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THE ROLE OF TITLE INSURANCE IN LAND COMMERCE

F. W. Audrain†

The observations in this commentary on the title insurance business and its most well known product, the policy of title insurance, are primarily limited to California. They are based on more than thirty years of direct and continuous participation in the business from the vantage point of having stated the policies and procedures of one of the larger title insurance companies in that state.

As in other business enterprises, the propriety of the existence of the title insurance company is debated by some members of the public. Methods, procedures, and costs of title services and of title insurance are often regarded with hostility. Occasionally, a critical article appears in local or national publications examining the subject of title insurance, but these articles show little concern with the workaday role that the title insurance business occupies in land commerce in the United States.

Often the suggestion is advanced, usually by persons who have not inquired carefully, that a system of land registration, such as was once in effect in California,¹ should dispense with the need of the privately conducted title business. Some who make this suggestion have not read of one persistent claimant against the "Torrens" fund for the recovery of his loss. This litigant found himself in the appellate courts four separate times.² He also found that the State was a capable and equally determined adversary. Finally, this plaintiff found that the amount of the fund provided by law fell far short of covering his loss.³

An item like this is mentioned to illustrate that the title insurance business is often a ready target for hit and run criticism by

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¹ The Torrens Act, Cal. Gen. Laws, Act 8589 (Deering 1944); Repealed by Stats. 1955 Ch. 332 § 1.

² Gill v. Johnson, 21 Cal. App. 2d 649, 69 P.2d 1016 (1937); Gill v. Johnson, 8 Cal. App. 2d 369, 48 P.2d 139 (1935); Gill v. Johnson, 125 Cal. App. 296, 13 P.2d 857 (1932); Gill v. Johnson, 103 Cal. App. 234, 284 Pac. 510 (1930).

³ The Torrens Act prevailed only to the fair market value at the time the claimant suffered the deprivation complained of. Thus, an increase in value to any appreciable degree would not make whole the injured claimant. The litigation in the Gill cases was spread over a nineteen year period, in addition to an increase in the valuation of this property.

many people who have not done their homework thoroughly. While the word, "insurance" is used in the title insurance business, there are substantial differences between title insurance and most other kinds of insurance.⁴ These distinctions are well known to some of the insureds, particularly institutional lenders who are named as insured in thousands of title policies each year. Most of the general public, including many people who are directly and indirectly involved in land commerce, are not aware of some of the fundamental differences between title insurance and other forms of insurance.⁵

The informed institutional insured knows that a title company writes its insurance policy after having made a careful examination of the title as evidenced by public records in the county where the land is located. As a matter of fact, other records are actually included in the scope of title insurance, but that is a separate subject, and not germane to this article. For insured and insurer, this examination is made to achieve an accurate picture as to ownership, encumbrances, and description. Experience has shown that this is ascertainable information. The loss-experience of title insurers illustrates that a portion of their losses arises over title company personnel's failure to achieve the desired end.⁶ In most other kinds of insurance, loss arises from events which had not occurred or been set in motion before the policy was written, but which insured and insurer apprehended might occur, such as the auto accident or fire.⁷

⁴ The general statutory provisions relating exclusively to title insurance are found in CAL. INS. CODE, § 12340, *et seq.* Section 12340 defines a policy of title insurance: "Any written instrument purporting to show the title to real or personal property or any interest therein or encumbrance thereon, or to furnish such information relative to real property, which in express terms purports to insure or guarantee such title or the correctness of such information, is a title policy."

⁵ CAL. INS. CODE, § 104 lends statutory support to the fundamentals of title insurance: "Title insurance includes insurance or guaranty of title to real or personal property or any interest or against loss by reason of defective title, encumbrances, or adverse claims of title, or otherwise." See also, *Hall v. San Jose Abst. & Title Ins. Co.*, 172 Cal. App. 2d 421, 342 P.2d 363 (1959); 6 Ops. Cal. Att'y Gen. 175 (1945).

⁶ In *Viotti v. Giomi*, 230 Cal. App. 2d 730, 41 Cal. Rptr. 345 (1964), the title company's abstracter failed to include a recorded homestead in a litigation report. The land had been purchased by the defendant at an execution sale. Because of the omission of the homestead from the litigation report, the judgment creditor failed to proceed according to CIVIL CODE § 1245 (filing of an appraisal within 60 days). The court quieted title in the judgment debtor. The judgment creditor cross-complained against the title company, on a negligence theory. The court held that the title company was liable, but only for damages proximately caused by its errors.

See also, *Lagomarsino v. San Jose Abstr. & Title Ins. Co.*, 178 Cal. App. 2d 455, 3 Cal. Rptr. 80 (1960) (mis-describing Southern Pacific right of way); *Trisdale v. Shasta County Title Co.*, 146 Cal. App. 2d 831, 304 P.2d 832 (1956) (easement described as belonging to the telephone company, actually belonging to gas and electric company); *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal. App. 2d 113, 253 P.2d 116 (1953) (water pipe easement).

⁷ The average insured under an automobile policy may well see an accident or the residue of an accident any day. He is induced to buy his automobile insurance

Becoming an insured title holder is very often a consequence of being a principal to the procedures of a real estate transaction which in California land commerce nearly always provides that he be an insured owner;⁸ this insured status is not always a major concern in acquisition of the real property. Out of the usual combination of seller, real estate broker, escrow officer, new lender, and title company, the new owner becomes an insured, even though he may not be sufficiently advised regarding the quality of title he should have for his own welfare. The institutional lender must also have a quality of title for its loan which substantially parallels what this owner would ask for, were he a sophisticated and well-informed buyer.⁹ Further, the title insurer, realizing the quality of title required, may find that the seller's land presents a problem. The problem generally is resolved, though the buyer who becomes an insured owner often never knows that any problem was present and subsequently eliminated.

An illustration of such problem-solving is now necessary. Frequently, the land seller finds that his land became burdened during his ownership with a tax lien related to a business enterprise, to an accounting judgment arising from a partnership venture, or to a marital money obligation. Quite often, the seller will try to persuade the title insurer to accede to his opinion that he will convince the tax collector that he does not owe the tax, or that he will get a reversal of the judgment, or that he will secure his former wife's release of her claim on the land. When the title insurer declines to rely on these oft made confident assurances, this statement

from a variety of sources. He may not see a house burn on some statistical interval, but he buys his fire insurance out of a wise apprehension that he too may have a fire. In these other fields of insurance, it is not usually related to some other transaction, and he has regular promptings to have a care about his coverage.

⁸ See generally, CONTINUING EDUCATION OF THE BAR, CALIFORNIA LAND SECURITY AND DEVELOPMENT, Ch. 7 (1960).

⁹ Reference may here be made to what has been judicially defined as "marketable title." In one California case the court stated, "A marketable title to which the vendee in a contract for the sale of land is entitled means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men (*sic*) ordinarily bring to bear on such transactions, be willing and ought to accept." *Stanton v. Buster*, 79 Cal. App. 428, 432, 249 Pac. 878, 880 (1926) (citing *Todd v. Union Dime Sav. Inst.*, 128 N.Y. 636, 639-640, 28 N.E. 504, 505 (1891)).

In one case involving an insurer, the concept of "marketable title" was scrutinized. The plaintiff sought to recover on her title policy for damages allegedly caused by a defect in title, namely, failure of the subdivider to obtain a bond guarantying the grading and paving of streets. The city subsequently refused issuance of building permits for the area, rendering her two vacant lots substantially valueless for the time being. *Held*, the title insurer not liable. It was the condition of her land, rather than the condition of her title, which was deficient. *Hocking v. Title Ins. & Trust Co.*, 37 Cal. 2d 644, 234 P.2d 625 (1951). See also, Comment, *Title Insurance and Marketable Title*, 31 *FORDHAM L. REV.* 559 (1960).

is commonly made by the seller: "You are in the insurance business, but you never take a risk. What are you collecting a premium for?"

There are no available replies satisfactory to this seller, but the title officer knows of continuing and usual difficulties which surround the above situations.

A tax lien can readily become a source of future loss. To illustrate: An owner was confident that he would persuade the Internal Revenue office that he did not owe \$1,500 for which a tax lien had been recorded. He expected a favorable ruling within a month. An accommodating but cautious title officer required that \$2,000 be paid in escrow to protect the newly insured party. Two years later a release of this lien came of record, showing that \$13,000 had been paid to release the recorded lien. The tax people found that more taxes had been owing when the lien was filed than they had known about. Further, the case of *National Holding Co. v. Title Insurance and Trust Co.*¹⁰ illustrates that strict attention is required in this area.

In a transaction involving a partnership, California Corporations Code section 15010(3)¹¹ may come into play. Where there may be no recorded certificate of partnership, and a dishonest partner conveys away a partnership asset, the firm may recover the property, and present a serious challenge to the clear title of the proposed grantee.¹²

Regarding a marital money obligation, section 140 of the Code of Civil Procedure empowers the court to require reasonable security for the payment of child support or alimony. In one case,¹³ the California Supreme Court specifically held that, ". . . the payment of permanent alimony may be secured by making the same a lien or charge on the obligor's property."¹⁴ Further, section 674.5 of the Code of Civil Procedure creates even greater impact in encumbering a divorced obligor's land. This statute provides that when a copy of

¹⁰ 45 Cal. App. 2d 215, 113 P.2d 906 (1941).

¹¹ The text of this subsection reads, "Where title to real property is in the name of one or more of the partners, whether or not the record discloses the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of Section 15009, or unless the property has been conveyed to a bona fide purchaser for value without knowledge that the partner in executing the conveyance has exceeded his authority."

¹² *In re Hurt*, 129 F. Supp. 94 (9th Cir. 1955).

¹³ *Reed v. Hayward*, 23 Cal. 2d 336, 144 P.2d 561 (1943).

¹⁴ *Id.* at 341, 144 P.2d at 564. In *Rosenthal v. Rosenthal*, 197 Cal. App. 2d 289, 17 Cal. Rptr. 186 (1961), the court somewhat extended the breadth of the lien. In that case, it was held that the court could require a person ordered to pay *temporary* alimony to give security for same.

the order for alimony or child support is recorded, a lien shall attach on real property of the divorced spouse when he is in arrears of his alimony or support payments. This lien will also attach to realty he thereafter acquires, as well, if he has not yet discharged the lien's effect by paying the sums due.¹⁵

Thus, the insurer will seldom act on the self-serving statements of the land seller. The reason for the title company's reluctance is as follows:

1. After the sale is completed, the seller will then have no incentives to take any needed steps to assure that the risk under discussion does not materialize.
2. The seller often is not genuinely concerned whether or not the new owner will get less than the quality and condition of title which the buyer has specified.
3. The premium he has paid does not, as a few sellers have suggested, primarily go into reserves to later pay for losses anticipated on an actuarial basis. Rather, premiums mostly contribute to payment of salaries, maintenance of the title plant, and for work done to examine and report out the condition of title.
4. The new owner can rightly state that he was improperly dealt with by his insurer for insuring incorrectly as to the quality of his title, particularly as to the matter known to the insurer, not disposed of properly, and which later became at least a source of apprehension, if not a money loss, to the new owner.

Hence, the title insurer that seems unresponsive to the appeal, "But you are in the insurance business, aren't you?", usually has on its side the better principle of fidelity to a prospective new insured, and a duty to give a quality of service which it knows a new owner would want, even if such new owner is not well schooled concerning this aspect of land commerce.

The foregoing is typical of how seldom a new owner knows about what occurs. The title insurer, relying on much experience, declined to assume a proposed risk. Consequently, sufficient attention was focused, and the source of risk was removed. A parcel of land was then able to move freely in land commerce.

¹⁵ CAL. CODE CIV. PROC. § 674.5 provides in part, "A certified copy of any judgment or order of the superior court of this State for alimony or child support, when recorded with the recorder of any county, shall from such recording become a lien upon all real property of the judgment debtor, . . . owned by him at the time, or which he may afterwards and before the lien expires, acquire, for the respective amounts and installments as they mature (but shall not become a lien for any sum or sums prior to the date they severally become due and payable) which lien shall have, to the extent herein provided and for the period of 10 years from such recording, the same force, effect and priority as the lien created by recordation of an abstract of a money judgment pursuant to Section 674."

The remaining portions of the statute refer to the accomplishment of satisfaction of the debt.

This discussion of title insurance does not undertake to analyze the title insurance contract as another phase of the subject, that is, the study of details of coverage. The subject of what is included or what is excluded from coverage requires comprehensive separate discussion, and, to some extent, this has occurred.¹⁶ This discussion does not undertake to explore the history, theory, and basis upon which policies of title insurance are priced. Little published discussion has occurred on this phase of the matter. Much criticism occurs on this aspect of title insurance, and probably many critics would find uninteresting a carefully prepared development of the price structure of the title insurance business.

The limited scope of this article has to omit detailed discussion which has occurred in some states over the respective role of lawyer and title company.¹⁷ The charge is often made that title insurance companies, in their preparation of escrow instructions, are engaged in the practice of law. The controversy involves mainly the preparation of instruments which secure legal interests in land. It suffices to say that a notable volume of comment has occurred on this phase of the title insurance business, such as would be found in the publications of the American Bar Association.¹⁸ There is also a growing body of material dealing with the regulation of the title insurance business,¹⁹ and new laws have been enacted dealing with this subject.²⁰

The public has difficulty understanding how a land title once examined and insured but a year earlier should require substantial time and cost, when seemingly little could have occurred in so short an interim. Each member of the public, as an immediate participant, sees a very limited volume of land commerce. The informed observer, however, can discern significant factors. An example of complexity is the parcel of land that has had an orderly and untroubled history for three quarters of a century. The property has been repeatedly encumbered, and has seen death and divorce

¹⁶ CALIFORNIA LAND SECURITY AND DEVELOPMENT *supra* note 8.

¹⁷ See generally Hammer, *Title Insurance Companies and the Practice of Law*, 14 BAYLOR L. REV. 384 (1962); 49 KY. L.J. 384 (1961); 36 NOTRE DAME LAW. 374 (1961).

¹⁸ See cases cited in AMERICAN BAR FOUNDATION, UNAUTHORIZED PRACTICE SOURCE BOOK 87-89 (1958).

¹⁹ 36 J. ST. BAR CAL. 783 (1961).

²⁰ See CAL. INS. CODE § 12396 (added 1965). This code section gives the statutory requisites of operation for escrow departments in underwritten title companies. The section specifies numerous financial, licensing, and auditing measures. Penalties for violation of the measures are also specified.

See also CAL. INS. CODE § 12405.7 (added 1965) which prohibits a title insurer from furnishing advertising or independent evidence of title for a customer as an indirect promotion.

in the record ownership. This parcel may pass swiftly through the process of examining because every action and event affecting that title was properly handled by all participants, leaving no residual doubts as to the regularity of any event. However, that same parcel could in less than a few minutes become encumbered with a deed of trust, and that encumbrance paper could then move into an investment scheme involving a few or hundreds of people. Thereafter, the owner of the land may find that lawsuits, bankruptcy adjudication, or receivership proceedings could tie up the property for several years. The title insurer, being called upon to insure a sale of that property, may have to spend days pouring over court records to ascertain that this parcel is conclusively free from the great burden of its recent past history. The title insurer might also report that it finds an appeal taken from the last order, and that several more years will be required to get a final determination as to the correct status of the land and the deed of trust.²¹

The foregoing is an illustration of a title insurer's function, namely, three fourths of a century quickly reviewed and found regular. In contrast, the act of an owner in executing a trust deed may result in an awesome package of trouble. Yet, when the land becomes insurable three or four years later, this one deed of trust may set in motion an involved situation demanding far more time of the title insurer than the prior seventy-five year examination of the same parcel.

Approaching the central theme of this article, the role of title insurance in land commerce, it is important to recognize that the land, the title insurance business, in fact, every phase of the subject is now, and has always been affected by the activities of people and their organized groups.

While events of nature do make some problems as to land, such as the flood that relocated a river channel,²² problems arising from such a source are minor when related to the consequences of death, bankruptcy, marriage, divorce, wars, and other sovereign activities. Few people know that as of 1965, there are claims pending involving the lands of the California Indians.²³ There are many unresolved

²¹ At this point, it may be noted that CAL. CODE CIV. PROC. § 339(1) imposes a two-year statute of limitations on title policy claims. The statute begins to run upon discovery of a loss, not from the date when discovery would have been possible. *Hansen v. Western Title Ins. Co.*, 220 Cal. App. 2d 531, 33 Cal. Rptr. 668 (1963), 98 A.L.R.2d 520 (1964).

²² See *Bishel v. Faria*, 53 Cal. 2d 254, 347 P.2d 289, 1 Cal. Rptr. 153 (1959).

²³ There are specific statutory provisions relative to California Indians. See 25 U.S.C. §§ 651-58 (1928). Section 652 provides: "All claims of whatsoever nature the Indians of California as defined in section 651 of this title may have against the United States by reason of lands taken from them in the State of California by the United

problems arising out of official land surveys made as long as a century ago. Further, the state and local governments are deeply involved in discussions of land in which both claim an interest, all arising from laws and acts based on those laws occurring decades ago.

In any given time period—a decade or a century—there is no measure of how many parcels of land acquire “people-made” problems that call for the kind of service that a title insurer may render. It will suffice to say that on any given day in California, there are parcels of land that are not moving as readily in land commerce as owners had hoped for because of particular problems which these owners created, often only first ascertained by a title insurer in connection with its work on that parcel of land. The combined efforts of the title insurer and of the attorney for the interested parties are often required for such a parcel to ultimately be sold or financed, free of its particular burden. The value of such land, having this special kind of attention, is, in our times, usually many thousands of dollars. Proposed new owners, lenders, and lessees are not sentimental people. Along with economic considerations, they frequently indicate an additional objective: they want the maximum certainty as to quality and condition of the land into which they are investing their funds. To the seller, the conditions he has to observe are often inexorable in view of the requirements of the buyer and his lender.

The following illustrations are commonplace. The work of the title insurer was indispensable to each parcel of land becoming freed of a problem. Real property could then contribute a greater role of usefulness and value to the community and to the state.

ILLUSTRATION: Possibility of Sovereign Title

Thirty acres of land abut the waters of a well-known inland bay. The earliest recorded document for this land was a tidelands patent from the State of California. One hundred feet offshore,

States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians, may be submitted to the Court of Claims by the attorney general of the State of California acting for and on behalf of Indians from the United States; and jurisdiction is conferred upon Court of Claims of the United States with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all such equitable claims of said Indians against the United States and to render final decree thereon.

It is declared that the loss to the said Indians on account of their failure to secure the lands and compensations provided for in the eighteen unratified treaties is sufficient ground for equitable relief.”

See also, *Spector v. Pete*, 157 Cal. App. 2d 432, 321 P.2d 59 (1958).

when the tide is high, stands a four or five acre island. The public records as to this island begin with a deed from one private person to another, but with no document in the county records from the state, the United States, or from the Spanish or Mexican sovereigns. To a developer of a proposed marina, who had taken a six-months' option from the mainland owner who claimed to own the island, and who had paid the taxes, the title insurer's advice that the island had no recorded history in the county was unsettling.

The optioner-seller and his attorney urged that the recorded deeds which began wild, together with payment of taxes²⁴ on an island theretofore occupied only by birds, enured to an insurable interest. A multimillion dollar development was contemplated. The optionee-buyer, knowing of the problem, made more emphatic his insistence on a policy of title insurance that would insure him as the owner without exceptions of any kind. He desired no uncertainties in the public records regarding his ownership. The seller argued to the title insurer that it was almost ridiculous to apprehend that the State or the United States could have any interest in an unoccupied piece of land which had been claimed by a succession of individuals for nearly a century. These contentions caused the prospective buyer to add the comment, "A title insurance policy represents much more to me than to reimburse me for a loss of title. I also want the assurance that every effort has been made to ascertain that my title will free any claim against me."

The necessary work to develop all the available facts regarding title to this island led to the title insurer's search of records of the State at Sacramento, of the federal records found in that city, and finally, of records of the United States in Washington, D.C. The results of this substantial additional work was to find and secure for recording in the county where the island was located, a copy of the authoritative ruling by a federal agency arising from a hearing before a United States agency tribunal half a century earlier. Upon examining these proceedings to determine regularity, and upon further studying the relevant statutes and administrative procedures to determine the legality of that ruling's order, the title insurer was able to find the key. This enabled the seller's attorney to get on with the other steps to perfect his client's title. This illustration is given to show an area of constructive work by a title insurer which moved the island into active land commerce.

²⁴ CAL. CODE CIV. PROC. §§ 749 and 749.1 provide that the taxes be paid for alternative periods of five or ten years, depending upon which remedy the adverse claimant wishes to take.

ILLUSTRATION: *Obviating Trust Restrictions*

Eighty acres of land were owned by a prosperous farming family for half a century. Twenty years ago the husband, with the aid of his attorney, created a living trust. The trust instrument revealed the trustor's lively concern that his widow enjoy the then valuable land; however, there were severe restrictions on the trustee, showing the trustor's obvious awareness that his sons were not of his business ability.

The settlor did not anticipate the oncoming oil exploration. He neither realized that the land might later become valued beyond his imagination, nor that it could even become relatively unimportant for agricultural purposes. His trust instrument contained such restrictive language on the trustee's powers that the contemplated oil and gas leases were nearly precluded. When the advance men from the oil companies began their discussions, they were not fully aware of the extreme problem of the trust indenture. Their offers regarding bonus, advance rental, and royalty were handsome. Trustee, widow, and adult beneficiaries were anxious to lease the land. Exploratory wells were being drilled half a mile away by other oil companies, and in a few months were going to approach projected depths which would indicate a substantial new production or a dry hole.

The title insurer, reporting out the vesting of the land for the benefit of the proposed lessee and the trustee, also knew that the trust indenture was going to be a serious problem. Within several days, the attorneys for the parties, after much discussion of the matter with attorneys for the title insurer as to what kind of judicial proceeding to undertake and what a proposed decree should state, were preparing the complaint. It was necessary to raise the power to lease, to plead the urgency to the trust estate, and to try not only for the immediate income, but to protect the land from loss of the "fugitive substance" which could be reached by wells on adjacent land. Care had to be taken in the naming of parties to the action in order to reach unborn persons and contingent remaindermen, so that the prospective lessee with a valuable leasehold estate would not later have to face demands from one not reached by the proposed court decree.²⁵

²⁵ A parallel case is that of *Adams v. Cook*, 15 Cal. 2d 352, 101 P.2d 484 (1940). In this instance, the *res* of the trust was certain undeveloped property. It was not known at the time of the trust execution that the land was oil property. At the time the action was instituted, there was drilling on adjacent property. The trustee was not empowered to execute a lease beyond the life of the trust, since the trustor had directed that the land be eventually sold. Upon refusal of the trustee to lease, plaintiffs, who represented ninety percent of the beneficiary interest, prayed

The prospective lessee would neither disburse money for advance rental and bonus, nor would he spend perhaps three quarters of a million dollars to drill without a policy of title insurance.* In the course of the preliminary work, the parties had to cope with an eager life tenant, a widow of forty-eight years who was absolutely positive that she could never again become a mother, and who was vastly annoyed about the title insurer's apprehensions on the subject. Yet, this piece of land commerce called for certainties, not the taking of calculated insurance risks. Not until her lawyers undertook their own independent study as to what the courts have said about the possibility of issue²⁸ could legal work get underway to ultimately enable drilling equipment to go into the land.

ILLUSTRATION: Marital Property Settlement

Not every husband and wife who are headed toward a final decree of divorce that may not be entered for several years discuss their preliminary steps with a lawyer. Suppose there are minor children, and the wife says to the husband, "I don't need the home, but we must have a home for Christy (age two) and Joanne (age four)." Title is in the husband, and he makes a deed to his wife, with the grantee designation as "Irene Ethel Doe as trustee for Christy Doe and Joanne Doe." Ten years after divorce, the wife remarries, and second husband's employer, one year later, requires that he report for duty within thirty days to the Bahrein Gulf.

After listing the home for sale, a real estate broker readily finds a buyer, and soon afterwards the title insurer reports out the vesting of the property as shown in the first husband's deed. The escrow officer asks the title officer what is needed as grantor parties for the deed to the new owner. The title officer asks if there is some writing which the seller-wife may have regulating her powers as trustee, particularly, her power to sell the land. The wife is forthwith upset, having no concept of the applicable law on the subject or the concerns of the title insurer. She protests that she holds title for her children, saying, "They are minors, they haven't any interest in this land." Christy is by now living with his father.

The seller-wife finally becomes persuaded that she has a problem, and that her deed alone will not pass title. Her attorney realizes

for declaratory and equitable relief. The prayer alleged irreparable damage by virtue of adjacent drilling. *Held*, the court was empowered to alter the administration of the trust. The beneficiaries' interest was held paramount, so that a lease for no longer than the life of their trust would substantially impair both the trustor's intent and the cestuis' beneficial interests.

* [Ed. note: The subject of insurability of oil and gas leases is amply discussed in Audrain, *Title Insurance of Oil and Gas Leases*, 3 U.C.L.A. L. REV. 523 (1956).]

²⁸ See generally, Annot., 98 A.L.R.2d 1285 (1964).

that the sale cannot be completed before she must leave the country with her second husband. He discusses the matter with the title insurer, and acts on the recommendation that some papers be executed as intermediate steps, such as a carefully drawn power of attorney, which, in ways unanticipated, could be quite useful.

By now, Christy had become influenced by his father, and this precluded use of sometimes practical steps known to title insurers. The title insurer recommended comprehensive but available procedures relative to the conveyance of the son's interest. Christy's father, as his guardian, elected to cooperate with the proposed sale after having had independent legal advice. The title insurer's recommendations relative to the daughter's interest were followed, and the sale was finally closed months later. The buyer was patient, having made a good purchase. The sale bore the scrutiny of the court hearing the proceedings as to Christy and Joanne. To get this land moving in land commerce, there was full cooperation between the seller's attorney and title insurer.

ILLUSTRATION: *Ambiguous Exception*

One hundred sixty acres of land were conveyed in 1910 by a deed in which, after the description, the following words appeared: "Excepting therefrom, one half the oil and gas." Forty years later, this quarter section is now owned by the fifth successor grantee. The property is of substantial interest to a developer proposing to create an industrial site subdivision because of the proximity of two railroads and favorable on and off movement to and from a recently completed segment of a freeway.

In that forty-year period, three of the land transfers were in the family, and the last two conveyances were to grantees who were persuaded that since the land had been so long-owned in one family they need not use the usual land transfer processes of escrow and title insurance. Every deed in those transfers copied the exception in the first deed verbatim. When the title was first examined after the forty-year span, it was found that for the last grantee the ownership of oil and gas, at least by virtue of the public records, was unknown. The title insurer knew that the possibilities of claim of ownership to the oil and gas were unpredictable. The former owners had had the usual events come their way. Sundry events had affected the ownership of the fractional divisions of the oil and gas, events such as deaths, omnibus clauses in decrees of distribution to wives and children, property settlement agreements, and some deeds out by intermediate grantees of what they presumed to be their interest in the oil and gas. To the owner, the problem was simple. He knew he owned one-half the oil and gas by reference to his deed, and he

was certain he owned the other half of the oil and gas because he had farmed the land for seven years and had paid all the taxes.²⁷

The prospective buyer wanted the entire fee with all the oil and gas. Unless he was to be so insured, he would not buy. The last grantee reluctantly employed counsel, and after many hours of work with the title company, all information from the public records was ascertained, information as to every former owner and all persons who could claim undivided interests as distributees or from other relationships during those forty years. An action was filed with defendant-party designations²⁸ specified by the title insurer. After proper service, the filing of satisfactory defense pleadings, and the entry of a decree satisfactory to the title insurer, the buyer became an insured owner.

Inasmuch as the title insurer was being asked to insure full ownership in the new owner, all parties fully understood the propriety of observing the specifications to the title insurer regarding what was needed in the action and the decree. After completion of a subdivision, new owners came into title, and lenders from all sections of the country contributed to the development.

This illustration represents the indispensable function of the title insurer in getting this property into land commerce.

ILLUSTRATION: *Condominiums and Statutory Restrictions*

Condominium development in recent years has given rise to an unusual amount of cooperative effort involving the land seller, the land buyer-developer, the attorney for the developer, the engineer for the developer, and the title insurer.²⁹ There must be compliance with the changing and exacting requirements of state regulatory agencies, the requirements of city and county planning commissions,³⁰ and careful preparation of the condominium documents and plans which are required by law.³¹ For buyers and lenders, both of

²⁷ CAL. CODE CIV. PROC. § 323 designates what constitutes adverse possession under a written instrument or judgment. Cultivation is one statutory element which constitutes possession and occupancy.

²⁸ CAL. CODE CIV. PROC. §§ 373.5, 749, 749.1, 750.

²⁹ The condominium has been statutorily defined: "A condominium is an estate in real property consisting of an undivided interest in common in a portion or parcel of real property together with a separate interest in space in a residential, industrial, or commercial building on such real property, such as an apartment, office or store. A condominium may include in addition a separate interest in other portions of such real property.

Such estate may, with respect to the duration of its enjoyment, be either (1) an estate of inheritance or perpetual estate, (2) an estate for life, or (3) an estate for years." CAL. CIV. CODE § 783.

³⁰ CAL. CIV. CODE § 1370.

³¹ See CAL. CIV. CODE §§ 1350-1359, and CAL. REV. & TAX. CODE § 2188.3.

whom require policies of title insurance, the need is serious that the prospective condominiums comply with applicable law. The title insurer applies searching and critical attention to those phases of the project that must follow the dictates of statutes. If the title insurer's policies are not available, the plans of the developer are delayed until he revises his plans to achieve a true and lawful condominium, or try another field of development. It has often occurred that the developer and his attorney, both beginning their first condominium venture, ascertain for the first time from the title insurer the far-reaching scope and complexity of a condominium project. When the parcel or the several parcels of land become a completed and insurable condominium, the activity of the title insurer has had a useful role in substantially increasing the number of parcels or interests in property moving in land commerce.

ILLUSTRATION: *Restrictive Covenants*

In 1922, a new tract was established with eighty residential lots. The subdivider imposed restrictions limiting the use of the lots to single family residences.⁸² As the decades passed, two of the streets which formed an intersection, on which some of the subdivision lots faced, gradually became heavily traveled.⁸³ The lots across these streets facing the 1922 subdivision became business properties. The restrictions that once applied to those lots across those streets had long since lost any significance.

The lots facing the busy streets acquired little residential construction; if they were built upon at all, the volume of traffic made them unsuitable, and they sustained long vacancy.

At this intersection expensive gasoline stations were being constructed on lots not in the 1922 subdivision. Several of the lots at and adjacent to this intersection in the 1922 subdivision were seriously considered by other oil companies. Upon study of the restrictions,⁸⁴ the question was immediately asked, "Will a title insurer write title insurance specifically covering the risk inherent in building and operating a gasoline station on lots restricted for residence use?"

For such a situation, there is ample experience upon which to base estimates as to this particular situation. The title insurer may

⁸² See *Atlas Terminals, Inc. v. Sokol*, 203 Cal. App. 2d 191, 21 Cal. Rptr. 293 (1962).

⁸³ See *Bard v. Rose*, 203 Cal. App. 2d 232, 21 Cal. Rptr. 382 (1962); *Wolff v. Fallon*, 44 Cal. 2d 695, 284 P.2d 802 (1955).

⁸⁴ See *Hurd v. Albert*, 214 Cal. 15, 3 P.2d 545 (1931); *Strong v. Hancock*, 201 Cal. 530, 258 Pac. 60 (1927).

require that the lot owner who wants to sell to the oil company obtain the prescribed writings from as many other owners of his immediate tract neighborhood so as to substantially eliminate the risk of litigation to stop the proposed oil company's use.

If the needed work is done, and it often is accomplished, an inactive parcel of land becomes substantially more valuable in the community, with desirable benefits to that community.

LAST ILLUSTRATION: *Floating Easement*

Decades ago, land parcels were generally larger in area, and mostly used for agriculture. Water was desired by all, and the granting of an easement for a ditch or pipe line was often created in the manner of a floating easement. The grantor saw where the line was to be placed through his orchard, and asked no more, not even a request of a plat from the water company's surveyor for final location. Half a century later, with numerous ownership changes, both as to the servient tenement³⁵ and as to the water company, the record location of this pipe line is wholly uncertain, except that the water company does occasionally use the line.

For a prospective subdivision, neither new owners nor lenders can assume the risk of an unlocated but recorded easement which might pass beneath any one of a group of new homes. The title insurer is often confronted with this situation. Every title insurer has had extensive difficulty with long established subsurface pipe lines arising from utilities-trenching, swimming pool excavations, or routine land grading.

There are instances where the title insurer is able to bring its accumulated experience and observations to bear on such a dilemma, and to write its policies of title insurance without mention of the easement. In one such situation, the easement was required by the grantor's deed to "run as near as possible along the base of the hills" on the grantor's property. Inquiry among informed people long resident in the area revealed that this recital was put in the deed to assure that there would be a gravity flow of the water. Since the base of the hills was safely distant from the nearest line of the subdivision, the title insurer was able to omit reference to this otherwise unlocated easement. This particular easement required no further work, and the sale of perhaps one hundred homes became a reality.

CONCLUSION

Every informed member of the California Bar who has had years of active title insurance experience could narrate these and a

³⁵ See CAL. CIV. CODE § 803.

host of related situations. They are commonplace, and counted not in the hundreds, but in the thousands.

The title insurer, through its informed personnel, its title plant, and title searching facilities, is a continuous factor in expediting land commerce in this state. Essentially, an acquaintance with all California real property law, an acquaintance with all relevant cases (including those in advance sheets), experience with legions of actual situations—these factors as well contribute to the reliability and quality of the title insurance business.

At every moment in time, some event is forming or happening that will affect the title to a parcel of land. To the uninformed, it appears that a parcel can be transferred and insured as quickly as documents can be prepared and recorded. The foregoing illustrations point out only a small segment of the complexities which are often integral components of a vast number of land transactions.

It has been the author's purpose to call attention to the role of the title insurer prior to policy writing. This role is frequently carried out with the understanding and cooperation of the lawyers of this state, without whose services much of our land would not so readily move in land commerce.