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TITLE EVIDENCING IN NORTH DAKOTA

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The selling and buying of land,[1] often stated to be the sole source of all wealth, is a very ancient custom. The Holy Bible gives the story of a real estate[2] transaction occurring more than four thousand years ago,[3] when Abraham, the Hebrew patriarch, desiring a burial ground for his wife, Sarah, purchased a field for four hundred shekels of silver and Scripture states:

> The field and the cave that is therein were made sure unto Abraham for a possession of a burying place by the Sons of Heth.

That evidence of the passage of title to Abraham was considered important is denoted by a public proclamation of the change of ownership to all who entered the gate of the village that day

Down through a long history from Biblical times to the present day, the need for and the systems used to give notoriety to and evidence of the ownership of real property have wended their way into American heritage and law, and the statutes of the State of North Dakota.

Both the Fifth and Fourteenth Amendments to the United States Constitution recognized the right of a person not to be deprived of property without due process of law nor taken for a public use without just compensation. That such guarantees would necessitate some method of establishing and evidencing ownership of property was apparent.

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1. N.D. CENT. CODE § 47-01-04 (1960) defines land as "the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance."

2. N.D. CENT. CODE § 47-01-03 (1960) states that "Real or immovable property shall consist of:
   1. Land,
   2. That which is affixed to land,
   3. That which is incidental or appurtenant to land, and
   That which is immovable by law."

3. Genesis 23:3-20.

The area of North Dakota forms a part of that domain which was ceded by France to the United States, subsequently becoming part of the Dakota Territory, and the State of North Dakota. When the problem of settling the public domain arose after Independence, various committees were appointed by the young Congress to come up with some sort of a plan. It soon became obvious that the matter of description would first have to be attacked, and Congress on May 20, 1785, passed the Land Ordinance providing for townships six miles square, subdivided into lots or sections one mile square. The Ordinance of 1786 provided for a Surveyor General and the Act of 1812 a General Land Office to carry out the problem of surveying and disposing of the public domain. Thus we find the "rectangular" system[4] adopted and applied to the domain of which the State of North Dakota became a part, and it was possible to describe a tract of land with some definite certainty and ability to locate it by reference to the Government Surveys.

All the land within the State of North Dakota was within the public domain and title was only to be acquired from the United States of America. The policies of Congress have gone through various stages but in the "disposal" stage various acts of Congress were passed to permit private ownership, or making outright grants.[5]

In order to maintain some sort of record keeping and control at the local level, Land Districts were set up and a register and receiver were appointed to administer the disposal of the public domain.[6] Thus we have the start of the record keeping of title evidence to lands within the State of North Dakota.

Following the lead of the Colonies and prior states, when the

4. Prior to the American Revolution there were fundamentally two systems — the New England System and the Southern System. The New England System was based on the county, town or parish systems as had existed in England. The township was generally an irregular area surrounding a town, and tracts within the township were established by surveys and plats were prepared and the bounds recorded. As early as 1652 the rectangle of 36 square miles was used as a township and as time went on the system grew.

The Southern System was based upon individual surveys of each tract, which often caused overlaps and title disputes.

The "rectangular" system adopted after the American Revolution was based upon lines running North and South and East and West, and six miles apart, thus building up tiers from where the original lines crossed, and a range was a tier of townships, running from North To South, enumerated from East to West. The North and South line originally established was on a principal meridian (that governing land in North Dakota being the Fifth) and the East and West line was called the "base line."

5. There were two primary means of disposing of public lands — Congressional Grants (such as those in aid of railroads, school land grants, grants for internal improvements and right of way grants), and disposal under General Acts (such as the Homestead Act, Tree Claim Act, Preemption Act, Desert Homestead Act, and others, all designed to promote settlement.

6. Under the Act of April 24, 1874, Congress provided for Land Districts with offices in Pembina, Bismarck, and Grand Forks, among other cities. The register in each office kept records of entry upon lands within the public domain, as well as other evidences of claims, and the receiver issued receipts for the nominal per acre charge provided for under the various Acts, as well as other payments.

Territorial Code of 1877 was adopted by the Territorial Legislature of Dakota Territory, statutory provision was made for an office to be headed by a register of deeds.[7] The register of deeds was to keep records of instruments authorized by law to be admitted to record[8] and a penalty was provided for failure to record[9] those instruments which the law authorized to be recorded.[10] It is from this or some other type of recording system that evidence of title is based as distinguished from a system which relies on possession of both the land and the necessary title documents.[11]

The public record[12] is not an end unto itself, but is to provide a public record of deeds and other conveyances affecting the ownership and possession of real property, to give notice by operation of law to all persons who may be in the process of acquiring any interest in the property, and to set forth the priorities as between conflicting interests. Transferring of ownership or interests in real property brought forth a conveyancing system, which utililzed the recording system but was also dependent upon other rules and regulations.[13]

Once a recording system has been established there must of

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7. REVISED CODES OF THE TERRITORY OF DAKOTA, 1877, Pol. C. § 15 (hereinafter cited as Pol. C. 1877).

8. Pol. C. 1877 § 57 provided that the register of deeds had a duty to "keep a full and true record, in proper books kept for that purpose, of all deeds, mortgages, bills of sale, chattel mortgages, and all other instruments, authorized by law to be admitted to record, filed with him for that purpose" and § 58 provided " the register of deeds shall prepare from the records of their offices respectively, and shall hereafter keep, a numerical index of the deeds, mortgages, and other instruments of record in their respective offices affecting or relating to the title to real property, in lieu of indexes by names of grantors and grantees, as now kept." This innovation of the "tract " index has done much to make the public records a more reliable source of title evidence.

9. REVISED CODES OF THE TERRITORY OF DAKOTA, 1877, Civ. C. § 671, (hereinafter cited as CIV. C. 1877) provided that "Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or incumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." This is a "notice-race" type recording statute which is in force in about one-third of the states, as distinguished from so-called "notice" or "race" type.

The positive effect of recording is set forth in CIV. CODE 1877, § 674, when it states that the recording and depositing of an instrument, "proved and certified" according to law "are constructive notice of the execution of such instrument to all purchasers and incumbrancers, subsequent to the recording."

10. CIV. C. 1877, § 647, provided "Any instrument or judgement affecting the title to or possession of real property may be recorded" provided, with certain exceptions, its execution could be proved by acknowledgment or proof of witnesses.

11. Except as to the registry Acts or Torrens law in England this is still the system prevalent there.

12. The "public record" generally spoken of in evidencing title to real property is the record which imputes constructive knowledge to persons dealing with the property of certain persons who might own property, whether or not it is of record in the Office of the Register of Deeds. Other things which would be considered part of such a record are taxes, judgments, mechanic's liens, and anything else which is provided for in the statute as imputing knowledge.

We purposely left out specific citations in this area, so that we might advance to the problem of extracting from the record all the instruments, facts and other information necessary for a determination of the status of the title. The reliability of the record as a basis for determination of ownership is another topic.

13. BABYE, CLEARING LAND TITLES, § 2 (1953).

necessity be some examination of that record if a prospective purchaser or encumbrancer is to take free and clear of instruments properly recorded.[14]

It does appear historically that when the populous in an area was small and everyone knew everyone else, that perhaps not too much attention was actually paid to the record as a basis for determination of ownership. Reliance apparently was had more on the actual knowledge of possession and occupancy and the original documents of title. However, growth in population and commercial activity soon served to bring examination of the record as an essential part of the conveyancing system.

That the examination should be made by some one skilled in the law of real property seems essential, but apparently prior to the middle of the 19th Century there developed a practice in England that someone other than the person trained in the law should peruse the records and present a synopsis of everything of record to the lawyer for examination.[15] Thus there developed a group of persons skilled in finding all the necessary instruments and other information of record and compiling it for examination by the lawyer. These people soon became known as "abstracters" and their product an "abstract of title." A recognition that the making and compiling of abstracts of title was vested with a public interest was apparent as early as 1899[16] when statutory regulation was provided to supervise the abstracter, and to provide financial security in the form of a bond conditioned for the payment of any and all damages that may accrue "by reason of any error, deficiency or mistake" in any abstract or certificate of title.

Once the abstract of title is compiled and presented to the lawyer-examiner, the question then arises as to just what kind of a title can the lawyer-examiner advise his client he can or must take. The statutory requirement was and is that specific performance cannot be enforced in favor of a seller "who cannot give to the buyer a title free from reasonable doubt."[17] Such a definition as "free from reasonable doubt" does little to help the examining

14. In this connection it might be pointed out that when the statute requires certain things before recording, it means just that in that the Courts have consistently held that an instrument not entitled to record but actually recorded imparts no constructive notice. See American Mortgage Co. v. Mouse River Live Stock Co., 10 N.D. 290, 86 N.W. 965, and cases following. Such an interpretation of the statute tended to benefit the person who did not examine the record, as in Doran v. Dazey, 5 N.D. 167, 64 N.W 1023, the court did hold that an examination of the record imparts "actual" notice and the problem of "constructive notice" was not an element. This situation was changed, under the statutes of North Dakota Ch. 334 of the 1959 Session Laws, to provide that whether entitled to record or not an instrument actually recorded would have all the benefits of the recording acts.

15. See WARVELLE, ABSTRACTS, §3 (1907).

16. POL. C. 1895, Art. 24-Abstracters.

17. CIV. C. 1877, § 2002 same as N.D. CENT. CODE §32-04-15.

attorney, so we turn to the decisions of our supreme court to find out what it says about what type of a title is free from reasonable doubt and may be the subject of specific performance.

In *Easton v Lockhart*[18] the court by way of dictum stated that the purchaser cannot be compelled to accept a title that "is so clouded by claims and demands that the same is not a marketable title." Thus we find the court in effect saying that a title which is not free from reasonable doubt is not a marketable title, and there is born the eternal search for the "marketable" title. The court continues in its dictum by adding that if there is such uncertainty in the title as to affect its market value there can be no specific performance and "cast upon the purchaser the risk of litigation and the embarrassment of a questionable title," and concludes that such a rule "is entirely elementary"

In *Woodward v McCollum*[19] the court states the statutory rule is merely a declaration of the common law rule that the vendor must be ready and able to convey a marketable title. The court then cites with approval a rule stated thus:

> A purchaser is not compelled to take property the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and, if he wishes to sell it, be reasonably sure that no flaw or doubt will arise to disturb its market value.[20]

In further definition of what type of a title was subject to specific performance, in *Kennedy v Dennstadt*[21] the court stated:

> A "good and merchantable title" means a title in fee simple, free from litigation, palpable defects, and grave doubts; that is, a title which will enable the purchaser not only to hold the land in peace, but will enable him, whenever he may desire to do so, to sell or mortgage the land to a person of reasonable prudence and caution.

And in *Coverston v Egeland*[22] the court added that even if there might be some sort of an outstanding interest the probability "was very remote that Charles Breen would assert any claim to the property" and that if he did assert a claim the record "is devoid of evidence that any attack by Charles Breen would have been successful" and thus the "remote possibilities charged as defects

18. 10 N.D. 186, 86 N.W 700 (1901).
19. 16 N.D. 42, 111 N.W 623 (1907).
20. Vought v. Williams, 120 N.Y. 253, 24 N.E. 195 (1890).
21. 31 N.D. 422, 154 N.W 271 (1915).
22. 69 N.W.2d 790 (N.D. 1955).

against this title are not sufficiently substantial to raise a reasonable doubt as to its validity" and thus "the title was therefore marketable."[23]

From these pronouncements the examining attorney is obliged to search for a title which meets the stated specifications when examining for one bound by a contract specifying in any language what could be interpreted to mean the vendor must tender a marketable title. That such a standard would develop into the standard for all examinations could be expected, and notwithstanding that the great majority of title examinations are made for only prospective purchasers or encumbrancers.

Too often land and its uses are taken to be strictly a legal problem, in complete disregard of the economic and social implications. The United States has always been committed to private ownership and a policy of alienability of land, to the extent that laws dealing with land and its fixtures, for the most part are different than those dealing with personal property Traditionally laws are slow of change and lag behind social and economic changes. That this was and perhaps still is in many areas the case is no where more apparent than in the matter of the evidencing of title to land.

As early as 1857 there was evidence that the recording system was not completely adequate, for in that year Sr Robert Richard Torrens supervised the installation of a scheme modelled on what was known in English law as the "Merchant Shipping Acts," for the transfer of land titles in South Australia. This scheme soon became known as the "Torrens Act" or the "Torrens System of Title Registration," and fundamentally provided for official certification of title by the state after an examination of the public records by the state or county officials or official examiners, and registration of the result in and by a judicial proceeding and court decree. The Torrens system, with some modifications to meet constitutional requirements, came to the United States as early as 1897 [24] In 1917 the State of North Dakota adopted the scheme.[25] The adoption of the system of land registration caused a storm in the title and legal field. The abstracter thought he was going to

23. The 1955 Report of Committee on Acceptable Titles to Real Property, A.B.A. Section of Real Property, Probate & Trust Law 32 stated "We suggest that the holding in Covertson v. Egeland, is a dangerous expansion of the rule, for (1) it shifts to the buyer the burden of showing that the title is unmarketable, and (2) forces upon an unprotected purchaser the risk of defending his title against a clear defect in what might prove to be expensive litigation."

24. CALIFORNIA, STAT. 138, (1897), MASSACHUSETTS GEN. LAWS, Ch. 185, Ch. 562 (1898) NEW YORK LAWS, Ch. 444 (1908).

25. Laws of 1917, Ch. 235, Supplement to the 1913 Compiled Laws of North Dakota, Ch. 50A. Apparently no use was ever made of the system for registration and the whole act was repealed by omission from the N.D. REV. CODE of 1943.

be put out of business and the examining attorney could see his business moving into the hands of a public official.

Far seeing members within both the abstracters associations and bar associations while criticizing the Torrens system did recognize deficiencies in the recording system and the abstract-attorney opinion system. On August 16, 1906, John T Kennedy, of the Bar of Madison, Wisconsin, speaking to the State Association of Wisconsin Abstracters, speciffically on the Torrens system opened his remarks by stating:

> That our present system of land transfers is in serious need of simplification and improvement or of complete reform, no one is more fully aware, I believe, than the members of this association.

A recognition of the need for some simplification and improvement by a few did not generate much enthusiasm among the organized bar[26] and no real efforts were made to attack the system with a view toward improvement until fairly recent years, and it is questionable whether the system itself can survive.

What is wrong with the system? It has been characterized as slow, expensive, and uncertain as well as causing confusion, frustration and irritation, but this really begs the issue. Why is it slow, expensive and uncertain? Is it the system itself or the humans using it?

There are fundamentally three steps in the conveyancing process and these are (1) an appraisal of the seller or borrower's title; (2) the drafting, execution and delivery of valid instruments of conveyance; and (3) the recording of these instruments. It is primarily with the appraisal step that we are most concerned, although to a limited degree the other two steps might contribute to the criticism of the conveyancing system, no matter what type of title appraisal system is used.

The abstract of title should be a complete and accurate compilation of all instruments and other facts of record, in such form as to contain all the legal requirements necessary for the examiner to come to an intelligent conclusion. It is obvious that the abstract cannot improve upon the record, but must stand or fall with any weakness in the recording system. It is from the abstract of title that a determination of the quality of the record title is usually determined by the examiner [27]

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26. See Ruemmele, *The North Dakota Marketable Record Title Act*, 41 N.D. L. REV. 575 (1965), SIMES, A HANDBOOK FOR MORE EFFICIENT CONVEYANCING, Ch. 4 (1961).

27. It is apparent that as the instruments accumulate in the record the volume tends to become greater and the task of both the abstracter and attorney more tedious and time

A sometimes overlooked distinction is the definition of marketability which has caused some confusion. A title can be "marketable of record" and not "marketable in fact" or vice versa. A title is generally considered marketable of record if the record shows a title which meets the standard of marketability and is also capable of prima facie proof entirely from the record.[28] One writer feels that the distinction is merely a reflection of the difference in the means of determining the quality of marketability,[29] we feel that the distinction points almost to the heart of the breakdown in such a conveyancing system. Marketability, whatever the word may mean, is not an end in and of itself, and only so long as the legal application of the word or its definition serves the economic and social uses and demands for land can it survive. Within the frame work of everyday dealing with land and its title, there really is no place for the use of the standard of "marketable of record." There really is no such thing as a record title.[30]

An oil company which desires to purchase a tract of land at the intersection of two highways for the purpose of erecting and operating a retail gasoline station and borrowing funds for the erection does not care if the title is marketable of record. It wants to know whether it can erect the station, can offer a title which a lender will accept as security for a loan, can operate the station peaceably, and when they are through can readily dispose of it.

Is an examination of the record as reflected by an abstract of title sufficient to permit any examiner to assure a client it can do all those things? There should be no dispute with the position that it is not. So we must conclude that the record is not a complete indicia of the kind of title desired. The facts missing from the record are often referred to as non-record items, such as the rights of parties in possession, rights of materialmen or laborers for

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consuming. There have been some efforts to endeavor to eliminate from the abstractor certain instruments, such as mortgages released of record 40 or more years ago, and such other instruments which have historical value, but because of the statute of limitations and curative statutes, really have no bearing on the quality of the title at the present time. A modernizing of the system must include some elimination from the abstract of such instruments.

28. PATTON ON TITLES, § 48 (1957).

It is commonly stated that in order for marketability of record, one should be able to take the instruments of record and introduce them into evidence without further proof and such instruments should establish a prima facie title. This concept is recognized by N.D. CENT. CODE § 47-19-45 (1960), when it provides "All instruments entitled to record, the record of all instruments, or duly certified copy of such record, shall be admissable in evidence in all courts of this state and may be read in evidence in all courts of this state without further proof." Prior to S.L. 1959, Ch. 335, only those instruments of record which were entitled to be recorded were so admissible.

Abstracts in North Dakota get a big boost as evidence under N.D. CENT. CODE § 43-01-22 (1960), which provides that "abstracts prepared by an official abstracter shall be received as evidence in all courts, and shall be prima facie evidence in all courts and places of the facts stated therein."

29. BASYE, *supra* note 13, § 4.

30. See 6 HARV. L. REV. 302 (1892) GAGE, LAND TITLE ASSURING AGENCIES 35 (1937).

improvements on the premises, installments of special assessments not certified for collection, any knowledge which might put one on inquiry notice, governmental zoning and use regulations, and facts which might be disclosed by a survey

The historical surrounding of land and its every incident of ownership with safeguards has tended to perpetuate interests, liens and claims which in the law remain as assertable. Every writer, and there are many, who have in recent years attacked the problem of improvements in the present conveyancing system has asserted that there should be machinery within the system itself to bar old claims and interests and to do it in such a manner as to make the barring thereof apparent on the record.[31] In line with more recent thinking the barring of old claims and interests and the adoption of a statutory definition of marketable record title, has done more to bolster the present system than anything else.[32]

Perhaps the greatest weakness in the matter of potential loss is inherent in the system, notwithstanding all the safeguards embodied in the statutes. The record cannot disclose forgeries, nondelivery, capacity of parties, false recitals, invalidity of court and probate proceedings, and the human error in the actual recording and indexing process. Every examiner must presume the validity of the instrument of record where there is nothing on its face to warn him otherwise.

One of the greatest problems to overcome has been the adoption of some uniformity by examiners. The "fly-specker" has done a great disservice to the system, and just one in any community established the standard for all examiners. No examiner would pass a title which might end up in the hands of the "picayunish" examiner and find himself trying to justify his opinion to his own client. In order to endeavor to bring some order out of the confusion, bar associations began to adopt real estate title standards.[33] The State Bar Association of North Dakota adopted standards in 1950 and has had a standing committee working on improvements and additions ever since. In the main a good deal of the fly-specking has been eliminated.

The problem of the length and volume of the record has not

31. N.D. CENT. CODE § 35-03-14 and 35-03-15 (1963), (N.D. Sess. Laws 1963, Ch. 256, Mortgage), N.D. CENT. CODE § 28-05-07.1 (1960), (N.D. Sess. Laws 1957, Ch. 212, Lis Pendens) N.D. CENT. CODE § 28-01-42 (1960), (N.D. Sess. Laws 1959, Ch. 255, Contracts) N.D. CENT. CODE § 47-19A-11 (1960), (N.D. Sess. Laws 1959, Ch. 331, Rights of Reentry and Reversion).

32. The North Dakota Act was adopted in 1951 and appears as N.D. CENT. CODE § 47-19A (1960) See Leahy, 29 N.D. L. REV. 265 (1953) Ruemmele, 41 N.D. L. REV. 475 (1965) It should be noted that this Act carries forward the distinction between marketable of record and marketable in fact.

33. See BASYE, *supra* note 13, § 7.

really been much of a problem in a young state, such as North Dakota, but the time is arriving, as evidenced by the use of microfilm for recording and the lack of filing space in the office of the register of deeds. Akin to this problem is that under the system very seldom does one examiner rely upon the examination of his predecessor Thus we end up with re-examination after re-examination of the same instruments, and as the record becomes more voluminous the job more tedious and wasteful.

From the standpoint of the client or the public, there seems to be a growing concern about the reliability of the record, the abstract, and the examiner's opinion because of the human element involved in each. If the recorder, or the abstracter, or the examiner fail in their duties what recourse does the client or the public have in recouping any losses that might be sustained as a result of this failure?

The register of deeds is an elected public official and under the statutes must file a bond in the amount of fifteen thousand dollars, conditioned for the faithful discharge of his duties.[34] In *Rising v Dickinson*[35] the court found that the failure of the register of deeds to enter an instrument in the tract index was negligence per se, and in *Farmers' Bank v Raugust*[36] held that an error on the part of the clerk of court in failing to properly note a satisfaction of a judgment was negligence for which the clerk and his surety would be responsible, but that the six year statute of limitations applied, the time commencing from the moment a mortgage was impaired by the failure to so properly note. That the record contains many errors of misfeasance, malfeasence and non-feasance is well known,[37] but perhaps the fault is most usually visited upon the abstracter, or fought out between the parties in the chain of title.

We have previously noted that public regulation of abstracters of title began with statehood.[38] The present provisions, in providing for the licensing of not only the abstract plant, but also the person in charge of the plant, provide for a minimum bond or abstracter's liability policy of ten thousand dollars and maximum of forty thousand dollars condition "for the payment by the abstracter of

34. N.D. CENT. CODE § 11-10-06 (1960).
35. 18 N.D. 478, 121 N.W 616 (1909).
36. 42 N.D. 503, 173 N.W 793 (1919).
37. Two of the most interesting cases on the subject of who, as between the grantor and grantee, must suffer the burden of the recorder's error are Northwestern Improvement Co. v. Norris, 74 N.W.2d 497 (N.D. 1955) and Northern Pac. Ry. Co. v. Advance Realty Co., 78 N.W.2d 705 (N.D. 1956). In those cases the recorder failed to properly transcribe into the record a mineral reservation contained in a deed, and the court went through some gymnastics to solve the problem.
38. *Supra* note 16. The present statutes are contained in N.D. CENT. CODE § 43-01 (1960).

any liability imposed upon him by law for damages arising from any claim against him that may be sustained by or that shall accrue to any person by reason or on account of any *negligent act, error or omission* in any abstract or certificate of title."

In *Morin v Divide County Abstract Co.*[39] the court was considering the liability of an abstracter based upon the statute which then placed a liability for "any and all damages that may be sustained or accrue to any person by reason or on account of any *error, deficiency or mistake* in any abstract or certificate of title." The court found the abstracter had compiled the abstract from his own records rather than the records in the office of the register of deeds and that the abstracter was liable. The court found it immaterial whether the cause of action arose out of contract or tort as the measure of damages would be the same.

In *Commercial Bank of Mott v Adams County Abstract Co.*,[40] with the same statute as in the *Morin* case, the court found that the abstracter's liability arose out of a contractual relationship and that the six year statute of limitation began to run from the time the mistake was made and the abstract delivered rather than the time the damage accrued.

It is quite likely that a decision under the present statute putting liability on the basis of "any negligent act, error or omission" the court would reach a contrary conclusion and find liability arising out of tort.

"An attorney is not a guarantor that the titles which he certifies are perfect; he is liable only for negligence or misconduct in their examination."[41] In the eternal search for the marketable title it seems quite obvious that there would be some division of opinion among examiners on legal points, otherwise we would have no need for title standards nor would there be any reported cases on the subject of marketability of title. Even if the loss is sustained through negligence or misconduct in the examination must a client be left to the sole recourse of the financial ability of the examiner to respond?

That the examination of abstracts and titles is a specialized field in the law today is generally understood by the organized bar,[42]

39. 48 N.D. 214, 183 N.W 1006 (1921).
40. 73 N.D. 645, 18 N.W.2d 15 (1945).
41. 7 C.J.S. *Attorney and Client* § 143 (1955) See Watson v. Muirhead, 7 Pa. 161 (1868), which has been cited as the greatest single force in changing the whole aspect of title-assuring methods in Pennsylvania.
42. Professor John C. Payne in writing in 15 ALA. L. REV. 39 states "Furthermore, through the financially interested attorney or by their own paid representatives, the title insurance companies have infiltrated the organized bar and habitually use this influence to block any measures which they disapprove. The exact extent to which this has been done at the local level has never been adequately determined but it is notorious that the only nationaly body of property lawyers, the American Bar Association's Section of Real Pro-

that the public is not so aware. To remind the public that there should be an attorney, just any attorney, in every title transaction does not completely fulfill the obligation of the organized bar to provide adequate legal advice to all members of the public.

With the pressures today to have the vendability of real property as easy as that of personal property, and the constant use of the ownership of real property to hedge against inflation and rising taxes can it truly be said that a conveyancing system based solely upon the record, the abstract of title and attorney's examination meets the needs and desires of the public today, even with all the suggested improvements by way of legislation and title standards?[43]

There is no one answer to the question. Undoubtedly the system is still performing its function rather well in rural and relatively unpopulated communities, which comprises most of North Dakota. With a greater concentration of the population in cities and the need for outside capital to finance the development of the state, both agriculturally and industrially, the type of title evidence demanded by purchasers and lenders from the outside are going to dictate the trend in North Dakota.

In the year 1868, in *Watson v Muirhead*,[44] the Pennsylvania court in construing liability of a conveyancer who had relied upon an opinion of an attorney, whose opinion was based upon, but found to be contrary to the law involved, stated:

> When it appears that having been previously employed to investigate the title, he (the defendant) had submitted it to eminent counsel who had given a written opinion in its favor, to hold him responsible would be to establish a rule, the direct effect of which would be to deter all prudent and responsible men from entering a vocation imminent with such perils.

This decision left the purchaser without recourse for his monetary loss and apparently aroused the conveyancers as in 1874 enabling legislation was passed in Pennsylvania permitting corporations to guarantee titles, and in 1876 the Real Estate Title Insurance Company of Philadelphia was organized, reputedly by conveyancers, for the purpose of issuing a guarantee of title with a specific indemnity clause. This was followed in 1883 by the Title Gurantee

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perty, Probate and Trust Law, is entirely dominated by title insurance company interests." What is overlooked in the comment quite likely is that interest among the individual practitioner in the title field has slipped so low that only salaried house counsel of title companies and students of property in the law schools have enough interest in the subject to become proficient at it.

43. See Cross, *Weakness of the Present Recording System*, 47 IOWA L. REV. 245 (1961).

44. 7 Pa. 161 (1868).

and Trust Company, and in 1885 the Lawyers Title Insurance Company in New York. This latter company apparently was the outgrowth of opposition by lawyers as under its plan stock in the company was subscribed to by lawyers devoting their time to the examination of abstracts. The attorney would examine his own title, make up his opinion and then present it to the law department of his company The law department would read it over, and if it approved, the company would insure the title for a small fee. It apparently soon became evident that the small fee could not support a legal department sufficiently large to review and recheck the opinions of lawyers of varying ability, and before long the company was accepting business directly from the public.[45]

Apparently the matter of insuring titles became closely associated with the operation of a trust company, and many of the first companies performed both functions.[46] The interest in title insurance grew gradually, but by 1913 there were a sufficient number of companies to cause The American Association of Title Men, which had been formed in 1907 by abstracters, to establish a separate section within that Association for title insurance companies. In 1930 the Directory of that Association, which had changed its name to American Title Association, indicated there were about 263 companies in thirty-five states. Apparently due to consolidations and failures the number had shrunk to about 147 in 1957,[47] with the highest use of its product on the Pacific Coast[48] and the least in the New England states.

That a commercialization of the insuring of titles would raise some objection was evident on the part of the lawyers in New York as early as 1885, and on the part of abstracters at least from 1922.[49] That the abstracter is being absorbed by the title insurance industry is quite evident from the fact that the abstracter formed The American Association of Title Men in 1907, created a separate section for title insurance companies in 1913, and it is now proposed that the same Association under the name of the American Land Title Association change the name of the abstracter's section to the agent's and abstracter's section, recognizing that in many instances

45. GAGE, LAND TITLE ASSURING AGENCIES 83 (1937).

46. It is interesting to note that as early as 1897 there apparently had been established in the minds of many that a trust company would naturally perform the function of a title company. The N.D. Sess. Laws 1897, ch. 142 provided that a trust company had the power "7. to make, compile, and certify abstracts of title to real estate upon the conditions prescribed by the laws of this state relating to abstracters, to insure the validity and genuineness of titles to real property;" and N.D. CENT. CODE § 6-05-08 contains the same provisions.

47. Johnstone, *Title Insurance,* 66 YALE L. J. 492 (1957).

48. See Ford, *How California Went Title Insurance Over Night,* Proceedings of American Title Association (1932).

49. Potter, *Abstracts v. Title Insurance,* Bulletin, American Association of Title Men, Title Men (Oct. 1922).

those who used to perform solely the function of an abstracter are now predominantly issuing agents for a title insurance company and rarely compile and turn out an abstract of title for examination by an attorney

The first real effort to promote title insurance in North Dakota as a means of title evidencing began in the year 1952, although title insurance on property in North Dakota had been written long prior to that. In 1952 The Title Insurance Company of Boise, Idaho, and The Title Insurance Company of Minnesota, both were admitted in North Dakota, to be followed in 1953 by American Title Insurance Company, Miami, Florida, in 1954 by Lawyers Title Insurance Corporation, Richmond, Virginia, in 1960 by City Title Insurance Company, New York, New York, and in 1964 by Chicago Title Insurance Company, St. Louis, Missouri.[50] The total premiums written in North Dakota and reported to the Insurance Department in the year 1965 were $28,861.00.

The question now arises as to whether the use of title insurance is the answer to the criticism of the system of abstract-attorney's opinion. The title insurance industry spends tremendous amounts of money to maintain adequate plants based upon the public record and employs competent examiners to advise whether or not a certain title is an insurable title. The system combines the function of the abstracter and the attorney, and adds a specific indemnity against loss, even against the loss through unmarketability in some states. It is obvious that the mechanical work of compiling an abstract of title is obviated by a perusal of the record title by competent examiners, who have the record placed before them by searchers and clerks, and once a determination is made and a committment or policy issued the company no longer has to go behind that date in searching the record. If there is error the financial stability of the title company will either defend or pay the loss or possibly both. That title evidencing by way of title insurance can be quicker and more secure cannot be doubted, however, to endeavor to continue to compile the abstract of title, submit it to a general practitioner for examination and an opinion, and then submission to the title company to issue the policy certainly does not add any speed.

That this was recognized by the title insurance companies many years ago is evident in the fact that the companies have appointed abstracters agents with authority to issue title policies, based upon an opinion secured from an attorney-examiner. Obviously this did

50. Statistical Report for years 1964 and 1965 by K. O. Nygard, Commissioner of Insurance, for State of North Dakota.

not eliminate the time consuming task of compiling and preparing an abstract of title. The next step was very obvious—why not license abstracters and authorize them to issue title policies based upon their own examination of the record or such non-record matters as are desired? This has been done and in areas of a large volume is the general method of operation. You thus end up with a system whereby the firm or person taking the order for title evidence, makes the necessary searches and examinations and issues the title policy, as an agent for a title insurance company, with but a single charge.

It has previously been noted that the lawyers in some localities did not look kindly upon such an operation as the independent examiner fell by the wayside. In 1947 there was organized under a Massachusetts or business trust in Florida the Lawyers' Title Guaranty Fund, and only members of the Bar with two years' experience in examining titles in individual practice or one year's experience in association with an attorney of five years' practice was eligible to apply to a membership committee for membership in the fund. One of the major features of the fund is that the individual lawyer issues the title guarantee,[51] and in effect becomes what would be an agent, and thus one entitled to any commission on any premium for the guarantee or title insurance.

In the years following the formation of the Florida Fund it seems that other Bar Associations, either voluntarily or with some prodding, endeavored to restrict the activities of title companies through unauthorized practice of law suits.[52]

The organized Bar was not convinced that title insurance was necessary or needed in the conveyancing process, until in 1958, the Committee on Economics of Law Practice, of the American Bar Association under the chairmanship of John C. Satterfield, pointed out the lawyer was being left out of title and land transactions more and more, and determined that one satisfactory solution would be the use of a method whereby the public is offered the protection of an attorney's opinion in real estate transactions as well as indemnity against title defects. That the recommendation for indemnity against title defects would emanate from a committee on economics

51. Yelen, *Lawyers' Title Guaranty Funds· The Florida Experience,* 51 A.B.A.J. 1070.

52. State Bar Ass'n v. Arizona Title & Trust Co., 336 P.2d 1 (1961), Beach Abstract & Guar. Co. v. Bar Ass'n, 326 S.W.2d 900 (Ark. 1959), Title Guar. Co. v. Denver Bar Ass'n, 135 Colo. 423, 312 P.2d 1011 (1957), Cooperman v. West Coast Title Guar. Co., 75 So.2d 818 (Fla. 1953), Bar Ass'n Inc. v. Union Planters Title Guar. Co., 26 S.W.2d 767 (Tenn. 1959), New Jersey State Bar Asn'n v. Northern New Jersey Mortgage Associates, 32 N.J. 430, 161 A.2d 257 (1960) Pioneer Title Ins. & Trust Co. v. State Bar, 74 Nev. 186, 326 P.2d 408 (1958), Labrum v. Commonyealth Title Co., 368 Pa. 239, 56A.2d 246 (1948), and the earlier cases in New York. People v. Title Guar. & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919), People v. Lawyers Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940).

of law practice in and of itself is unique, however, in 1961 President Satterfield of the ABA was authorized to appoint a Special Committee on Lawyers' Title Guaranty Funds. The first report of that Committee stated:

> The conclusion is that, while the use of commercial title insurance need not result in the failure of the public to seek independent legal advice, in many areas this result has followed. Whatever the reason for the lawyer-controlled organizations, the Committee believes that it is a proper field for the Association to explore from the standpoint of protection of the public and the improvement of the profession.

and as a result the Committee was authorized to make a study of title insurance and title guaranty funds.

There did not seem to be much use in studying lawyer oriented title guaranty funds until it was determined just how far a lawyer could ethically participate in a proration of funds generated from the title guarantee. There was released from the Standing Committee on Professional Ethics on February 16, 1962, Formal Opinion 304, and the consensus was that the receiving of a commission was not unethical if the attorney disclosed to his client "his financial interest in the transaction, or crediting the client's bill with the amount thus received."

This Special Committee then put out Pamphlet No. 1, entitled Bar-Related Title Assuring Organizations, wherein it admits that after a lawyer examines and handles a title there is still a risk, when it states in the pamphlet:

> But there is still a risk, usually lesser, arising from latent defects and the chance of honest error; and though the risk is lesser, the damage can sometimes be greater.
>
> To protect lawyers' clients against the lesser risks is the role of title insurance; and the failure of the legal profession to recognize this need has permitted commercial title insurance companies to advertise and glamorize the lesser risk and perforce influence the public toward overlooking the important functions of the lawyer Unless some means is afforded by which a lawyer can assure his client against the lesser risk, protection of the client is incomplete.

This same pamphlet states that bar-related title assurance is in the interest of the public and the bar and that:

> Bar-related title insurance is based upon the concept of Florida Lawyers' Title Guaranty Fund, that a lawyer is entitled to be paid a fee commensurate with his professional

> service, and that the routine inclusion of a title guarantee as an added professional service makes it more likely that the full fee will be paid cheerfully

Just how the adding of the title guarantee fee, in which the lawyer is obliged to explain to his client he has a financial interest, to the lawyer's usual fee will make the client happy is not explained, but at least there does appear to be an official recognition by the organized bar that title insurance has a place in the conveyancing system.

Most states have been quite slow in adopting insurance codes to specifically deal with title insurance and title insurance companies. A minimum code was adopted in North Dakota in 1959.[53] Included in the chapter is a provision that:

> No domestic corporation organized for the purpose of insuring title to real property in this state or of insuring against loss by reason of defective titles thereto, or encumbrances thereon, or foreign corporation authorized to do business in state, shall issue any policy, binder, or certificate unless it shall have secured from a person, firm or corporation holding a certificate of authority under the provisions of Chapter 43-01 the record title evidence of the title to be insured, and such title evidence has been examined by a person duly admitted to the practice of law as provided by Chapter 27-11. Any corporation violating the provisions of this section shall have its certificate of authority revoked as provided by Chapter 26-07 [54]

This statutory provision would seem to endeavor to maintain the present conveyancing system of the abstract of title and attorney's opinion and superimpose upon it a title insurance policy

In line with the thinking that it was in the public interest that title insurance be controlled by members of the Bar there was organized in Kansas a corporation named Kansas Insured Titles, Inc., on the basis that 75% of the stock would be sold to Kansas lawyers and 25% of the stock sold to Kansas abstracters, and in order to prevent limited control no stockholder may own more than 3% of reissued capital stock. Under various other plans bar associations in Arkansas, Georgia, Indiana, Kentucky, Minnesota, Colorado, and Ohio have either completed the forming of or are in the process of forming bar-related title insurance companies or funds.

Pursuant to a recommendation of a Special Committee on Title Insurance of the North Dakota Bar Association, the general meetings of the State Bar Association on June 24, 1966, at Dickinson, invited

53. N.D. CENT. CODE § 26-32 (1960), (N.D. Sess. Laws 1959, Ch. 242).
54. N.D. CENT. CODE § 26-32-06 (1960).

the Kansas Company, which has changed its name to Insured Titles, Inc., to transact business in the State of North Dakota and to offer stock in the company to North Dakota lawyers and abstracters at the same price which was paid by Kansas lawyers and abstracters at the time the company was organized. Apparently the Kansas Company is, has, or hopefully will, make the same offer to lawyers in Nebraska, Oklahoma and Wisconsin. The purpose of this apparently is to permit the appointing of lawyers as well as abstracters, as agents for Insured Titles, Inc. and to make title insurance available through both sources.

At the present time there are 42 abstracter title insurance agents located in 41 counties in the state, so that title insurance has been and is available to the public. About the only purpose that can be served seems to be to have lawyers appointed agents so that the title insurance service can be offered through the law office rather than the office of the abstracter, and at the same time permit the lawyer to participate in the commissions to be paid from the title insurance premium.

It can be safely said that there is no mad rush for title insurance on properties in North Dakota and with the total premium generated it is quite a marginal business. This can be changed when the lawyer becomes a selling agent for title insurance, but it is doubtful that the majority of the lawyers in the state will do much in the way of changing the present method of operation, which is the applying for title insurance through the local abstracter-agent or directly from a title insurance company

Under the plan of Insured Titles, Inc., to continue the compilation of the abstract and the examination by the lawyer as a prerequisite to the issuance of a title insurance policy it seems that many of the shortcomings of both are being perpetuated.

The most economical, efficient and secure method of conveyancing and title evidencing is title insurance, using the public record as an underwriting base, and combining the search, examination and issuance of the policy into one operation. Historically, that has been the end result in areas where an effort has been made to superimpose title insurance on the abstract and opinion. The result in North Dakota probably will be no different.