nor shall any objection be made by reason of omission of a corporate seal on any conveyance prior to June 30, 1931, the effective date of the last legalizing act (Section 49-3208, X Burns Anno. 1933, page 212).

(25) That a corporate conveyance is made without any showing of consent by preferred stockholders in cases: (1) where the corporation is organized among other purposes to buy and sell real estate; (2) where neither the recorded Articles nor Amendments show any authorization for the issuance of preferred stock; (3) where the record date of the conveyance is more than 20 years prior to the date of the

last continuation; (4) where the record shows that no authorized preferred stock was outstanding at the time of the conveyance, or that any preferred stock then outstanding has since been retired; (5) where the recorded articles of incorporation, amendments or the preferred stock certificate, if incorporated into the record, waived any requirement of consent; or (6) where the corporation was, at the time of the conveyance, organized or reorganized under the Indiana General Corporation Act of 1929.

(26) That the record does not contain proof of identity in cases where a corporation appears in the chain of title and there is added or omitted the word "The" before the name of the corporation, or "Co." is used for "Company," or "Corp." for "Corporation."

(27) That title to real estate was held by a foreign corporation or by an alien, where it does not appear from the records that the state has instituted proceedings to take advantage of the statutory restrictions on holding of land by such parties and the corporation or alien has transferred the title to one capable of receiving and holding it. Where title to land is now held by a foreign corporation or by an alien and the state has not instituted such proceedings, the title examiner should pass the title with the notation that the transfer contemplated should be made prior to institution of such proceedings by the state.

(28) That a mortgage has not been released or is improperly released of record, where the abstract shows that the same became due, or in the absence of any due date shown in the mortgage, or by affidavit of record, that the same was executed more than 20 years prior to the date of examination; provided it is affirmatively shown that no suit has been instituted or is then pending to foreclose such mortgage.

(29) That the Recorder has not released a mortgage or lien, which under the statutes of the State of Indiana could be released by him upon proper affidavit; that is, a release entered by a Recorder on the record does not effect the validity of the title one way or the other.

(30) That there is no clerk's certificate of satisfaction of a mortgage nor a release by the mortgagee where a mortgage in the chain of title has been properly foreclosed.

(31) That a mechanic's lien has not been released or is improperly released of record, where more than one year has

elapsed since the date of the filing of the notice of lien, provided it affirmatively appears that no suit has been instituted or is pending to foreclose such lien.

(32) That a judgment for costs is unreleased where more than ten years have passed since the date of the judgment, exclusive of the time the exceptions apply enumerated in Sec. 2-2706 Burns' 1933

(33) That foreign executions coming into the hands of the Sheriff more than 90 days prior to the date of the last continuation appear unsatisfied, unless the record shows that a levy was made thereon.

(34) That no estate has been opened up where three years have passed since the death of the owner of the property.

(35) That no petition and schedule for the determination of inheritance tax has been filed where it affirmatively appears that more than ten years have passed since the date of transfer. (See Acts of 1937, p. 846).

(36) That there is no showing of the payment of the Federal Estate Tax where more than ten years have elapsed since the date of death of a deceased titleholder.

(37) That the abstract shows delinquent or unpaid real estate taxes to the extent that the same became payable more than 11 years prior to the date of last continuation.

(38) That personal property taxes appear unpaid or are omitted to be shown. (The Supreme Court having construed the 1941 act as abolishing any liens of personal property taxes against real estate).

(39) That the abstract shows unbonded special assessments where the final confirmation of the assessment roll was made, or bonded special assessments where the last installment became due, more than 5 years prior to date of last continuation, unless a suit has been brought for the foreclosure thereof.

(40) That older portions of abstracts, compiled in accordance with abstracting standards at the time prevailing but not in the more complete detail of present day abstracts, shall not be objectionable solely on account of the form thereof, if the same be printed or typewritten and fairly contain the substance of the chain of title from the first record and are covered by certificates of present abstract companies or their

predecessors, unless the pages are so torn, worn or obliterated as to be unreadable.

(41) That an abstracter's certificate is in the form which reads "We can find" no liens or encumbrances other than as shown, etc., if executed as of a date when this practice prevailed.

(42) That abstracts of title or continuations thereof were made by Fort Wayne Abstract Company if prepared prior to the year 1930.

(43) That court proceedings of another county necessary to the title to local real estate have not been certified and recorded in this county where such proceedings are properly abstracted by a competent abstractor of such county.

(44) That affidavits necessary to the title have not been recorded where properly attached to the abstract.

(45) That there is no affidavit to establish facts, where such facts are recited in a conveyance as a proper part thereof or in explanation thereof, in the absence of any conflict therewith in the record or actual notice to the contrary.

(46) That a plat is not signed by the owner of the property where such plat appears on record, and the owner thereafter has conveyed according to the plat.

(47) That in proceedings to sell real estate in an estate to pay debts of a decedent, the wives or husbands of the heirs are not joined as parties to the petition where the heirs in question are properly joined.

(48) That in the foreclosure of a mortgage, where the owner of the equity of redemption is dead and his estate is under administration, neither claimants against the estate nor legatees, nor judgment creditors of heirs or devisees, are joined as parties, except where the will makes a charge upon the real estate for a creditor or legatee.

(49) That notice to defendants appear to have been insufficient in a suit affecting real estate, where the record shows a finding of the court that such defendants had been properly notified; or that notice of sale does not comply with the statute or with an order of court, where the court has made a finding that sufficient notice had been given of such sale and the sale had been expressly approved by the court.

(50) Where, in the examination of an abstract, it appears that a petition or other pleading in an action "in rem" makes certain named persons defendants and also alleges sub-

stantially in the wording of the statute that diligent investigation and inquiry has been made and that the residence of the named defendants, if in the State of Indiana, is unknown, and where the statutory affidavit has been filed and the court or judge has made the proper order for published notice and such notice has been published against the named defendants and the proceeding has been concluded by a proper decree or order of court, it is not negligence to approve the proceeding as sufficient to pass or confirm the title, even though one or more of the defendants thus served was or were, in fact, within the state when the publication was commenced.

(51) Where a statute provides that the final judgment or other portions of the record in a court proceeding affecting real estate may or shall be recorded in some office or record in the same county in addition to the court records and judgment dockets, the absence of such additional recording shall not affect the marketability of titles if the proceedings appear satisfactorily in the original court records and files and are so shown in the abstract.

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We suggest that this matter be referred to some member of your local Bar Association for his special attention and discussion at the January meeting of the State Bar Association which is reserved for the discussion of this general subject with the view of gathering together the abstract examination difficulties and proposed remedies.

Until all the difficulties have been thoroughly discussed and analyzed, it will be quite impossible to get complete Bar Association cooperation throughout the State.

Please do not come prepared merely to listen to someone else. This is every examining attorney's problem.

Yours very truly,
CHESTER L. ZECHIEL
Member of the Committee

Since writing the above statement of progress, the Bar Association held its winter meeting. In that meeting further action was taken by the Association in the form of four resolutions on motion made by Wilmer T. Fox of Jeffersonvile, Indiana. These resolutions, together with comments of Mr. Fox are as follows:

MR. FOX: Mr. Chairman, I think there was general agreement at our meeting last summer that this problem involves a series of questions, and that some of these questions are independent and must be solved as such. I, therefore, move that we appoint four sub-committees, composed of such membership as the Chairman of this Section may choose, to do these definite things: One committee to make a survey of the statute of limitations of all the states, and that they submit a bill, making such changes in our statutes of limitations as they think advisable.

I move that another committee be appointed to make a survey of the laws of real property as they are governed by statute, and that they consider necessary changes in the common law and that they report back at their convenience. This is a man-sized job, and some of the men from our leading law schools as well as practitioners should be on that committee.

I move that another sub-committee be appointed to draft and submit to us a model abstract, that is, a concrete abstract, attempting to cover every situation that would occur in the average title.

I move that another sub-committee be appointed to take the work that has been done by the Fort Wayne or Allen County Bar Association and bring that down to date. It would be much more valuable if it were condensed and if the citation to statutes or decisions, or, at least, a reference to the rule of law were included.

. . . The motion was duly seconded, was put to a vote and was carried. . .

Following the passing of these four resolutions Frank C. Olive, General Chairman of the Tax and Property Section, obtained the consent of Bernard C. Gavit, Dean of Indiana University Law School, to act as chairman of the committee created to study the property statutes and the statutes of limitations. Dean Gavit has appointed as members of his committee: Charles C. Baker, John Grimes, Leon Wallace, James Thornburg, Charles Reed, Francis N. Hughes and Alfred Evens.

Mr. Olive has also secured the consent of Mr. Fox to act as chairman of the committee charged with the preparing of a model abstract.

It must be evident to the members of the Indiana State

Bar Association that the Association is now on its way to real accomplishment in the field of abstracts of title to real estate. It will entail a large amount of work and considerable time, but the results, if these committees secure the entire cooperation of the members of the Association, should go far toward perfecting the law of titles and the simplification and perfection of titles themselves. These committees and the entire program must have the sympathetic and intelligent cooperation of the members of the Bar, if the Association is to succeed in this large and difficult undertaking.

Lawyers throughout the State, should see to it, individually, that the difficulties which they have experienced are presented to the committee so that these committees may have before them as many of the problems faced by examining attorneys as possible. It will be a difficult task to correct and coordinate the statutes and the various ideas concerning satisfactory abstracts, but it will be even more difficult to anticipate all the difficulties met by the examining attorneys.

In addition to the Allen County recommendations on marketability of abstracts, we have certain recommendations made by the committee of the Indianapolis Bar Association, which we are now including herein in the same spirit in which we are reprinting the Allen County recommendations, that they may all be considered by the committees who will draft state-wide recommendations to be presented to the Indiana State Bar Association at some future date.

INDIANAPOLIS BAR PROPOSALS

We,the undersigned members of the Indianapolis Bar, and interested in the simplification of examination of abstracts, and in order to have a more uniform system of opinions with respect to abstracts, recommend to attorneys, and agree among ourselves, that in the examination of abstracts that the following rules be observed:

1. That we will restrict our opinions to an examination of the abstracts submitted to us and will not attempt to pass upon the responsibility and ability of the several abstracters who may have contributed to the formation of the abstracts.
2. The question of celibacy of a male grantor in a deed shall not be questioned in the opinion if the instrument was executed prior to 1890.

3. The question of the celibacy of a female grantor in a deed shall not be questioned in the opinion if the instrument was executed prior to 1900.
4. We recommend that hereafter in the preparation of abstracts that the records be abstracted by the Abstract Companies and not a complete record made, except where a request is made for a more complete record.
5. Printed abstracts of old additions, and which are certified to and which are properly abstracted, shall be accepted, such as the printed abstracts of Holliday's, Garfield Park Addition, Warfleigh, Mars Hill, Brendenwood, Beech Grove, Stout's Indiana Avenue Addition, Oliver Johnson's Woods, Hasselman Place, etc.
6. Affidavits which are furnished at the request of the Auditor of Marion County in order to induce the Auditor to transfer property upon the tax duplicates should not be recorded but should be merely filed with the Auditor and placed in a box for safe-keeping by him as custodian, unless the party filing the instrument requires that such affidavits be recorded.
7. Recitals used in the settlement of an estate or in a correction affidavit filed in the Recorder's Office, which recital in the decree or affidavit names certain persons as being the sole and only heirs, shall be accepted as true if the same has been a matter of record for 30 years or more and has not been questioned, as shown by the record.
8. Where a corporation is the grantor and the conveyance has been signed by the officers of the corporation other than the president and secretary, the instrument will be presumed to have been properly signed and the authority of the officers will not be questioned if the instrument has been recorded for 15 years or more and not questioned.
9. Where a conveyance is made by a corporation and such instrument of conveyance has been recorded for 15 years or more the examiner will not require a copy of the minutes or resolution authorizing the conveyance.
10. Where a conveyance has been made by a corporation and an examiner has raised the question of the requirements of any possible outstanding Preferred Stock, such examiner will only require satisfactory proof that there

was no outstanding preferred stock at the time of the conveyance and, in the absence of such information, the examiner will only require the abstracter's certificate of the records in the Secretary of State's office as to whether said records indicate that there has ever been any Preferred Stock authorized.

11. Where a conveyance has been made to a corporate trustee without any indication having been made in the instrument conveyance showing the powers, duties and rights of the trustee, if such trustee has conveyed the property to other parties and such latter conveyance has been of record for more than 25 years, then no objection will be raised to the conveyance because in either instrument of a failure to state the purpose, nature and extent of the trust.
12. Where real estate passes through an estate and the abstracter certifies that the estate has been reported for State Inheritance Tax purposes and gives the gross amount of the estate as fixed by the Inheritance Tax Appraiser, and that the real estate examined is included therein; and if the estate is of a value less than the amount required to be reported for Estate Tax purposes to the United States Government, then no further information will be required upon affidavit that the entire estate of decedent was situate in Indiana.
13. Where an estate is of a value requiring report to the Federal Tax Department and if the estate has been closed ten years or more, no showing will be required that the Federal Estate Tax Department has reviewed the case or passed upon it finally, if the property in question has been included in the estate tax return and tax paid.

The following named attorneys have subscribed to the foregoing agreement: (signatures omitted)

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Both sets of recommendations are referred to not as a solution to the problems of examing abstracts, but as examples of what has been done as a product of a careful and conscientious work. Numerous other Bar Associations have performed similar services. It is hoped that by coordination and perhaps simplifying the rules of examination to be agreed upon that much good can be accomplished. It is recommended that similar rules adopted by the bar associations of the

several counties be mailed to Frank C. Olive, of Indianapolis, for the use of the committees involved.

The work of these committees can be a great step toward perfecting merchantable abstracts of title and the law with respect to titles to real estate.

The hard work which will be done by the committees should not be left to go for naught because of lack of interest on the part of lawyers, who will benefit the most.

Yours very truly,
Chester L. Zechiel,
Member of the Committee