STATE OF CALIFORNIA
STATE LANDS COMMISSION

# LAND TITLE LAW

OF

# STATE OF CALIFORNIA


JANUARY, 1953

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# REPORT ON
# LAND TITLE LAW
# OF
# STATE OF CALIFORNIA

Pursuant to the Budget Act of 1949
and
Section 6211 of the Public Resources Code

JAMES S. DEAN, *Chairman*
GOODWIN J. KNIGHT, *Member* ROBERT C. KIRKWOOD, *Member*
RUFUS W. PUTNAM, *Executive Officer*

JANUARY, 1953

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## Chapter 1: INTRODUCTORY.

### A. AUTHORITY.

For some years past the Assurance Fund established under the provisions of the previously enacted laws for the certification of land titles has been overdrawn as the result of a court decree. Applications for original certificates of title have ceased to be made, and the holders of a large number of certificates have found themselves with no financial protection as far as the registration system is concerned. Feeling that the circumstances warranted remedial action and that the participants in the State's land title registration system were possibly entitled to some form of relief, the State Legislature directed that the survey on which this report is based be made and provided funds for the purpose. This was accomplished by the following item contained in the Budget Act of 1949:

> "For comprehensive survey and report with recommendations to the Legislature on the land title law, commonly called the Torrens Title Law, Division of State Lands, Department of Finance, payable from the State Lands Act Fund ---------- 10,000"

Section 6211 of the Public Resources Code of the State of California reads as follows:

> "Land titles: Inspection and investigations: Reports and recommendations. The Commission may, not more often than once in two years, inspect and investigate conditions in the various counties in respect to land titles. It shall annually report thereon to the Governor and shall, prior to each regular session, report to the Legislature, making such recommendations as it deems proper and necessary. The commission may consult with and advise county registrars of land titles and make such suggestions and recommendations to them as it deems desirable."

Therefore, under the authority and by direction of the two foregoing legislative enactments, this report is submitted.

### B. PROCEDURE IN REGISTRATION OF TITLE.

The procedure followed in registering real property in California and in obtaining a certificate of title therefor is similar to that used in an ordinary civil court action. It requires the filing of a petition, similar to a complaint, the giving of notice to interested persons by personal service or by publication, a court hearing similar to those in ordinary court actions, and a decree rendered by the court and entered in the same manner as a judgment. A decree results which purports to be a conclusive determination of all persons' interests in the property.

The decree orders the Registrar of Titles to issue a certificate of title which states who owns the property and what interests others have in it. It lists all proven liens, encumbrances and other charges against the land.

After property has once been brought under the provisions of the Land Title Law, subsequent transfers of that property are made by filing the deed with the Registrar, together with the duplicate of the certificate of title, and having a new certificate issued by the Registrar.

C. LEGISLATIVE HISTORY.

In 1893 the State Legislature provided for a Legislative Commission of five members, with instructions to examine and report on the Torrens land title act of Australia. As a result there was approved on March 17, 1897, an act "for the certification of land titles and the simplification of transfer of real estate." This law lay dormant for eleven years, the first certificate thereunder being issued in 1908.

The "McEnerny" or "Burnt Records" Act of 1906 accounts for some of the inertia that prevailed, as this law provided a means of establishing ownership of land by judicial procedure where the public records had been destroyed by the San Francisco fire.

The registration system did not really become active in California until a new Land Title Law became effective in 1915 as the result of an initiative measure enacted at the general election of November 3, 1914. While this act has been supplemented in certain minor respects, it has been amended only once. Chapter 293 of the Statutes of 1949, providing for the withdrawal of lands from the registration system, was approved at the general election of 1950. Since the basic law is the result of an initiative measure, amendments likewise require a vote of the people at a general election. The enactment of amendments is thus slow and cumbersome.

D. PRESENT STATUS OF LAND TITLE SYSTEM.

The constitutionality of California's original Land Title System was sustained in the courts in the case of Robinson vs. Kerrigan, 151 Cal. 40, 90 P. 129 (1907). Subsequent cases have appeared to assume the applicability of the decision in that case to the new statute of 1915. There have been a number of court decisions, however, which have tended to weaken the validity of a certificate of title. With reference to this situation, Professor Richard R. Powell, in his book entitled "Registration of the Title to Land in the State of New York", states that:

> "...reliance upon a certificate of title was unsafe if (a) some holder of a record interest at the time of registration had not been joined; or (b) the petition failed to reveal that the lands were tidelands so as to make the joinder of the state a necessary

act; or (c) an inspection of the premises would put one upon notice as to outstanding rights; or (d) if there were irregularities in the registration proceeding. ..."

The almost complete cessation of activity in the California Land Title System came as the result of the case entitled Gill vs. Frances Investment Company. A certificate of registration had been issued on certain property which had appeared to be unincumbered. A mortgage had existed, however, which was later enforced against a subsequent transferee who brought suit against the State Assurance Fund. A judgment was obtained against the fund in 1937 in the amount of $48,000, plus interest at 7%, which not only exhausted the fund but also left a deficit which, with accrued interest, amounted to $7,921.21 on June 30, 1952. Reports have indicated that between 1937 and 1949 only four original certificates of title had been issued in the entire state, the latest registration being in 1945.

On January 10, 1952, the Division of State Lands advised the Governor (pursuant to the provisions of Section 6211 of the Public Resources Code) that reports of activities from the twenty-one counties of the state in which the registration system was in effect showed total issuances of certificates of title as follows:

| | | | |
|---|---|---|---|
| Alameda | 213 | San Bernardino | 17,617 |
| Fresno | 131 | San Diego | 11,168 |
| Humboldt | 452 | San Francisco | 34 |
| Imperial | 80 | San Luis Obispo | 9 |
| Inyo | 5 | Santa Barbara | 1,629 |
| Kern | 227 | Santa Cruz | 693 |
| Los Angeles | 219,222 | Sierra | 8 |
| Merced | 1 | Sonoma | 1,307 |
| Mono | 5 | Tulare | 142 |
| Orange | 14,582 | Ventura | 7 |
| Riverside | 453 | | |

Thirty-seven counties have reported as having had no transactions whatever under the Land Title Law.

E. CONDUCT OF SURVEY.

Item 26 of the minutes of the meeting of the State Lands Commission of December 21, 1949, reads in part as follows:

"The Commission was informed that in accordance with the authority granted the State Lands Commission by way of a special legislative appropriation for the purpose, the Executive Officer recommends that the Commission's mandate to make a 'comprehensive survey and report on the Torrens Title Act of California' to the Legislature, be carried out by means of written reports to the Commission by qualified experts in the field of land registration and recording systems.

"For this purpose it is proposed that the surveys be conducted and the reports be prepared as follows:

1. Field surveys and compilation of statistical and procedural data will be conducted:

   a. State of California, by Division Staff.
   b. Cook County, Illinois, by Illinois Attorney.
   c. State of Massachusetts, by Massachusetts Attorney.

2. Consultation and general supervision over field surveys and compilations, by Massachusetts Attorney.

3. Compilation of legislative history, and review and analysis of laws and court decisions:

   a. For California, by School of Law, University of Southern California.
   b. For Illinois and Massachusetts, by Massachusetts Attorney.

4. Conclusions:

   a. Main features of good forms of recordation and registration systems, by Massachusetts Attorney.
   b. Applicability to California, by School of Law, University of Southern California.

5. Recommendations: by State Lands Commission and Division Staff.

"To effectuate the foregoing program, it is proposed to contract for the services of Mr. James C. Short of Chicago, Illinois, an attorney of over 20 years' experience in Cook County where the Torrens system has been used extensively. To him will be assigned the field survey and compilations for that area.

"The field surveys and compilations for the State of Massachusetts and the operations called for in Items 2, 3b, and 4a above are proposed to be contracted for with Mr. Nathaniel C. Bidwell of Boston, Massachusetts. Mr. Bidwell is a former Assistant Attorney General of that State and has had a long experience in land title matters there. The State of Massachusetts is known to be outstanding in its land title laws and their administration.

"At the suggestion of the Commission at its meeting of November 21, 1949, conferences were had with the Dean of the School of Law, University of Southern California, with regard to what portions of the entire study it might undertake. As a result the assignments in Items 3a and 4b were tentatively agreed upon."

By resolution the State Lands Commission approved the program and authorized the negotiation and execution of the necessary contracts. The studies assigned were duly made, and reports rendered. The report of the University of Southern California, School of Law, was prepared by Miss Gertrude Greenard, Attorney at Law, and edited by Professor Moffatt Hancock; all of it is reproduced in this report. The other reports have been thoroughly reviewed and form the basis of some of the conclusions made.

Chapter 2: CONCLUSIONS.

A. RECORDING SYSTEM.

In the reports made by the School of Law, University of Southern California, and by Mr. Nathaniel C. Bidwell it has been emphasized that no registration system could operate successfully and efficiently in the absence of a good recording system. This is for the reason that the latter forms the basis for the title search and the preparation of an accurate abstract of title which is a most important prerequisite to the issuance of a certificate. The following conclusions may be drawn from the material in these two reports regarding the more important defects in the California system of recording:

1. Grantor-grantee index books in use by Recorders require exhaustive and cumbersome searches through a chain of transactions and former owners to determine with reasonable accuracy the history of title to a piece of property and encumbrances of record against it. The chances of errors and omissions are many.

2. No legal description is contained in the index, making it necessary for each document given by any one in the chain of title to be examined to determine its effect, if any, on the property in question.

3. Important records are kept separately in various offices other than that of the Recorder. The County Clerk's office must be consulted, and the County Tax Collector's office; also the records of the Probate and Bankruptcy Courts, and the assessment offices. This situation leads to omissions and inaccuracies, and is cumbersome.

4. A grantee is required to search all deeds in the record executed by the grantor which convey neighboring lands to discover restrictions against the land the grantee acquires.

5. The records in the Recorder's offices in the larger counties are bulky and voluminous, making the title search process a cumbersome one.

6. Adverse possession, lack of capacity, and fraud are not a matter of record.

B. REGISTRATION SYSTEM.

As to the registration system, the reports of those employed to make the survey lead to the following conclusions as to its important defects:

1. The State Assurance Fund has been proven to be vulnerable and will continue to be so as long as it attempts to insure the original certificate of title as well as errors that occurred following

original registration, as long as it has to cope with increased valuation with no increase in contribution to the Fund, and as long as determination of the issuance of a certificate of title rests upon abstracts that are based upon a faulty recording system.

2. The Land Title Law provides for inadequate fees to support the system, thus contributing to the tendency to employ insufficient and unskilled personnel to operate it.

3. The statutory requirement of a contribution of one one-tenth of one per cent of the assessed valuation of the property at the time of its registration resulted in an assurance fund that was too small to carry the obligations that it was called upon to meet.

4. Sufficient doubt exists about the validity of a certificate of title to have resulted in examinations of title going back of the last certificate even though the Land Title Law is to the contrary.

5. The Land Title System entails the filing of more documents in a transaction than does the Recording System, and more elaborate records must be kept in the Registrar's office; consequently the probability of occurrence of errors is greater.

6. A certificate of title merely shows a summary of encumbrances; in many instances reference to the actual documents (on file with the Registrar) and their interpretation by an attorney is necessary.

7. Property may not be acquired by adverse possession under the registration system once it has been registered. The Massachusetts Land Title Law permits such form of acquisition.

8. Through fraud and defects in the original registration proceedings a purchaser of registered property may be subject to interests which do not appear on the certificate. He may also suffer loss through a forgery of his certificate of title.

9. A certificate of title issued subsequent to an initial certificate cannot have the legal status of the first one, which has the backing of a court decree, because it is based upon an interpretation by the Registrar of documents filed with him.

10. Costs to the owner of a parcel of land that is under the registration system, for services and protection equivalent to that afforded by the recordation and land title insurance system, are equal to and often greater than the costs of the latter; in addition there is a substantial subsidy of public funds.

Chapter 3: RECOMMENDATIONS.

It is apparent that in equity to the large number of holders of certificates of title issued under laws which created a faulty system, some action should be taken by way of a remedy. Only two alternatives appear to be practical: Either abolish the Land Title System entirely, by appropriate means; or provide for a new system, with the defects in the present one removed, to which certificate holders under the existing system could transfer. What are believed to be appropriate steps to accomplish either alternative are discussed in what follows:

A. ABOLISHMENT OF LAND TITLE SYSTEM.

The existing Land Title System has resulted in the issuance of over 270,000 certificates of title, both original and subsequent, with probably about 70,000 parcels of property involved. Voluntary withdrawal from this system has been provided for by Chapter 293, Statutes of 1949. By following the procedures set forth in that act, paying the Registrar a fee of $10 for services rendered by his office, plus the Recorder's fees for recording and indexing a certificate of discharge and the cancelled last certificate of title, an owner will have withdrawn his property from the Land Title System and the fact thereof will have been recorded. Whatever protection the Land Title System afforded parties of interest in the property up to the time of recording of the withdrawal is to remain unimpaired. Withdrawals are being made at the rate of approximately 2000 parcels per year currently.

This process may be considered to be the equivalent of a voluntary transfer to the Recording System. If nothing further is done by way of legislation and a referendum it may reasonably be expected that a complete transfer to the Recording System would result in perhaps fifteen to twenty years. This would be the simplest solution to the problem of abolishing the Land Title System, but it cannot be recommended because of the large loss in public funds resulting from continuing the present system over that length of time. Annual losses are currently well in excess of $100,000.

The mechanics of abolishment of the Land Title System might best be put into operation through passage of a bill by the State Legislature and its subsequent approval by the voters of the State at a general election. Such a bill should provide for the act to become effective at some date well into the future, perhaps five years after the date of the general election at which it is approved. This is for the purpose of providing ample notice to all parties at interest and to allow sufficient time for the processing of all withdrawals from the system.

Making such withdrawal or transfer mandatory might be claimed to have deprived holders of certificates of title of rights or privileges without just compensation. However, in view of the condition of the Assurance Fund and of the other defects previously noted in this report, it is difficult to see how any future transactions under the existing system can be proven to possess anything more of value than would be the case were that system abolished.

Actual termination of the system might be effected by a provision in the bill which would discontinue completely the issuance of certificates of title

of all kinds as of the selected effective date. Care should be taken not to impair or diminish rights of all parties of interest in the properties involved as such rights existed at the time of withdrawal.

B. TRANSFER TO REVISED LAND TITLE SYSTEM.

Consideration has been given to correcting the defects in the existing Land Title Law by amendment of that law itself. It might be possible to do this, but there appear to be too many practical difficulties. If, for instance, the law were to be amended so that the Assurance Fund would protect only against errors arising subsequent to the issuance of the original certificate of title, it might well be claimed that certain present holders of certificates had been deprived of protection against errors in the original certificate. A change in the schedule of fees or in the amount required to be paid into the Assurance Fund might be handled by amendment, but there would result the problem of what to do with present certificate holders.

These and other similar complications lead to the conclusion that it would be better to provide for termination of the present Land Title System in the manner suggested in "A" of this chapter, above, and for transfer to the Recordation System or to a new Land Title System at the option of the holders of existing certificates. All new registrations would come directly under the new system.

If this alternative is to become a reality, an entirely new land title law should be drafted. It could contain many of the provisions of the existing law, and should incorporate the following changes or additions:

1. The Assurance Fund should be applicable only for errors or omissions occurring after issuance of the original certificate of title.

2. There should be a limit as to the amount of liability in any one case, probably the assessed valuation of the interest or estate concerned at the time the loss occurred.

3. A charge should be made upon the issuance of each subsequent certificate of title for augmenting the Assurance Fund. This charge should be related to the assessed value of the property at the time of issuance of the subsequent certificate.

4. Fees for services performed by the Registrar's office should be more closely related to the costs of such services.

5. Examiners of title should be appointed by the Court, and should be paid out of funds accruing to the county out of fees for services rendered in the Registrar's office.

6. There should be a State Inspector of Land Title Registration in the Division of State Lands to carry out the specific duties assigned to the State Lands Commission in Section 6211 of the Public Resources Code and in particular to consult with county registrars of land titles and make such suggestions and recommendations to them as deemed desirable with a view to improving methods used and assigning adequate and competent personnel.

7. Provision should be made for referendum elections in each county so that the voters in each can decide for themselves which alternative should prevail within the county.

In the report of Mr. Nathaniel B. Bidwell it was recommended that consideration be given to the creation of one or more Land Courts in California similar to that which has been in existence for over fifty years in Massachusetts. The jurisdiction of such a court is confined solely to land titles, and the members of the court and its staff are skilled and experienced in land title matters. While the principal activity of such a court is with respect to procedures related to land title registrations, all types of judicial actions involving land titles are handled, such as quiet title actions, foreclosure and redemption proceedings relating to tax titles, etc.

The creation of one or more Land Courts in California would require a major reorganization of the judicial system of the State, and it is believed that the results that would be obtained would not justify such action. Accordingly their establishment is opposed.

C. CHANGES IN RECORDATION SYSTEM.

As stated previously, no land title system can operate satisfactorily without a good recording system. Therefore, whether either of the foregoing alternates is ultimately adopted, certain changes are indicated in the laws of California pertaining to the recording of deeds and other instruments relating to real property. These changes can be accomplished without recourse to a referendum, as the basic laws were legislative enactments only. The changes recommended are:

1. Grantor-grantee indexes should show a legal description of the property involved.

2. Tract indexes should be provided so that all transactions involving a specific parcel of property would be listed on a page containing a legal description of the property involved.

3. All records of transfers of or encumbrances on property should be recorded in the same office, i.e., the Recorder's.

D. IN CONCLUSION.

Even though a new land title system is adopted with the revisions suggested in Section B of Chapter 3, above, it is not believed that it can be made to operate as effectively and economically as can the recordation system. It would be unwise to attempt to remedy the present unsatisfactory conditions by appropriating State monies to restore the Assurance Fund; the vulnerability of the fund would still exist. It is therefore recommended that the Land Title System of California, as provided for by the iniative enactment of November 3, 1914, be abolished, and that the State Legislature recommend to the electorate the adoption of a measure that will accomplish this end.

It would appear that those who own property for which certificates of title have been issued are not fully aware of the defects in the Land Title System and of the fact that the costs of supporting this system are greatly in excess of any benefits received. It is accordingly recommended that the SUMMARY AND RECOMMENDATIONS of this report be given wide distribution.

STATE OF CALIFORNIA
STATE LANDS COMMISSION

James S. Dean, Chairman — January 16, 1953 (Date)

Goodwin J. Knight, Member — January 17, 1953 (Date)

Robert C. Kirkwood, Member — January 17, 1953 (Date)

# PART II

## REGISTRATION IN CALIFORNIA

Chapter 1: INTRODUCTORY MATERIALS - REGISTRATION SYSTEM
(By University of Southern California)

## I. HISTORICAL BACKGROUND

Contrary to popular belief the system of Registration of Titles as opposed to Recording of documents dealing with titles is of early origin. It has been discovered that such a system was in use in Bohemia in the 13th century.(1) Its modern use in Europe dates from 1836 and has been used to some extent in Germany, Austria, Hungary, Switzerland, and France. England adopted a Title Registration System in 1862, but it has not been used there to any great extent. The country of Australia adopted a compulsory system of Registration in 1858, through the concerted efforts of Sir Robert Torrens. Due to his active participation in connection with the Registration System it has been called the "Torrens System." This leads the majority of people to feel that the Registration system began in Australia originally, but as shown above its beginnings can be traced back to early days on the continent. Several Canadian provinces followed Australia in adopting the so-called Torrens System and its operation has been quite successful both in Australia and the Canadian provinces.(2)

Just before the turn of the century, writers in the United States became very interested in the Registration System as a method of Land Reform. Illinois adopted the first statute creating the Torrens System in the United States in 1895. Ohio, Massachusetts, and California then adopted the system at approximately the same time. At the present time there are 19 states which have adopted the Torrens System.(3) The system has not been well received by the general public in the United States and in many instances has functioned very poorly. This has been caused by many factors, such as the additional work involved; the refusal of the people to use the system due to ignorance and inertia; constitutional problems which are not present in the European countries and English Dominions, and finally, court decisions which have sapped the system of its effectiveness in achieving a system in which a certificate of title is conclusive evidence of title and can be completely relied on by the purchaser. These problems as they affect the functioning of the system in California will be discussed at length in subsequent sections of this paper.

## II. LEGISLATIVE HISTORY OF THE CALIFORNIA LAND TITLE LAW (THE TORRENS ACT)

In 1893 a Legislative Commission of five was appointed "for the purpose of examining and reporting to the Legislature on the Torrens land transfer act of Australia."(4)

In 1897 the first Torrens statute was adopted in California. It was entitled "An Act for the certification of land titles and the simplification of the transfer of real estate."(5) The statute consisted of 116 sections. Only one case was decided under this statute. This was the case of Robinson v Kerrigan,(6) which upheld the constitutionality of the 1897 statute.

The 1897 statute was replaced by an initiative measure enacted by the people of the State of California at the General Election held November 3, 1914. The new statute, entitled the "Land Title Law" became effective in 1915.(7)

The 1915 statute revised the wording of the sections of the old statute and expanded some of them. The 1915 statute consists of 115 sections.(8) It has not been considered necessary to indicate the exact changes in each section of the statute since the 1897 statute has been completely superseded by the 1915 statute and only one case was decided under the 1897 statute. The discussion of this paper will be confined to the problems raised by the 1915 statute, entitled the "Land Title Law," with the exception of the discussion of this one case.

The 1915 statute was supplemented in 1917 by an act which defined the duties of the Surveyor General in respect to title registration and preparation of forms.(9)

Two statutes have been passed which affect the Land Title Law, but which do not actually amend the statute. These are Section 542 of the Code of Civil Procedure, which provides for certain notations which must be made when an attachment is levied on registered property,(10) and Section 1223 of the Probate Code which requires a court order to sell registered property issued in connection with a Probate proceeding to direct the Registrar to issue a new certificate of title.(11)

There had been no actual amendment or change in the 1915 statute until November 1950. At that time an election was held in which a measure was adopted by the People of the State of California amending the 1915 statute to allow persons whose property was registered under the Torrens Act to withdraw their property and return it to the General Recording System.(12)

## III. CONSTITUTIONALITY OF THE CALIFORNIA LAND TITLE LAW

The constitutionality of the 1897 statute was challenged in the case of Robinson v Kerrigan(13) and upheld by the Supreme Court of California. The constitutionality of the entire system has never again been challenged and it has been assumed in the case of Frances Investment Co. v Superior Court(14) that the holding in Robinson v Kerrigan is applicable to the 1915 statute.

The grounds for attack in Robinson v Kerrigan were as follows:

1. The Land Title Law provides that service by publication in a newspaper for four weeks is sufficient to give notice of the pendency of registration proceedings to those persons who are unknown to the party seeking registration of his property, but who nevertheless have an interest in the property which it is sought to have registered. This provision of the Land Title Law was attacked as a violation of the United States Constitution

since it deprived persons of their property without due process of law and deprived persons of the equal protection of the law. The court in Robinson v Kerrigan answered this contention in the following manner:

> "The state has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the state has power to provide a special proceeding, in the nature of a proceeding in rem, to fix the status of the land and declare the nature of the titles and interests therein and the person or persons in whom such titles and interests are at the time vested. It may do this wherever it may be considered necessary or likely to promote the general welfare."

2. In addition, the court found there was no violation of the separation of powers between the judicial and administrative departments of the state government. The court in determining title in the initial registration proceedings and settling disputes exercises a judicial function. The Registrar in his duties in connection with the details of the transfer of title to registered property exercises administrative functions. At times he may make what is in effect a judicial determination in connection with these duties, but it is merely incidental to his general administrative duties and does not violate the rule of separation of powers between the judicial and executive departments of government.(15)

3. Other minor questions involving constitutionality were disposed of summarily by the court. They included the question of whether the act embraced more than one subject in violation of Article 4, Section 24 of the California constitution and the question of whether the act is special.

Special provisions of the Land Title Law have been subject to attack on the basis of unconstitutionality. For example, the provision regarding Mechanics' Liens. These matters are discussed in subsequent chapters of this paper.

## IV. OPERATIVE EFFECT OF THE CALIFORNIA REGISTRATION STATUTE

When the Torrens System was inaugurated in many countries including the United States it was thought that such a system would solve the difficulties encountered in connection with the recording system. Torrens, who originated the system in Australia, stated its purpose was "...to simplify, quicken and cheapen the transfer of real estate and to render titles safe and indefeasible."(16) The way in which it was hoped to accomplish these purposes can be illustrated as follows by reference to the operation of the California Torrens System.

An owner of property desirous of bringing such property under the Torrens System must first bring an action in the nature of a quiet title action in the Superior Court. A court action is required to comply with the requirement of the United States Constitution that no person may be deprived of his property without due process of law. This requires that

the owner of property be given proper notice, a hearing, and an opportunity to be heard before any final determination of title to that property is made. (17) A court decree is rendered settling all questions of ownership of the particular piece of property which it is sought to have registered. A certificate of title is then issued by the Registrar in the name of the owner of the property as determined by the court decree and the interests of other persons in the property as established by the court decree are shown on the certificate. The purpose of the court action is to settle the state of the title conclusively and the certificate issued by the Registrar showing such title is intended to be conclusive evidence of the state of the title.(18)

Any subsequent transactions dealing with registered property are required to be shown on the certificate. If they are not registered and do not appear on the certificate (with certain exceptions discussed below), a purchaser of the property would not be subject to these interests.

Theoretically, subsequent purchasers may rely completely on the state of the title as indicated by the certificate in the Registrar's office. In actual practice this has not proved true. The reasons for this are given below.

To illustrate the operation of the Torrens System in California let us take the following example:

P is desirous of purchasing Blackacre owned by O and registered in O's name. P has the legal description of the property and can check the property index in the Registrar's office to find the certificate of title issued for this property. He could check the name index under O's name and obtain the same information since the Registrar's office maintains both property and name indexes. The prospective purchaser then looks at the certificate of title and finds O is the owner, subject to an easement in favor of X, a mortgage in favor of Y and certain property restrictions in favor of Z. According to the theory and purpose of the California Torrens Act, P would be subject to these interests only, with a few exceptions listed in the Torrens Statute such as certain interests of persons in possession although unregistered, federal liens, taxes and assessments.(19)

This illustration shows the simplicity of the method of search involved. Compare it with the lengthy, cumbersome, archaic method of search used when property is recorded under the General Recording System. Here under the Torrens Registration System all encumbrances can be determined by a glance at a sheet in the Register of Titles. However, this has been criticized since the purchaser searching for the state of the title sees only a summary of the outstanding encumbrances. He does not see a copy of the instruments creating such encumbrances. This may be insufficient to give the purchaser all the information he actually needs or is desirous of having to obtain a complete picture of the state of the title.(20) In addition, it is still necessary to secure the services of an attorney to

determine the exact nature and effect of the encumbrances listed on the Torrens Certificate of Title.(21)

However, in spite of this one criticism of the Torrens System it is indeed a simplification of the method of transfer of real property. In that respect one of the purposes of the System has been accomplished.

In actual practice the California system has failed to accomplish its main purpose of making titles to land absolutely certain and making the certificate conclusive evidence of title. This is partly the result of certain statutory provisions contained in the California statute and partly the result of judicial decisions of the California courts.

The provisions in the statute which prevent the title from being certain and the certificate conclusive evidence of title will be considered first.

Section 34 of the Land Title Law states:

"The registered owner of any estate or interest in land brought under this act shall, except in case of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office and free from all others, except:

1. Any subsisting lease or agreement for a lease for a period not exceeding one year, where there is actual occupation of the land under lease. The term "lease" shall include a verbal letting.

2. All land embraced in the description contained in the certificate which has theretofore been legally dedicated as or declared by a competent court to be a public highway.

3. Any subsisting right of way or other easement, created within one year before issue of the certificate upon, over, or in respect of the land.

4. Any tax or special assessment for which a sale of the land has not been had at the date of the date of the certificate of title.

5. Such right of action or claim as is allowed by this act.

6. Liens, claims, or rights arising under the laws of the United States, which the statutes of California can not require to appear of record upon the register."

The practical effect of this section of the Land Title Law is that a purchaser of registered land may not rely solely on the status of the title as it appears on the register. He must check records of the Tax Collector's office, inspect the premises to determine whether someone is in possession under a short term lease, check the Federal records for outstanding liens against the property and check for any highways created on this property. If he fails to make these investigations he will still be held to take title to the property subject to these interests which do not appear on the certificate of title. Therefore, it can readily be seen that the certificate of title does not give a true picture of the state of the title. The purchaser is not safe in relying on it completely.

In addition, a one year period is allowed after the issuance of the first certificate of title for persons claiming adverse interests in the property to assert interests which they were unable to assert during the registration proceedings for various reasons.(22) This makes the title of the registered owner inconclusive for one year and prevents the certificate from being a complete indication of the state of the title. These claims could not, however, be asserted against a subsequent bona fide purchaser of the property generally.

Of course, the decree of registration is subject to the period allowed for appeal from an ordinary judgment.(23) It could also be set aside on the grounds of fraud or mistake within the statutory time limit, although a bona fide purchaser of the property would be protected in such a situation.(24)

The judicial decisions which have contributed to the inconclusiveness of the certificate of title have been mainly the result of defects in the original registration procedure. As shown above, there is a statutory one year period for persons who have not had an opportunity to assert their interests, to attack the decree of registration. The most common example of this occurs when a person who claims an interest in the property is "unknown" and therefore, receives notice of the registration proceedings only by publication in a newspaper. If he does not actually learn of the proceedings until after the decree he has only one year in which to assert his interest and it is cut off entirely if the property is transferred to a bona fide purchaser. He would, of course, have recourse against the Torrens Insurance Fund.

The California courts have not stopped with this limited protection. In a series of decisions in which persons with interests in the property that was being registered were not given the <u>proper type of service</u> (i.e. personal service if occupants or known to the party registering the land), the courts have permitted these parties to attack the decree and assert their interests <u>at any time</u>. The one year provision has been held to be no barrier in this instance. In addition, the fact that the property involved has been transferred to a bona fide purchaser has not affected the situation, either.(25) In such a case, the property may be taken away from a bona fide purchaser. His only recourse is against the Torrens Title

Assurance Fund provided by Section 105 of the Land Title Law. Since the celebrated decision of Gill v Johnson(26) this fund has been bankrupt, leaving the purchaser with no recourse other than his normal right of action against his vendor.

It is no wonder purchasers are dubious about acquiring a Torrens Title. This leads to a consideration of the defects in the Torrens System.

## V. DEFECTS IN THE TORRENS SYSTEM

The defects can be divided into two categories: Internal and External.

### A. INTERNAL DEFECTS:

The system of registering the title requires voluminous records. A page is required for each lot and a new certificate is issued for each transfer and the old one cancelled but retained. In addition, it requires a great degree of clerical work to prepare the certificates and record the interests on every certificate that is issued. This involves risk of error by omission of essential data when transferring memorials from one certificate to another.(27)

The system of showing merely a summary of the encumbrances on the certificate of title is poor since it does not give a prospective purchaser an opportunity to see the record of the instruments creating these encumbrances.(28)

### B. EXTERNAL DEFECTS:

The most important defect is the fact that the certificate does not show all interests to which the title is subject. A bona fide purchaser may lose title to the property because of failure to notify a party in interest in the initial proceedings when he should have been notified.

In addition, the title of an owner of registered property may be lost if a thief steals the duplicate certificate, forges the owner's name and transfers the certificate to a bona fide purchaser. In such a case by express provision in the statute the subsequent purchaser is protected and the true owner loses his property.(29) Recourse against the Assurance Fund it has been seen is inadequate.

The purchaser's title is subject to certain latent factors such as possession by a lessee, taxes and assessments not showing on the certificate, et cetera.(30)

To what extent the title is subject to other defects such as non-delivery of a deed in the chain of title or lack of authority of an agent involved in one of the transfers in the chain of title has apparently not been judicially determined in California. According to the purpose and

intent of the Torrens Act the subsequent purchaser should be protected as he is in a case where he purchases from a thief who has forged the owner's name.(31) For example: O is the registered owner of Blackacre and has agreed to sell it to P-1. The deed is put in escrow, but delivered to P-1 in violation of the escrow instructions. Then if P-1 has acquired the duplicate certificate and has a new one issued in his name he may transfer the property to P-2. In such a situation P-2 should be protected against O's claim that the deed was wrongfully delivered out of escrow. He should be permitted to rely on the certificate which P-1 has acquired made out to himself. Any other conclusion would violate the purpose of the Torrens Act which is to make the certificate "conclusive". However, this results in O's loss of his property through no fault of his own as is the result in the case of forgery. To this extent the Torrens System is defective since it permits loss of property in such manner without provision for sufficient recovery against the Assurance Fund. The owner is left to what recourse he has at law against P-1 who received the deed out of escrow improperly or against the escrow for violating escrow instructions.

It can be seen from this summary of the defects in the registration system that it has not solved the problems presented by the recording system and has created some new problems of its own.

FOOTNOTES to CHAPTER 1: INTRODUCTORY MATERIALS - REGISTRATION SYSTEM

1. Gage, D. D., Land Title Assuring Agencies (1937), Ch. XVI.

2. Ibid. Reeves, Alfred G., Progress in Land Title Transfer, 8 Columbia Law Review, p. 438.

3. Bordwell, Percy, Resurrection of Registration of Titles, 7 University of Chicago Law Review, p. 470; Myers, O. P., American Torrens Land Title System, 4 Iowa Law Bulletin 266; Bordwell, Percy, Registration of Title to Land, 12 Iowa Law Review, p. 114; Powell, Richard R., Registration of the Title to Land in the State of New York (1938) p. 54.

4. Cal. Stat. 1893, p. 121.

5. Cal. Stat. 1897, p. 138. This statute was approved March 17, 1897. See Wild's Annotations of the Torrens Land Title Law of California (1915) p. 19; Landels, Edward D., A Brief Review of the Torrens Experiment in the United States (1938) p. 9; Powell, Richard R., Registration of the Title to Land in the State of New York, p. 90, cited supra, footnote #3.

6. 151 Cal 40.

7. Cal. Stats. 1915, p. 1932; Deering's General Laws 8589. Powell, Registration of the Title to Land in the State of New York; p. 90; Landels, A Brief Review of the Torrens Experiment in the United States, p. 9; Wild's Annotations, p. 19. All these works were cited supra, footnote #5.

8. Ibid, Powell, p. 90.

9. Cal. Stats. 1917, p. 1668.

10. Cal. Stats. 1927, p. 853, amended by Cal. Stats. 1931, p. 1726.

11. Cal. Stats. 1931, p. 668.

12. Proposition 11, General Election, Tues. Nov. 7, 1950. It should be noted that since the original 1915 statute was adopted by Initiative all amendments thereto must be voted on by the people. See Article IV, Section 1, California Constitution.

13. 151 Cal 40.

14. 189 Cal 107.

15. See Powell, Registration of the Title to Land in the State of New York, p. 91 and 92, cited supra, footnote #3.

16. Thompson, Real Property (Perm. Ed.) vol. 8, sec. 4415.
Landels, A Brief Review, p. 7, cited supra, footnote #5.

17. Ibid, Landels, p. 11 and 12. Robinson v Kerrigan, 151 Cal 40, cited supra, footnote #13.

18. Ibid, Robinson v Kerrigan. Ogden, Outline of Land Titles (1947) p. 610.

19. Land Title Law, sec. 34.

20. Crouch, Winston W., Analysis of Measures on the Ballot, Nov. 7, 1950, prepared under a grant from the Haynes Foundation.

21. Landels, A Brief Review, p. 16, cited supra, footnote #5.
In this article reference is made to Gage's book, cited supra, footnote #1, in which the same comment is made.

22. Land Title Law, sec. 45.

23. Ibid, sec. 15.

24. Section 473 of the Code of Civil Procedure limits time within which a decree can be set aside for mistake to six months from date decree entered. Apparently, under Section 45 of the Land Title Law, one year would be the time limit for setting aside a decree of initial registration based on mistake. When the basis is fraud apparently a longer time limit is given. Section 338 of the Code of Civil Procedure would apply in such a situation giving three years from discovery of the fraud within which to bring the action. The basis for this is that fraud is made an exception in Section 34 of the Land Title Law, whereas mistake is not. This provision states: "In case of fraud, any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act..."
See In re Sackett, 53 Cal App 592; Cooper v Buxton, 186 Cal 330.

25. Newcomb v City of Newport Beach, 7 Cal (2) 393; Moakley v L. A. Pacific Ry. Co., 99 Cal App 74; Swartzbaugh v Sargent, 30 Cal App (2) 457; Follette v Pacific Light & Power Corp., 189 Cal 193.

26. 21 Cal App (2) 649. See Ogden, Outline of Titles, p. 611, cited supra, footnote #18. Also, Wild's Annotations, p. 18, cited supra footnote #5.

27. 7 California Law Review, p. 75.

28. See supra, footnote #20.

29. Land Title Law, sections 38 and 60. If a forged deed is transferred by X to A without the duplicate certificate, A would not be protected.

If he, however, transferred the property to B, a bona fide purchaser, B would be protected, according to the wording of Section 38. If A receives the duplicate certificate, also forged, he will then be protected under Section 60 since he has the right to rely on such duplicate certificate. See 7 California Law Review, p. 81 for a discussion of such a situation.

30. Land Title Law, section 34.

31. See Beale, Joseph H., Registration of Title to Land, 6 Harvard Law Review, p. 369, in which it is shown how the Torrens System should deal with the off the record risks inherent in the Recording System. See also Patton, R. G., Torrens System of Land Title Registration, 19 Minnesota Law Review, p. 534. There seems to be no California authority on these questions and therefore, any conclusions must be conjecture.

## Chapter 2: PROCEDURE INVOLVED IN INITIAL REGISTRATION OF TITLE
(By University of Southern California)

### I. INTRODUCTION

The procedure followed in registering property under the Land Title Law is similar to that used in an ordinary civil action.(1) It requires the filing of a Petition, similar to a complaint, the giving of notice to interested persons by personal service or by publication service, a hearing similar to a hearing in an ordinary action, and a decree rendered by the court and entered in the same manner as a judgment. The proceeding is by nature similar to a quiet title action and results in an in rem decree which is said to be a conclusive determination of all persons' interests in that property. In spite of the fact that the Land Title Law declares that the decree is conclusive there have been various court decisions in which the decree has been set aside or held not to be binding on certain parties. This problem which is the major one in connection with the Torrens system is considered in detail in Chapter 4.

The decree which is granted orders the Registrar of Titles to issue a certificate of title which states who the owner of the property is and what interests other persons have in the property. It lists all liens, encumbrances, and charges against the land. This certificate is declared to be conclusive evidence of title. In actual practice, however, the certificate has not been treated as conclusive and the courts have permitted certain parties to assert interests in the property whose interests did not appear on the face of the certificate. To the extent that this has been permitted the Land Title Law has not been achieving its purpose of giving absolute certainty to the ownership of real property.

A judicial proceeding as outlined here is necessary to meet the constitutional requirement of due process as was discussed in Chapter 1.

After property has once been brought under the Torrens System the subsequent transfers of that property are made by filing the deed with the registrar, together with the duplicate certificate, and having a new certificate issued by the registrar. Chapter 3 discusses this in detail.

The various steps which must be followed in the initial registration of land and the various problems that arise in connection therewith will be discussed in detail below.

### II. THE PETITION

The first step in obtaining registration is the filing of the Petition. This will be discussed under the following topics:

1. Form and Contents of the Petition
2. Additional Documents Filed with the Petition

3. What Persons May File Petition.
4. What Types of Interests in Land May be Registered.

A. FORM AND CONTENTS OF THE PETITION

The petition which is required to be verified is addressed to the Superior Court of the County within which the property is situated and is filed with the County Clerk. If the land constitutes a single parcel but lies partly in two or more counties one petition may be filed covering the entire parcel. This may be filed in either county in which the land lies, but the certificate which is subsequently issued covering the property must be filed with the Registrars of all counties within which the land is situated.(2)

The petition must contain the following information:(3)

1. Name, occupation, residence, post-office address of applicant.

2. If applicant represented because of any disability, name, occupation, residence, post-office address of person representing him and reason for representation.

3. If application is by corporation, its name, when and where incorporated, its principal place of business, names and addresses of president and secretary, and if none, of its executive officers.

4. Whether or not applicant is married. If married, name and address of husband or wife. If unmarried, how marriage relation terminated and if by annulment or divorce where and by what court.

5. That applicant is 21 and free from disability. If under disability, state age or other disability.

6. Description of the land.

7. Value at which land and permanent improvements assessed at last assessment for county tax.

8. If any petitioner claims title individually, separately from others, the particular land which he claims must be set forth separately.

9. Statement of the interest each petitioner has in the property, whether it is community property or subject to a homestead.

10. Statement of any easement, lien, or encumbrance against the property, nature and amount of lien, and book and page of record if recorded.

11. Statement of whether land occupied or not.

12. Persons who must be named in the petition are as follows:

a. Names and addresses of persons claiming easement, lien, or encumbrance.

b. Name and address of occupant of the property and statement of any interest he claims.

c. Name and address of owners of adjoining lands, so far as this can be ascertained by a diligent inquiry.

These will be the necessary parties defendant in the action which is begun by this petition.(4)

13. Section 6 of the Land Title Law requires the petition to show the character of possession if the petitioner claims title by adverse possession.

14. Section 6 of the Land Title Law requires a statement of what claims the petitioner has in a public or private way if the property he owns is bounded by such a way. Also, whether the petitioner desires to have the line of the way determined.

B. ADDITIONAL DOCUMENTS FILED WITH THE PETITION

When the petition is filed it is required to be accompanied by the following documents:(5)

1. Plat or plan of survey

2. Abstract of title

Where no map is on file with the county recorder, a plat or plan of survey of the land made by the county or licensed surveyor must accompany the petition. If a map is on file a reference to such map in the petition is sufficient.

An abstract of title must accompany the petition. The abstract need only go as far back as the date of a decree of a court determining the title to such property or to the date of issuance of a policy of title insurance.

The abstracts must be verified by the searcher making them.

When title is claimed by adverse possession an abstract need not be filed with the petition. The court may on the hearing require such abstract, however.

C. WHAT PERSONS MAY FILE PETITION

Section 5 of the Land Title Law provides that a petition may be filed by the owner or owners of any estate or interest in land whether legal or

equitable. An exception is made in the case of the owner of an undivided share or an easement.

In certain situations specific persons are designated to file the petition. These are as follows:(6)

1. If the application is made by husband and wife and the property is community property both husband and wife must join in the petition.

2. If the property is collectively owned by several persons, they all may join in the petition.

3. If the property is owned by a corporation, the petition may be filed by an agent of the corporation.

4. If the property is part of the estate of a deceased person, the petition may be filed by the administrator or executor of the estate.

5. When the property is owned by a minor or other persons under disability, the petition may be filed by the guardian, but in the name of the person who is the owner of the property.

The owner of several pieces of property which are contiguous may include them all in one petition.(7) It would seem that the same would be true of the owner of several pieces of property that are <u>not</u> contiguous.(8)

Several persons owning parcels of land individually may join in the petition for registration. For example, if A owns Lot #1 and B owns Lot #2 adjacent to Lot #1 and C owns Lot #3, adjacent to Lot #2, they may all join in a petition to have their property registered under the Torrens System.(9) It would seem that the land need not necessarily be contiguous.

A person who is out of possession may petition to have the title to the property registered. In the registration proceedings the court may determine the applicant's right to possession and may order that possession be delivered to the petitioner and may then order the property registered under the Land Title Law.(10)

Although Section 5 of the Land Title Law allows the owner of any estate or interest in land to register that interest, only the owner of a <u>fee</u> interest may obtain the <u>initial</u> registration. Section 7 states: "No mortgage, lien, charge, or lesser estate than a fee simple shall be registered unless the fee simple to the same land is first registered."

For example, O is the owner of Blackacre and has mortgaged it to M, the mortgagee. If O has not registered the property, M has no right to petition for registration. If O has registered his property, M will be given notice and his mortgage will be shown as a memorial on the certificate of title issued to O. If the property is registered and the mortgage is given later, the

mortgage will then be registered upon the filing of the mortgage and the production of the owner's duplicate certificate of title. The registration consists of the writing in of a memorial on the original certificate of title stating the existence of the mortgage. This is done by the registrar when the proper documents are presented to him. See Chapter 3 for a discussion of these transactions occurring after the initial registration of title.

## D. WHAT TYPES OF INTERESTS IN LAND MAY BE REGISTERED

The Land Title Law permits the owner of any estate or interest in land to be brought under the Torrens System. An exception is made in the case of an owner of an undivided share or an easement. However, the statute refuses the registration of a mortgage, lien, charge, or lesser estate than a fee simple unless the fee simple to that land is first registered.

There have been several important decisions interpreting these code sections. They have considered the question of whether certain types of interests in land may be registered. These interests may consist of equitable rights to set aside documents, interests in land acquired by adverse possession, et cetera. These various decisions will be discussed below.

### 1. REGISTRATION OF FEE INTERESTS SUBJECT TO A LESSER ESTATE IN ANOTHER PERSON

It is elementary, of course, that the petitioner must show some title in himself, whether it is derived through a conveyance or acquired by adverse possession. If he fails to show such title, he has not brought himself within the provisions of the Torrens Act.(11)

More complex problems arise when an attempt is made to register land which is subject to rights in other parties. For example, O is the owner of Blackacre, but the property is subject to a lease in favor of L for five years, a mortgage in favor of M, and an easement for purposes of a road in favor of X. According to Section 7 of the Land Title Law, O may register his land even though it is subject to these various interests. Section 7 reads as follows: "...(a) It shall not be an objection to bringing land under this act, that the estate or interest of the applicant is subject to any outstanding lesser estate, mortgage, lien, or charge; but every such lesser estate, mortgage, lien, or charge shall be noted upon the certificate of title and the duplicate thereof, and the title or interest certified shall be subject only to such estates, mortgages, liens, and charges as are so noted, except as herein provided."

The case of In re Waltz(12) involved the following situation concerning this problem. O, owner of Blackacre, conveyed the property to P, who is petitioning to have the property registered under the Torrens Act. In the conveyance to P, however, O reserved the right to dig for oil and petroleum. It was held in this case that P was entitled to register his interest in the

property even though it was subject to a lesser estate in favor of O. This is in accord with Section 7 of the Torrens Act quoted above. Of course, the certificate issued must state the interest which O has reserved in this property.

It is interesting to note that the English Land Title Act(13) makes specific provision for the registration of the title to the surface land and registration of the title to the minerals separately. The California statute does not provide for such a situation, but by judicial decision in the case of In re Waltz it has been held that these interests may be registered separately. Therefore, the same result is achieved in California by court decision as is achieved in England by statutory provision.(14)

2. REGISTRATION OF PROPERTY ACQUIRED BY ADVERSE POSSESSION

The petitioner need not rely on a conveyance to prove his title, but may register a title derived through adverse possession.

The Land Title Law, Section 6, requires the petitioner in such a case to plead and prove the elements of adverse possession in order to show the court that he has met the requirements of the California codes for acquisition of title by adverse possession. If he is able to prove these elements he has a title which may be registered. It is, therefore, advisable to discuss at this point the method of acquiring title by adverse possession.

Title to property in California may be acquired by occupancy for the period prescribed as sufficient to bar any action for the recovery of the property.(15) This period of occupancy must be five years next preceding the action for recovery of the property or the action to register the property. Taxes must have been paid by the claimant or his predecessors during this time.(16)

The type of occupancy or possession which must be shown is very important:

a. If the occupant entered the premises under a claim of title founded on a written instrument (e.g. a deed or judgment of a competent court) he may show as a sufficient possession either of the following:

   1. Cultivation or improvement of the property.

   2. Fencing in the property.

   3. Use for pasturage and other ordinary use by the occupant.

   4. Where part of a known farm or single lot has been partly improved and the remainder of the lot left uncleared the occupant is treated as being in adverse possession of the entire farm or lot.(17)

b. When the occupant does not rely on a written instrument but has been

in possession claiming title for the requisite amount of time he may claim title to the part of the property he has been in actual possession of by cultivating, improving, or fencing in the property.

Possession in this case consists of cultivating, improving, or fencing in the property.(18)

In addition, the claimant must show he was in exclusive possession not sharing it with the true owner. The acts of occupancy must have been done openly, not in a clandestine manner. For example, one who entered another's property secretly under cover of darkness to pick crops or dig for minerals from time to time has been held not to have acquired title by adverse possession.(19) Of course, the possession must be adverse to the true owner. If it is consented to it cannot be made the basis of the acquisition of title. The possession must be continuous for the statutory period either by the claimant or his predecessors.

The final requirement is that the claimant or his predecessors paid the taxes assessed against this property for the five years during which the land was adversely occupied. If it is shown that taxes for one part of the area claimed have not been paid, although taxes assessed against the rest of the area have been paid the occupant may only claim title to the area for which the taxes have been paid.(20)

When the petitioner who is seeking to register his property has proved the type of possession required by statute and the payment of taxes he is then permitted to have his title registered in the same manner as a title acquired by a conveyance.

It should be noted at this point that no one may acquire title to property that has been registered under the Torrens System except by transfer of the certificate of title. This means that such property may not be acquired by adverse possession. The Land Title Act Section 35 provides for this as follows:

"After land has been registered, no title thereto adverse or in derogation of the title of the registered owner shall be acquired by any length of possession."

This provision has been subjected to criticism since it constitutes a radical change in the law of real property. It raises a question of public policy since it is undesirable to leave land unoccupied for any length of time without permitting someone to cultivate it and get some benefit out of the idle land.(21)

3. REGISTRATION OF PROPERTY ACQUIRED THROUGH SALE FOR TAXES

The Land Title Law permits a person who has derived title to his land through a tax sale to register this property. No change is made in the manner of acquiring such property. The procedure is as follows:



3

Since the year 1895 property on which taxes have become delinquent is sold to the State by operation of law after a specific time has elapsed and the proper notice given.(22)

The State is then required to hold the property for five years during which time the original owner may redeem. After that the property is sold at public auction to the highest bidder. The minimum bid must be the amount for which the property was sold to the State. The right of redemption which the original owner had is then terminated and the purchaser at the auction may pay his bid and redeem the property. At that time he will receive a deed to this property.(23) If the bidder does not pay or the property does not sell at the auction, the property is deeded to the state.(24)

The owner who has acquired his property through this procedure is entitled to have his property registered under the Land Title Law in the same manner as any other property.(25)

If the property was derived through a tax sale occurring before 1895 without the intervening sale to the State, the petitioner must prove that either he or his predecessors in title have been in adverse possession for at least five successive years prior to registration and have paid all taxes levied during that period.(26)

This requirement of proving adverse possession does not apply to property sold for taxes to the State after 1895 and then sold to a private individual after five years' holding by the State.(27)

## 4. REGISTRATION OF EQUITABLE INTERESTS IN LAND

The owner of an estate or interest whether legal or equitable may file a petition to register his interest. An equitable title may consist of the purchaser's interest under a contract to purchase real property, a beneficiary's interest under a trust, and other interests recognized by equity, but which do not consist of the legal title to the property in question. Of course, in many of these cases, the fee title would have to be registered first, before an equitable interest could be registered.

It has been held that the owner of property who has an equitable right to set aside a trust deed fraudulently acquired against this property may petition for registration. This case, Frances Investment Co. v Superior Court(28), decided that the court may determine the validity of the trust deed and set it aside if shown to be fraudulently acquired. The court may then certify title in the petitioner not subject to the trust deed. Therefore, when a person seeks registration of his property, he may have invalid instruments adjudicated in the registration proceeding and set aside before certification of title. The basis for such a decision is to avoid the necessity of two separate suits - one to determine validity of the trust deed and one to register the title.

It was argued in the Frances Investment Co. case that the petitioner could not bring such action since the fee title had never been registered and no lesser interest could be registered before that. The court held that it was sufficient if the abstract or petition showed facts sufficient to prove legal title in either the petitioner or the holder of the trust deed who claimed legal title. It is not necessary for the petitioner to have legal title at the time he files his petition if he is able to show that he has a right to legal title or that some other claimant in the registration proceedings has legal title.

### 5. REGISTRATION OF INTERESTS IN FIXTURES OR CROPS

The Land Title Law is limited in its operation to land titles and to transactions by way of mortgage, lease, contract to sell or other instrument intended to create such a lien, encumbrance, or charge upon land as shall affect the title thereto. If a mortgage involving registered land is not properly registered it may not be asserted against a bona fide purchaser of that real property. However, it has been held that failure to register a mortgage covering the crops on registered land will not affect its validity as to subsequent bona fide purchasers. This is because mortgages on fixtures and crops are not mortgages on real property within the meaning of the Land Title Law. Such instruments are not entitled to be registered and if they are registered none of the benefits of registration will apply. Likewise, the provisions of the Land Title Law cannot be invoked if such instruments are not registered.(29) The effect of recording such instruments is discussed in Chapter 2 of the paper on the Recording System in California.

## III. REFERENCE TO EXAMINER OF TITLES

The next step in the registration procedure is the examination of the abstract of title when one has been filed with the petition. This may be done by the court or by an examiner appointed by the court. The examiner may be appointed when the petition is filed or at a later date. He is required to be "an attorney in good standing, skilled in the examination of titles and admitted to practice before the Supreme Court of the State for at least five years preceding his appointment." The compensation of the examiner is agreed on by the parties and the examiner or fixed by the court. The party in whose favor registration is granted must pay the compensation as part of his costs.(30) These examiners may be Deputy Registrars according to Section 108 of the Land Title Law.

The abstract of title is referred to this examiner who examines the title of the land described in the application and investigates all facts pertaining to the title which are brought to his attention. The examiner then files a written report with the court together with a certificate of his opinion on the title. The court may not enter a decree in a case where the matter has been referred to an examiner until this opinion is filed. The court is not bound by the report, however, and may require other or further proof.(1)

This Examiner of Titles may be appointed when an abstract of title has been filed. He apparently has the right to hear witnesses, receive evidence and rule on objections.

When no abstract is filed, a General Referee may be appointed under Sections 638 and 639 of the Code of Civil Procedure. This was decided in the case of In re Reed(2) since the registration proceeding is in the nature of a quiet title action in which it is proper to appoint a General Referee. Such referee may conduct a hearing, receive evidence, and render a decision based on the evidence. The referee then gives a report to the court on which the court may base its findings of fact and draw its conclusions of law therefrom. In re McNamee(3) reiterates the proposition that such referee may be appointed but requires the trial before the referee to be conducted in the same manner as if it were before a court. The findings of the referee must be based on evidence regularly admitted in the hearing before the referee. If this is not done the findings if relied on by the court may be set aside.

This General Referee does not have to meet the qualifications of an Examiner of Titles since he is not appointed under the Land Title Law. He must meet the ordinary requirements for a referee.(4) He may, of course, be a title examiner or deputy registrar as provided in Section 108 of the Land Title Law.

## IV. RIGHT TO AMEND PETITION

The applicant is permitted by Section 9 of the Land Title Law to amend his petition. He must make a motion to this effect and if it is granted must file an amended petition verified in the same manner as the original. The amendment may, however, be ordered by the court on its own motion or upon the motion of any interested person.

The amendment may be made before or after notice has been served on the defendants. When the amendment is made before service of notice there is no problem of additional service. If the amendment is made after service of notice there is a question as to whether the notice need be republished or additional service given. California apparently has no authority on this point, but other states have refused to require additional service when all interested persons have been personally served or had entered their appearance.(5)

## V. WITHDRAWAL OF PETITION FOR REGISTRATION

An applicant is permitted by Section 20 of the Land Title Law to withdraw his application at any time prior to the hearing of such application. The petitioner must pay all costs at the time of withdrawal and make a written request for withdrawal and return of his abstracts of title, deeds, and other instruments. If the withdrawal is granted, the court orders the clerk to return these documents except depositions and affidavits deposited to support the petitioner's application. In this

order the court states that the request for withdrawal is granted.(6)

No provision was made in the Land Title Law as originally adopted to allow owners of registered property to withdraw their property from the operation of the Torrens System. An initiative measure adopted by the voters in November, 1950 amended the Land Title Law in this respect providing for such withdrawal.(7) This permits owners of registered land to withdraw it from the operation of the Torrens System and deal with it under the Recording System as non-registered land is dealt with. The procedure involved in withdrawing property from the Torrens System is discussed in Chapter 3. The advisability of permitting withdrawal is discussed in Chapter 1, Part IV.

## VI. METHODS OF GIVING NOTICE OF FILING OF THE PETITION TO REGISTER LAND

After the petition has been filed, amended if necessary, and all other proper steps taken, the order for service of notice of filing the petition is given by the court. The notice is given in the following manner to the various interested persons.

### A. NOTICE TO SUBSEQUENT PURCHASERS

When the petition for registration has been filed with the proper person this constitutes notice to all subsequent purchasers or encumbrancers of the property that a registration proceeding is pending. It is not necessary to file a Lis Pendens with the County Recorder as is required for other actions affecting real property.(8)

### B. NOTICE TO INTERESTED PARTIES

#### 1. Form of Notice

After the court has ordered notice to be given, a notice must be issued under the seal of the court. This is similar to a summons in an ordinary civil action and contains the following information:

1. Name of court and county in which action is brought.
2. Names of applicants.
3. Description of the land involved in the proceeding.
4. A statement that the petition has been filed for the registration of title and which prays for a decree declaring the applicant to be the owner in fee of the land described in the petition.

The notice shall be directed to all parties who appear by the petition, or the petition and abstract, or by the report of the examiner of titles to have any interest in the land or any part thereof.

The notice shall order the persons whom it concerns to appear and answer the petition. The time limit for answering is 10 days after personal service if served within the county, or 30 days if served elsewhere.

The notice must state that if appearance is not made within the time allotted the court will grant the petition and direct registration of the title to the land. It must also state that any person so served who fails to appear will be forever barred from disputing such registration decree.(9)

2. Service of Notice

Service of the notice and petition in registration proceedings parallels service of a summons and complaint in an ordinary civil action.

The first step in serving the notice is to have the notice published in a newspaper of general circulation published in the county for four successive weeks. The newspaper should be designated by the court. If the notice is published in a daily paper it is sufficient to publish the notice once a week for four successive weeks. This shall operate as notice to unknown persons who may have an interest in the property.

(a) Personal Service:
Personal service must then be made on the following persons:

1. All parties who appear by the petition or petition and abstract or report of the examiner of titles to be interested in the fee.

2. All occupants named in the petition.

3. Husband and wife of the applicant if married.

These parties are served with a copy of the notice attached to a copy of the petition. Personal service is required if these parties listed above reside in the State and can, with reasonable diligence be found and served within the State.

4. Personal service of the notice must be made on the owners of adjoining lands provided they reside in the State and can, with reasonable diligence be found and served therein. It is not necessary to serve them with a copy of the petition.(10)

If any of these persons listed above have joined in the petition or have assented to the petition in writing, no such service is required.(11)

(b) Publication Service:

If any of the parties who have not joined in the petition or assented to the hearing in writing, do not reside within the State or cannot with reasonable diligence be found and served within the State, a copy of the notice shall be sent by mail to such party at his last known address, within 30 days after the first publication of the notice in the newspaper. If his last known address cannot be found with reasonable diligence the notice must be mailed to the party in care of the County Clerk of the County in which the land is situated.

If any of these parties appear by the petition, petition and abstract, or report of the examiner of titles to be interested in the fee a copy of the petition must be attached to the notice that is mailed to him.

In any case it is not necessary to serve a copy of the abstract, order or map with the notice.(12)

(c) Service on Special Parties:

(1) If the petition prays to have the line of any public way determined, notice must be given to the mayor or other presiding officer of any incorporated city or town in which such way is situated. If the way is situated outside of any incorporated city or town, notice must be given to the chairman or presiding officer of the board of supervisors of the county in which such way lies. Notice shall be given to these persons by delivering a copy of this notice personally.

(2) If the land borders on a navigable stream or an arm of the sea or if it appears from the application or proceedings that the State may have a claim adverse to that of the applicant, notice shall be given by personal service to the attorney general.(13)

(3) The court may in its discretion order further notice to be given of the application as it may deem necessary and proper in addition to the statutory provisions discussed above.(14)

The constitutionality of these various sections providing for service of notice is discussed in Chapter 1.

The questions which arise when service has not been proper are troublesome. In many cases it has been held that a decree may be attacked at a subsequent date for failure to give proper notice in the manner prescribed. This gives an element of inconclusiveness to the certificate of title since it can be attacked in such manner. These problems are thoroughly discussed in Chapter 4. The present chapter is mainly devoted to a discussion of the requirements for proper service. The effects of failure to give proper service are analyzed in Chapter 4.

## VII. EFFECT OF ASSENT TO REGISTRATION

Any person who has or claims an interest in the land which is being registered may assent in writing to the registration. He will not be named as a defendant or if already named need not be served with notice of the proceedings.

The assent is to be executed and acknowledged in the manner required for the execution and acknowledgment of a deed. It should then be filed with the clerk of the court. The assents may be attached to the petition or filed separately.(15)

## VIII. APPEARANCE

After the petition has been filed and proper notice given the persons who claim an interest in the property may appear and object to the granting of the application. An exception is made in the case of a party who has given his written consent to the registration of the property. If the objection is sustained the applicant must pay the costs of the appearance. If it is not sustained, the defendant so objecting must pay the costs.(16)

When a person has a right to appear but has not been named as a defendant he may appear, demand a copy of the petition, and answer it within the time allowed.(17)

The time for appearance is 10 days after personal service within the county; 30 days after personal service out of the county and in the state. When persons are permitted to be served by publication, they may make an appearance within 60 days after the first publication of the notice.(18)

## IX. SUBSIDIARY MOTIONS AND PETITIONS IN CONNECTION WITH REGISTRATION PROCEEDINGS

### A. APPOINTMENT OF GUARDIANS

Section 13 of the Torrens Statute provides for the protection of minors and other persons under disability. The applicant for registration or any other interested person may petition to have a guardian appointed for the purpose of suit for minors and other persons under disability, and for all persons not in being who may appear to have any interest in or lien upon the land. The court will then upon granting of the petition appoint such guardian.(19)

### B. EFFECT OF DEATH OR DISABILITY OF APPLICANT FOR REGISTRATION

If the petitioner dies during the pendency of the registration proceedings or becomes subject to some disability the court, on motion, may allow the proceeding to be continued by, or against, his representative or successor in interest.(20)

### C. EFFECT OF TRANSFER OF THE PROPERTY DURING PENDENCY OF REGISTRATION PROCEEDINGS

If the property or interest which is being sought to be registered is transferred during the pendency of the registration proceedings Section 21 of the Torrens Statute provides that the proceeding may be continued in the name of the original applicant. The court may if it prefers allow the person to whom the transfer is made to be substituted in the proceedings.

## X. THE HEARING OF THE PETITION FOR REGISTRATION

After proper service has been given to all interested parties, and the time for appearance has expired, the court sets a date for the hearing.

Notice is given of the date to all parties who have appeared. This is done in the same manner as in an ordinary civil action. The court then hears evidence and determines the title to the land described in the petition.(21) The ordinary rules of evidence apply as in any civil action. The petitioner has the burden of proving he has a proper title for registration.(22) There are several items of interest connected with the hearing. These will be discussed below.

A. NATURE OF THE HEARING

There has been much discussion in the cases and texts on the question of the nature of the hearing and the power of the court to determine collateral issues of title incidental to the registration of title. Section 14 of the Land Title Law provides that "the court shall ... proceed to determine the title to all the land described in the petition and of all persons who may have any interest in any part thereof..."

This has been held to give the court authority to determine the validity of a trust deed obtained by fraud and to set aside such trust deed and decree that title to the property should be in the petitioner.(23) The court in Frances Investment Co. v Superior Court(24) which upheld a superior court's ruling to set aside a trust deed in a registration proceeding stated that the purpose of the act is to establish a merchantable title to the land in the true owner. It may be necessary to determine adverse claims and settle collateral issues preliminary to the establishing of title subject to registration. A registration proceeding is no different from an ordinary proceeding in equity even though the proceeding to register title is termed a special proceeding. Since the court is in substance a court of equity it may give complete relief and determine questions that are essential for a complete determination of the title to the land in question.

The case of In re Barlow(25) provides another illustration of the power of the court in a registration proceeding to decide collateral issues. Petitioner in this case sought registration of land to which he claimed title. Defendant claimed a right to part of this land as a result of a boundary settlement formerly made by the predecessors in interest of the petitioner and the defendant. The court in the registration proceedings settled the boundary dispute that had arisen between the parties and decreed that the parties were bound by the boundary agreement formerly made. This case shows the right of the court in registration proceedings to determine disputes as to ownership of the property sought to be registered and then to decree registration in accordance with the settlement of those disputes. The case of In re Scott(26) makes it clear that an action to register land is in the nature of a quiet title action in which all persons' rights in the particular piece of property are "conclusively" determined. In a later section it will be shown to what extent the decree represents a "conclusive" determination of rights.

The Scott case involved a petition for registration of land which was partially occupied by defendants under claim of title. The court determined

the issue of defendant's title to the land adversely to defendants, quieted plaintiff's title to the entire area and permitted registration of the land in petitioner's name. The court stated that although the purpose of the proceeding was to obtain conclusive evidence of title the action became a quiet title action in substance and effect when the defendant claimed title to part of the land. The court was, therefore, justified in determining the true owner of the property and permitting him to have possession of the property in addition to registration of his title.

The court has the power to decree title in any one of the parties who claims it. If the petitioner fails to show title in himself and the defendant successfully proves title, the court may quiet his title and register it in the defendant's name provided that is requested.(27)

Section 6 of the Torrens Act gives the court the right to determine the line of a private or public way in connection with a registration proceeding.

Section 14 of the Torrens Act requires the court to give a determination of title of all interested persons; a determination as to whether the land is the separate or community property of the party found to be the owner; and whether or not the title is held in any special capacity.

A decree is then rendered by the court to this effect.

B. RIGHT TO JURY TRIAL

A jury trial is provided for by section 14 of the Torrens Statute. This section states that any issue of fact raised by a verified pleading of a person claiming an interest in the land shall be submitted to a jury on demand of any party appearing in the action. It is then submitted to a jury in the same manner and to the same extent as it would be submitted in any ordinary action in accordance with general law and the constitution. The verdict of the jury will then have like effect as is provided by general law when issues in ordinary actions are submitted to a jury.

There are a few states which do not provide for a jury trial. These include Colorado, Illinois, Nebraska, Ohio, Oregon, Washington, Minnesota. In these states constitutional problems have been raised.(28) The California statute provides for a jury trial so no constitutional issues of that nature are involved.

C. ADVERSARY CHARACTER OF THE PROCEEDING

A proceeding to register title has been held to be adversary in character.(29) It is not a proceeding merely for the purpose of obtaining conclusive evidence of title, but is in effect an action in equity for the determination of title. The action to register property is considered adverse to the parties claiming title against the petitioner and it is also adverse to those who claim title through the petitioner.

For example, O the owner of Blackacre gives a deed of trust on the property to A. A is, therefore, claiming through O, the owner. X, who has been occupying the property claims title by adverse possession. A is, therefore, claiming title against O but not through him. If O then petitions to have his title certified and registered, A, the holder of the trust deed even though he claims through O would be a necessary party as well as X and would be accordingly served. He could not rely on O to protect his interests against X, the adverse possessor and should appear in the proceedings. The action would be adverse to A as well as to X. If A failed to appear after proper service on him, O might fail to mention the trust deed or by error it might not be shown in the decree and certificate subsequently issued by the registrar. A would have one year in which to attack the decree under Section 45 of the Torrens Act and have the interest he had appear on the certificate. If the property had been sold to a bona fide purchaser it would seem that A would not have this right to set the original decree aside. If A failed to come in within the prescribed time limit (leaving out the problem of an intervening bona fide purchaser) the decree would become final and A would lose his interest in the property. The court in the case of Title Guarantee and Trust Co. v Griset(30) states it is never safe for a necessary party to an adverse proceeding to fail to appear when summoned into court.

The result would be different if A had not received proper service. Chapter 4 discusses this problem.

### D. REGISTRATION IN OTHER PROCEEDINGS

In an action to quiet title, establish title to, partition land, or to administer upon an estate of a deceased person involving land, and the court has or can acquire jurisdiction of the land in rem, the decree may order the land registered. This may be done if it is requested and proper notice is published and served on interested parties. The application must set forth the facts described in the first part of this chapter as essential to a petition for registration.(1)

In proceedings to probate an estate involving land, a decree determining title to the land may also order registration. As in the situations discussed above, a proper petition must be filed, notice published and served as in an ordinary action to register land.(2)

## XI. THE DECREE OF REGISTRATION

After the hearing the court shall make, give, and enter a decree confirming the title of the person found to be the owner of the property involved in the action. This is provided by Section 14 of the Land Title Law. This section of the Survey will discuss the form and contents of the decree and the effect and conclusiveness of the decree. The methods of attacking such a decree will be discussed in a later chapter.

### A. CONTENTS OF THE DECREE

Section 15 of the Land Title Law provides that the decree must state

the following matters:

1. Whether or not the owner is married or unmarried. If married, it must state the full name of the spouse.

2. If the owner is under a disability, it must state the nature of the disability; the person who is acting for him; the source of that person's authority.

3. If the owner is a minor, it must state his age and in whose custody his estate then is.

4. The decree must contain an accurate description of the property.

5. The decree must set forth the estate which the owner has.

6. It must set forth all estates, mortgages, easements, liens, attachments and other encumbrances to which the land is subject in relative priority. This includes the rights of husband and wife. Any recorded lien or charge must be referred to by book and page of the record.

7. Any other facts properly to be determined by the court.

The decree then states that the applicants are entitled to have the land registered and decrees that the land is registered. It then orders the registrar to issue a certificate of title to the owner when a certified copy of the decree is filed with him.(3)

The decree should also state that it is a final and conclusive determination of title to the land as against all persons, known and unknown except as the act provides.

B. FORM OF THE DECREE

Section 15 of the Torrens Act requires the decree to be stated in a form convenient for transcription upon the certificate of title. Sections 23 and 24 which describe the contents of the certificate do not make provision for the decree to be copied on the certificate. A reference to the decree on the certificate is, therefore, sufficient.(4)

In setting forth the various encumbrances to which the estate is subject it is permissible for the decree to refer to the book and page where such liens are recorded. For example, the decree may state the property is subject to exceptions and reservations contained in deed recorded in Book 2000, Page 501, of Deeds Book. It is not generally necessary to describe in detail the various covenants and conditions, et cetera, to which the title is subject. However, in a situation in which a reference will not be sufficient to make it clear what liens affect the property sought to be registered, it is preferable to describe the encumbrances in the decree.

This problem would be likely to arise when several lots are being registered in one proceeding and references to several recorded instruments would be necessary. These references might result in confusion to a person attempting to determine what encumbrances a particular piece of property is subject to. Under such circumstances it is advisable to describe the specific restrictions in detail. This problem was raised in the case of In re Bangle(5) and the court stated:

> "While under the act reference may be had to records of deeds, nevertheless, as to a title which, as here, under the deeds is limited and qualified by so many covenants contained therein, the purpose contemplated would be far better subserved if the decree in specific language set forth the conditions, restrictions, reservations, and liens to which the court found the title to be subject, rather than by reference."

The court in the Bangle case summarizes the situation very clearly by stating:

> "Since the purpose of the proceeding is, so far as possible, to simplify the title and eliminate questions that no longer affect it, the decree should in plain, explicit, and unmistakable terms set forth the conclusion of the court thereon."

C. EFFECT OF THE DECREE

The decree in the registration proceedings is declared by the Statute to be "in the nature of a decree in rem, shall forever quiet the title to the land therein ordered registered and shall be final and conclusive as against the rights of all persons, known and unknown, to assert any estate, interest, claim, lien or demand of any kind or nature whatsoever, against the land so ordered registered or any part thereof, except only as in this act provided."(6) The courts in a series of decisions have refused to hold that the decree is a conclusive adjudication of title in spite of this section of the Torrens Act. This has led to a general distrust of a Torrens title and a breakdown of the entire system. This problem will be discussed in Chapter 4 "Effect of Registration of Property Under Torrens System."

The decree granted in a Torrens proceeding does not change the interests in the property which existed before registration. It does not change a covenant in a deed which was not binding on a subsequent party into a covenant that would be binding on a subsequent party.(7) The interests remain the same as before registration. Title is merely certified in the owner, subject to certain specified interests.

In addition, a registration decree cannot change legal requirements for the transfer of property. For example, in the case of Fitzsimmons v Raiche(8) A executed a deed conveying property owned by him to his sister, S.

A filed the deed, obtained a decree of registration but the deed was never delivered to S. The mere act of registering the deed did not affect the status of A as owner. Title had never been transferred to S since the deed had never been delivered. This property was, therefore, included in A's estate at his death. Registration did not affect the title to this property.

D. ENTRY OF DECREE, FILING OF CERTIFIED COPY

After the decree ordering registration has been granted, it must be entered on the records of the court.(9) The decree is then filed with the clerk and a certified copy of the decree is filed with the registrar, who issues the certificate of title.(10) This certificate is discussed below in detail.

Failure to enter the decree relieves the registrar of the duty of accepting a certified copy of the decree and issuing the certificate of title.(11)

The methods of setting aside the decree of registration including the right of appeal from the judgment will be considered in a later chapter.

XII THE CERTIFICATE OF TITLE

After the decree of registration has been filed with the clerk, and a certified copy filed with the registrar a certificate is issued by the registrar to the person declared by the decree to be the owner of the property.(12) This section will deal with the issuance of the certificate, form and contents of the certificate, and the effect of such a certificate. The conclusiveness of the certificate will be discussed in a subsequent chapter.

A. FORM AND CONTENTS OF CERTIFICATE

Sections 15 and 22 of the Land Title Law provide for the issuance of the certificate of title by the registrar after the certified copy of the decree is filed with the registrar.

The certificate of title is required to be in duplicate. The original is retained by the registrar in a book entitled "Register of Titles." The duplicate is delivered to the owner or person acting for him. The certificates must be numbered consecutively and must have endorsed thereon the year, month, day, hour, and minute of the issuance of such certificate. It must be under the hand and official seal of the registrar.(13)

The certificate of title must contain the following information:

1. Description of the property registered.(14)

2. Character of the ownership. (e.g. Joint tenancy, tenancy in common, et cetera)

3. Whether land is separate or community property. If community property the names of husband and wife.

4. Nature, amount and order of the liens, encumbrances, et cetera, and other interests established by the decree.

5. Whether owner (unless corporation or trustee, et cetera) is married or not. If married, the certificate must state the name of the husband or wife.

6. If the owner is a minor, the certificate shall state his age.

7. If the owner is under any other disability, the certificate must state the nature of the disability.

8. If the certificate is issued to an executor or administrator the certificate shall show the name of the deceased testator or intestate.

9. If the certificate is issued to an assignee in insolvency or trustee in bankruptcy the certificate must show the name of the insolvent or bankrupt.

10. The registrar must note at the end of the certificate the particulars of all estates, mortgages, liens, encumbrances, and charges to which the owner's title is subject.(15)

11. If the property is held by the owner "in trust", "upon limitation or condition" this fact must be shown in the certificate of title, but the particulars of the trust, condition, or limitation need not be set forth.(16) If a trustee has "power of sale" this must be noted on the certificate.(17)

12. Section 34 of the Land Title Law contains a list of the interests to which a registered title is subjected. This provision should be printed on the certificate as a memorandum to the holder. See Chapter 4 for a list of these various items.

13. It has been suggested that the following be printed on the certificate:

> "Right of appeal exists for six months after entry of decree, by Sec. 939, Code of Civil Procedure."(18)

This serves to inform purchasers what right of appeal exists.

Section 24 of the Land Title Law provides a sample form which is suggested but not made compulsory. This reads as follows:

"State of California, ) ss
County of .....)

A.B. (state occupation and residence, giving street and number), State of California (if an administrator, give the name of the deceased; if a minor, give his age; if under other disability, state its nature), married to (name of husband or wife, or if not married so state), is the owner of an estate in fee simple, (or as the case may be) in the following land (insert description contained in the decree). Subject, however, to the estates, easements, liens, encumbrances, and charges hereunder noted. (In case of trust, condition or limitation, say "in trust," or "upon condition," or "with limitation," as the case may be.)

1. Mortgage to ... for the sum of $..., dated ..., payable ..... after date, with interest at ... per cent per ..., interest payable ...

2. Mechanic's lien in favor of X. Y. for $...., filed ....

3. Assessment for improvement of ... street. Amount $..., due ....

(Any other encumbrances or charges.)

In Witness whereof, I have hereunto set my hand and caused my official seal to be affixed, this ... date of ...

.....
Registrar of Titles in and for the
County of ..., State of California"

(Seal)

B. DUTY OF THE REGISTRAR IN CONNECTION WITH THE ISSUANCE OF CERTIFICATES

As stated above, the Registrar must issue a certificate of title in duplicate when the certified copy of the decree of registration has been filed with him.

He is required to keep the original certificates in a book known as the "Register of Titles." In this book the certificates are entered in the order of their numbers, with blanks for the entry of memorials at a later date. Each certificate is a page in this book and the duplicate is numbered in the same fashion as the original.

In another book a record is kept of the name of the person to whom a certificate was issued, the number of such cerificate, the day, hour and minute of its issuance. This book also contains an entry of the name of the person to whom the duplicate was delivered and the book and page where

the original is entered or recorded. In this book there is a place for the signature of the person to whom a certificate has been delivered, constituting a receipt for the certificate. (19) Section 30 of the Land Title Law provides that a receipt must be given before a certificate shall be delivered and must be signed by the owner. This receipt may be printed in the book as described above or pasted in the book. The signature of the owner must be witnessed by the registrar or deputy or acknowledged by any officer authorized to take acknowledgments of deeds. If it is acknowledged outside of the presence of the registrar or deputy registrar the receipt must be pasted in the book. The receipt will then be prima facie evidence of the genuiness of the owner's signature.(20)

Sections 25 and 26 of the Land Title Law permit tenants in common of registered land to have a single certificate issued for the entire area. They may, however, demand that the registrar issue a separate certificate for an undivided share. These various certificates may later be exchanged for a single certificate covering the entire area.

The Registrar must then keep indices in the following manner. He must keep one index in which the names of the owners of registered lands and other persons with interests in registered land are alphabetized. He must also keep a property index in which the property registered is indexed according to its legal description. This permits a person who is interested in finding out whether certain property is registered to discover this by means of the names of the owners or by the legal description of the property.

C. EFFECT OF THE CERTIFICATE

When the certificate is issued and properly numbered the property is considered Registered. It then becomes subject to provisions of the Land Title Law as of the date of the filing of the petition.(21)

The certificate of title is declared to be conclusive evidence that the registered owner has a good and valid title to the land.(22) According to Section 30 of the Land Title Law a person purchasing registered land is subject only to the interests mentioned on the certificate. Exception is made in the case of fraud and forgery and in the case of certain interests enumerated in Section 34. In a series of decisions the California courts have refused to recognize the certificate as conclusive evidence of title and have held that the title of subsequent purchasers of the registered property is subject to interests not listed in Section 34. The result has been that a certificate of title is not conclusive evidence of title and subsequent purchasers are not safe in relying on such certificate for the true state of the title to land they are purchasing.

This problem is discussed in detail in Chapter 4 "Effect of Registration of Property under Torrens System."

FOOTNOTES to CHAPTER 2: PROCEDURE INVOLVED IN INITIAL REGISTRATION OF TITLE

1. Title Guarantee & Trust Co. v Griset, 189 Cal 332.
2. Land Title Law, Section 5.
3. Ibid, Section 5.
4. See Title Guarantee & Trust Co. v Griset, 189 Cal 332, cited supra, footnote #1, for a discussion of necessary parties in registration proceeding.
5. Land Title Law, Section 6.
6. Ibid, Section 5.
7. In re Sackett, 53 Cal App 592, involving registration of two adjoining lots in one action.
8. See Wild's Annotations of the Torrens Land Title Law of California, 1915, p. 20, footnote #16, for an argument in favor of this proposition.
9. In re Bangle, 54 Cal App 415 is an example of joinder of several lot owners in a single petition for registration.
10. In re Scott, 182 Cal 83.
11. In re Finley, 103 Cal App 694.
12. 197 Cal 263.
13. 38 and 39 Vict. c. 87.
14. 14 California Law Review 143.
15. Civil Code Section 1007.
16. Code of Civil Procedure Section 325.
17. It should be noted that this form of constructive possession is only permitted when the claimant relies on a written instrument. See Code of Civil Procedure Section 323 for what constitutes adverse possession under a written instrument.
18. Code of Civil Procedure Sections 324 and 325.
19. In re Wasson, 54 Cal App 269.
20. Ibid.

21. Thompson, Real Property (Perm. Ed.), vol. 8, sec. 4438. See criticism of this provision in 14 California Law Review 287. See Chapter 1 for further discussion of criticism. (Part IV)

22. The 1895 Statute was Political Code Section 3767. The present provision is found in Revenue and Taxation Code Section 3436.

23. Revenue and Taxation Code Sections 3476, 3477, 3478, 3479.

24. Revenue and Taxation Code Sections 3511-3516.

25. Land Title Law, Section 8.

26. Ibid. See Chapter 3 for the procedure involved when land that has been registered is sold for delinquent taxes.

27. In re Cox, 63 Cal App 175; In re Rogers, 91 Cal App 726.

28. 189 Cal 107. See also Title Guarantee & Trust Co. v Griset, 189 Cal 382, cited supra, footnote #1.

29. Congdon v Wagner, 207 Cal 373. See also Calusha v Meserve, 58 Cal App 174.

30. Land Title Law, Sections 11 and 18.

1. Ibid. Section 19.

2. 204 Cal 119.

3. 131 Cal App 30.

4. Wild's Annotations, cited supra, footnote #8, p. 57.

5. Tower v Glos, 256 Ill 121. See Wild's Annotations, cited supra, footnote #8, p. 42 note.

6. See Hindle v Warden, 50 Cal App 356, for a case illustrating withdrawal of petition for registration.

7. Proposition 11, General Election, Nov. 7, 1950, amended Land Title Law by adding sections 48.1 to 48.9 permitting Withdrawal.

8. Land Title Law, Section 10.

9. Ibid, Section 12.

10. Ibid, Section 12; See also Toler v Smith, 133 Cal App 199.

11. Ibid, Section 12.

12. Ibid, Section 12.

13. Ibid, Section 13. See Newcomb v City of Newport Beach, 7 Cal (2) 393 for effect of failure to serve the attorney general in such a situation. This case is discussed in Ch. 4.

14. Land Title Law, Section 13.

15. Ibid, Section 12. Wild's Annotations, cited supra, footnote #8, p. 17 discusses assents and advises petitioner to get as many as possible since it saves time and expense. P. 44, footnote 54 of the same book states that a person who has assented need not be given an opportunity to be heard and he will not be permitted to appeal from the decree of registration or assign error upon it.

16. Land Title Law, Section 12.

17. Wild's Annotations, cited supra, footnote #8, p. 43, note 53.

18. Land Title Law, Section 12.

19. Ibid, Section 13.

20. Ibid, Section 21.

21. Ibid, Section 14.

22. Thompson, Real Property (Perm. Ed.) cited supra, footnote #21, vol. 8, sec. 4430.

23. Frances Inv. Co. v Superior Court, 189 Cal 107; Title Guarantee & Trust Co. v Griset, 189 Cal 382, cited supra, footnote #1.

24. 189 Cal 107.

25. 89 Cal App 787.

26. 182 Cal 83.

27. Land Title Law, Section 14. See In re Barlow, 89 Cal App 787, in which the court quieted defendant's title to part of the area claimed by petitioner. Apparently defendant did not seek to have his property registered in this action but merely to prevent petitioner from having it registered in his name.

28. Peters v Duluth, 119 Minn 96.

29. Title Guarantee & Trust Co. v Griset, 189 Cal 382, cited supra, footnote #1.

30. 189 Cal 382.

1. Land Title Law, Section 7.

2. Ibid, Section 46.

3. See Wild's Annotations, cited supra, footnote #8, p. 50 for a sample decree.

4. Ibid, p. 50, footnote 63.

5. 54 Cal App 415, cited supra, footnote #9.

6. Land Title Law, Section 16.

7. Maple v Canady, 189 Cal 373.

8. 63 Cal App (2) 398.

9. Stewart v Logan, 185 Cal 435.

10. Land Title Law, Section 15.

11. Stewart v Logan, 185 Cal 435, cited supra, footnote #9.

12. Land Title Law, Section 15.

13. Ibid, Sections 22 and 23.

14. See Petition of Furness, 62 Cal App 753 for the effect of an improper description in the decree. Also, In re Sackett, 53 Cal App 592.

15. Land Title Law, Sections 15 and 23.

16. Ibid, Section 67.

17. Ibid, Sections 68 and 75.

18. Wild's Annotations, cited supra, footnote #8, p. 65.

19. Land Title Law, Section 22.

20. Ibid, Section 22.

21. Ibid, Sections 15 and 31.

22. Ibid, Sections 40 and 41.

## Chapter 3: PROCEDURE INVOLVED IN SUBSEQUENT DEALINGS WITH REGISTERED LAND
(By University of Southern California)

### I. INTRODUCTION:

When property has been registered under the Land Title Law all subsequent dealings with that land are subject to the provisions of the Land Title Law,(1) unless the property is properly withdrawn from the system. The bringing of the land under the act implies an agreement which runs with the land. Formerly, no withdrawal of property from the Torrens System was permitted. In the last election, however, a measure was passed by the people permitting owners to withdraw it from the Torrens System. The procedure for withdrawal will be discussed below. Until withdrawal, the property remains subject to the provisions of the Land Title Law.

The present chapter will be devoted to a discussion of the procedure followed in dealing with Registered land after it has been brought under the Land Title Law. This involves conveyances, creation of various types of voluntary encumbrances such as a mortgage, trust deed, et cetera; creation of various types of involuntary encumbrances such as judgment liens, attachment liens, et cetera.

### II. PROCEDURE INVOLVED IN THE CONVEYANCE OF REGISTERED LAND

The procedure described in this section applies to the conveyance of the entire estate in registered land; the conveyance of a part of the land; the conveyance of an undivided interest in the land; lease of registered land for the lessee's life. Any transfer of a lesser interest such as a lease for years and the creation of any encumbrances on registered land will be discussed in the next section.

The first step involved in the conveyance of registered land is the execution of an instrument of conveyance, which is required to be of durable material.(2) The form of this instrument may be the same as would be used if non-registered land were involved.(3) For example, O, the owner of Blackacre, desires to convey his interest to P. O executes any type of deed authorized by law, such as a grant deed or quit claim deed made out to P, the grantee. O must make a notation on the instrument that the land is registered land, the name of the registered owner (O in this case) and the number of the certificate of the last registration of this property. If this notation is omitted the instrument will be refused by the Registrar.(4) The grantee's full name and address must also appear on the deed.(5) If the property conveyed is registered property and consists of community property, the spouse in whose name it is registered may convey it in his name, but written consent of the other spouse must be obtained according to Section 57 of the Land Title Law. If the property transferred is homestead property, both spouses must join in the transfer as provided by Section 56 of the Land Title Law, unless

the homestead has been released or extinguished.

The deed must be properly delivered by the grantor to the grantee. This is an essential step in the conveyance of registered property.(6) Title does not pass, however, on the delivery of the deed as it would when non-registered land is conveyed. Title to registered land does not pass until the instrument is filed and a new certificate issued by the registrar. Until such time the only effect the instrument has is that of a contract to convey.(7) This is one of the essential differences between the ordinary recording system and the registration (Torrens) system.(8)

The next step which must, therefore, be taken is the filing of the instrument of conveyance. P, in the above example, must present the original deed to Blackacre given to him by O, to the Registrar. At the same time he must produce the duplicate certificate that had been issued to O when he acquired the property. This may be accomplished by having O give P the certificate or having O appear at the Registrar's office with P and give the certificate to the Registrar directly. Either method is troublesome since delivering the certificate to P involves the possibility of loss, and an actual appearance at the Registrar's office requires an element of time. In this respect the Torrens System is more cumbersome than the Recording System.(9)

In addition, the grantee (P in this case) must file an affidavit with the Registrar containing the following data:(10)

1. Whether the transferee is married and if so the name of the husband or wife and whether or not the property is community property. This affidavit must be signed by the transferee but it is not necessary for the spouse to sign also if the transferee is married. A recent opinion issued by the Attorney General's office clarified this since it had formerly been the practice of Registrars in California to require both the husband and wife to sign the affidavit.(11) The reason for this practice was to avoid fraud on the part of the spouse who was the transferee. The Attorney General's opinion held that a bona fide purchaser could rely on the state of the title in the certificate and would be protected if the spouse had made fraudulent statements concerning the character of his or her ownership as separate property or community property.

After these materials have been filed by the grantor and grantee in proper form, their duties have ceased. The Registrar then marks as "filed" the instrument, such as a deed, which has been deposited with him and marks the day, hour, minute and year it was received. This is done for all instruments filed with the registrar in the order in which they are received.(12) All instruments which are filed with the Registrar are required to be kept by him in the Registrar's office. They shall not be taken out except by a Subpoena Duces Tecum issued to and served upon the Registrar by a court of record.(13)

The Registrar shall issue certified copies of these instruments that have been filed with him, when demand is made and the proper fees have been paid. He must write across the face of these copies in red ink, "copy," "no rights conveyed thereby." These certified copies are admissible in evidence with the same force and effect as the original instrument.(14)

The grantee under a deed to registered property does not retain the deed, but it is kept by the Registrar. The grantee may, of course, retain a duplicate copy of the deed for his own use.

After marking the deed as "filed" the Registrar issues in duplicate a new certificate of title which certifies the title to be in the grantee (P, in our example above).

He then finds the old certificate of title in his book entitled "Register of Titles." This certificate will be in the name of the grantor (O, in the above example.) On this old certificate and on the duplicate copy of this certificate which has been surrendered by the grantor, the Registrar then makes a notation of the date of the transfer, the name of the transferee, and the volume and page in which the new certificate is registered. He then stamps across the old certificate surrendered and the old certificate in the Register of Titles the word "Canceled", in whole or in part, but retains them.(15) Section 55 of the Land Title Law requires the Registrar, in addition, to write the word "Transferred" and the date of the filing of the Instrument of transfer on the old certificate and surrendered duplicate certificate and sign the endorsement.

The new certificate which is issued contains the same information as is required when the original certificate of title is issued after the initial judicial proceedings required for the bringing of property under the Torrens System. The data required for such certificate may be obtained from Chapter 2 of this paper. Section 58, however, expressly states that the certificate issued in accordance with a subsequent transfer must state whether the property is community property or not. In addition, if the transferee is an executor or administrator Section 58 requires the certificate to name the deceased testator or intestate. If the transferee is an assignee or trustee, the new certificate must contain the name of the insolvent or bankrupt. If the property has been sold for taxes and the last certificate shows such to be the case, the new certificate issued upon transfer of such property must state that the transfer is subject to such sale for taxes. The procedure involved in sale of registered property for taxes is discussed subsequently.

The new certificate and duplicate are endorsed with the volume and page of the register where this new certificate is to be found. This requirement is the same as required when property is initially registered.

The new certificate which is issued is kept by the Registrar in the "Register of Titles" and the duplicate certificate is delivered to the grantee who is the new owner of the property. He must sign a receipt for this as discussed in Chapter 2 in connection with the initial registration

of title. The name of the transferee must be entered in the book required to be kept by the Registrar containing the names of all persons to whom certificates have been issued. The number of his certificate and the day, hour and minute of its issuance must also be entered in this book. An entry must also be made in this book of the name of the person to whom the duplicate was delivered and the book and page where the original is entered or recorded. This book also contains the receipts for delivery of duplicate certificates.

The new registered owner's name must then be indexed alphabetically in the index of persons owning interests in registered property. An entry would also have to be made in the property index. Chapter 2 contains a discussion of these records kept by the Registrar.

The property is deemed "Registered" in the name of the transferee when the new certificate is issued in his name in duplicate and a notation made thereon of the volume and page of the Register in which the original may be found.(16) This is the same method used in registering property when it is brought under the Torrens System for the first time. Registration indicates the passage of title from the old owner to the new owner.

It has been argued that the Registrar in issuing a new certificate upon a subsequent transfer of registered property or in making memorials of encumbrances on existing certificates of title is exercising judicial functions which is a violation of the California Constitution Article III, Section 1 which prohibits one department of the state from exercising functions belonging to another. The basis for such an argument is that the Registrar, an administrative official, must perform a judicial function in determining the legal effect of instruments filed with him, such as leases, deeds, et cetera before he issues the new certificate or enters a memorial of an encumbrance. In the issuance of the first certificate when property is originally brought under the Torrens System no such problem is involved since the certificate is issued by the Registrar under a court order.

The court in the case of Robinson v Kerrigan(17) discussed this constitutional problem and stated that every administrative official is called upon from time to time to exercise some powers which are legal in effect, but which are merely incidental to his administrative functions. Since the Recorder is merely a ministerial officer his decision on legal questions is not final and he may be ordered by a writ of mandamus to act properly. This, the court feels is a sufficient safeguard. The provision involving the duty of the Registrar to issue subsequent certificates has, therefore, been upheld as constitutional. In addition, Section 99 of the Land Title Law provides that the Registrar may petition the court for an opinion on how he should act in regard to any subsequent transaction when he is in doubt. In addition, if the parties disagree as to the way an interest should appear on a certificate they may request a court order giving the proper form to be used.

The case of In re Seick(18) involves the right of the Registrar to ask the court for an order as to the method of entering various encumbrances on the certificate of title. The case, however, stresses the point that an appeal may be taken from the court order as in the case of any court order and the decision of the appellate court may hold that the order given to the Registrar was improper and, therefore, should be changed.

The conclusion is that the Registrar may exercise certain judicial duties on occasion, but there is a sufficient judicial control over the exercise of these duties.

It should be noted that there is an alternative method of transferring registered property. This is as follows: O, the owner of Lot A may endorse on his duplicate certificate of title covering Lot A the following statement:

> "I, O, grant to P the real property described in this certificate. Witness ... hand ... and seal ... this ... day of ..., ...."(19)

This endorsement must also contain the full name, residence and post-office address of the grantee as provided in Section 54 of the Land Title Law.

This duplicate certificate of title, properly endorsed and acknowledged is then delivered to the grantee, P. This is sufficient to transfer the property without the issuance of a new certificate. When this method is used the certificate of title in the Registrar's office does not show the true state of title, but the duplicate certificate does. A subsequent purchaser from either O or P after the transfer to P will not be misled since he must acquire this duplicate certificate in order to acquire title and the duplicate will show the true state of the title. This is true whether he takes title by an endorsement on the duplicate certificate or by a surrender of the duplicate certificate to the Registrar and the issuance of a new certificate. This alternative method is advantageous in that it saves additional expense of issuing a new certificate.

Generally, when only a part of the land described in a certificate is transferred, a new certificate is issued to the grantee covering the part transferred to him and a new certificate is issued to the grantor for the part remaining in him. An exception is made when a tract is divided into subdivisions designated by numbers or letters on a plat filed with the Recorder. In such a case, if the owner of the tract conveys a subdivision of this tract, the Registrar may issue a new certificate to the grantee but merely enter a memorandum on the original certificate and the grantor's duplicate, cancelling the certificate as to the subdivision that has been conveyed.(20) This, of course, saves the issuance of a new certificate to the grantor each time he conveys a subdivision, which involves a considerable amount of time and expense. This process may be continued as long as there is room on the original and duplicate certificates for these notations.

Section 109 of the Land Title Law provides that the owner of registered land may subdivide it in the same manner as unregistered land and when this is done new certificates must be issued.

When the owner of a subdivision transfers lots subject to building restrictions, he may furnish the registrar with printed forms of certificates of title to be used by the Registrar and may include the restrictions in the certificates. These forms must be approved by the Registrar, but he has no authority over what restrictions shall be included.

## III. PROCEDURE INVOLVED IN CREATING ENCUMBRANCES ON REGISTERED LAND

The procedure involved in creating encumbrances on registered land is similar to that involved in a conveyance of this land. However, the main difference is that no new certificate is issued in connection with an encumbrance. A memorial of the encumbrance is generally made on the original and duplicate certificates of title applicable to the property involved. The procedure will, however, be discussed below. It is advisable to discuss voluntary and involuntary encumbrances separately due to a few major differences in the procedure for registering these two types of encumbrances.

### A. PROCEDURE INVOLVED IN CREATING VOLUNTARY ENCUMBRANCES ON REGISTERED LAND

Voluntary encumbrances include mortgages, trust deeds, and various charges against the property. The method of registering such encumbrances is as follows:

The owner of the registered property fills out an instrument such as is used when non-registered property is involved. (e.g. mortgage, trust deed)(21) This must contain the full name, address of the person who claims an interest under the instrument, and a statement that the land is registered land, the name of the registered owner and the number of the certificate of the last registration thereof.(22) This is filed with the Registrar's office together with the duplicate certificate of title to the property. Section 55 provides that when the instrument such as a mortgage is filed the property becomes subject to this mortgage. Until this time the mortgage operates merely as a contract to mortgage the property as between the parties. Actually, in spite of the language of Section 55 stated above, the mortgage does not become a lien until such time as it is actually entered on the Register of titles.

When the instrument is filed the Registrar endorses the date of filing thereon.(23) After making a memorial of this instrument on the original certificate in the Register of Titles, the Registrar makes a notation on the mortgage or other instrument filed, of the volume and page of the Register where the memorial of that document was made.(24) This document (e.g. Mortgage, et cetera) is retained by the Registrar in his files.(25)

When a mortgage, lease or other instrument creating or dealing with a charge upon registered land is in duplicate, triplicate, or more parts, only one part need be filed with the Registrar. The Registrar notes on the original certificate in the Register of Titles whether the mortgage or other instrument was filed in duplicate, triplicate, et cetera. The Registrar also marks on the other copies of the instrument "mortgagee's duplicate", "lessor's duplicate", et cetera, and the date of filing and the volume and page of the Register where the memorial of that document is entered. He then delivers them to the parties entitled thereto.(26) If a sufficient number of copies has not been furnished to the Registrar, the Registrar may make certified copies of the instrument filed in his office with the endorsements thereon and mark them "mortgagee's certified copy," et cetera. He enters on the Register a notation of the issuance of these certified copies. These are then delivered to the persons entitled to them. These certified copies then have the same force and effect as duplicates.(27)

As stated above, the Registrar makes a memorial of the mortgage or other charge filed with him on the original certificate of title in the Register of Titles and also on the owner's duplicate certificate which has been surrendered to the Registrar.

If the instrument transfers the property in trust, upon condition or upon limitation the Registrar must note this fact on the original and duplicate certificates of title. If the trustee is given a power of sale this must be noted on the original and duplicate certificates. If the instrument does not state that he has power of sale, a court order must be given in order to allow him to sell. A certified copy of this order must be filed with the registrar and a memorial of it entered on the certificate of title.(28)

Whenever a memorial is entered on a certificate of title it must be carried forward on all certificates of title until it is cancelled in the proper manner.(29) There is a danger of errors in copying these memorials and references several times. This recopying also involves a considerable amount of time and labor. The result is that the personnel of the Registrar's office must be adequate to meet these demands both in calibre of work and in dependability. A sufficiently large staff is required to attend to the many clerical duties involved. In addition, the parties in interest must check the Register to see that everything has been properly entered on the Register of Titles.(30)

The duplicate certificate must always be produced in order for the Registrar to issue a new one or enter a memorial. An exception is made when an order of court is obtained directing the Registrar to file the instrument without production of the duplicate certificate of title and enter it on the Register. This order is given by the court only when sufficient cause is shown. A memorial of the order of court must be made.(1) Also, if the owner refuses to produce the duplicate certificate a court order may

be obtained ordering him to produce it in court and present it to the Registrar.(2)

After the duplicate certificate has been endorsed by the Registrar with the proper memorials it is returned to the registered owner who retains it as proof of his title. The mortgagee or other encumbrancer receives a duplicate copy of the mortgage or other instrument for proof of his claim against the property.

Before returning the duplicate instruments and certificates, the Registrar must make proper entries in the name and property indexes.

A mortgage or charge on registered property may be assigned or released.(3) It is advisable to discuss the method of performing these functions at this point.

To assign a charge the holder of such charge executes a written assignment thereof. This is filed with the Registrar together with the duplicate or certified copy of the instrument creating the charge. The Registrar then enters a memorial of this assignment on the certificate of title in the Register opposite the charge, a statement of what priority it has, and a reference to that file number noted on the assignment.

The Registrar notes on the instrument filed in his office which created the charge and the duplicate of this instrument presented to him, the volume and page where the memorial of the assignment is entered and the date of entry.(4)

When property is sought to be assigned the above procedure is followed. When property is sought to be released from the effect of a mortgage or other charge the procedure followed is the same as in the transfer of registered property, except that no new certificate is issued. The instrument which created the charge is then stamped "cancelled" by the Registrar. The memorial of the charge on the Register and the duplicate or certified copy of the instrument creating the charge is also stamped "cancelled."(5)

## B. PROCEDURE INVOLVED IN CREATING INVOLUNTARY ENCUMBRANCES ON REGISTERED LAND

The procedure involved in creating involuntary liens is similar to that followed in creating voluntary liens. The main difference, however, is that the duplicate certificate need not be presented to the Registrar in order to authorize him to enter a memorial of the lien on the original certificate in the Register of Titles.(6)

The types of involuntary liens that are most often encountered consist of: judgment lien, attachment lien, mechanic's lien, lien for taxes or assessments. These will be discussed briefly at this time.

1. JUDGMENT LIEN:

A certified copy of the judgment must be filed with the Registrar by the judgment creditor. It must contain a notation that registered land is affected, the name of the registered owner, and the number of the last certificate of registration. The Registrar must then enter a memorial of that judgment on the original certificate of title covering the property of the judgment debtor on which it is desired to create a judgment lien. Until this memorial is entered, no lien is in existence.(7) This requires a lien claimant to determine whether the property against which he desires to create a judgment lien is registered land. It also requires additional notations on the copy of the judgment. This causes an additional burden for the judgment creditor. Under the ordinary Recording System all he would have to do would be to record the copy of the judgment in the Recorder's office. Immediately, the judgment would become a lien against all property owned by the judgment debtor in that county.(8)

2. LIEN OF ATTACHMENT OR EXECUTION:

When a levy of attachment or execution is made on registered land, the officer making the levy is required by Section 92 of the Land Title Law to file a certificate of the fact of levy.(9) In addition, Section 542 of the Code of Civil Procedure states that when real property subject to the Land Title Law is attached a copy of the writ of attachment, together with a description of the Torrens title certificate, a description of the property, and a notice that it is attached shall be filed with the Registrar of titles of the county. It should be noted that this section of the Code of Civil Procedure also requires the instructions to the sheriff to state that the real property to be levied upon either is or is not registered under the Land Title Law. It can be seen clearly in this instance that the Land Title Law creates additional work for all parties concerned.

The Registrar then makes a memorial of this levy of attachment on the original certificate on file in the Register of Titles. At that time the lien of the attachment becomes effective.

3. MECHANIC'S LIEN:

When a Mechanic's Lien is sought to be enforced against registered property it is necessary to record a notice of this lien in the County Recorder's Office and also file a Notice of Lien with the Registrar who makes a memorial of it on the original certificate of title to the property involved.(10) This notice of lien must state that the land is Torrens property, the name of the owner, and the number of the certificate of title covering the property. It should be filed within the period allowed for recording such lien.(11) The propriety of requiring this extra step has been discussed by the court in the case of Hammond Lumber Co. v Moore.(12) In this case a materialman had furnished materials for a building to be erected on registered property. He then recorded a notice of his mechanic's lien, but

failed to file it with the Registrar. As a consequence, he was not permitted to enforce a mechanic's lien against the property.

A mechanic's lien is provided for by Article IV, Section 24 of the California Constitution. The method of enforcement of the lien is left to the legislature with only the limitation that the lien claimant is not to be unduly hampered in his exercise of the lien. The court in the Hammond case did not consider the requirement of filing the Notice of Mechanic's Lien with the Registrar as being unduly burdensome. It is merely a supplementary step which is incidental to the general procedure involved in the enforcement of a mechanic's lien. In addition, the court held that the additional notations required to be put on the Notice of Lien were not unreasonably burdensome. This information can readily be obtained from the indexes in the Registrar's office and the original certificate of title.

As a practical matter, however, these requirements do put a mechanic in a difficult position. He must determine at his peril whether the property is registered property or not and act accordingly.

Section 93 of the Land Title Law states that no lien is created until such notice has been filed with the Registrar. The court in the Hammond case indicates by dictum that this part of the statute is unconstitutional, since the California Constitution provides that the lien is created when the materials are furnished. The legislature cannot change the date of creation of the lien, but merely its method of enforcement. Even if this section is unconstitutional, the court holds that it is separable from the rest of Section 93 of the Act requiring registration of such notice before enforcement of the lien. The conclusion is, therefore, that the lien is created when the materials are furnished, but if registered property is involved the lien cannot be enforced until the Notice has been recorded and registered.(13)

4. LIEN FOR TAXES AND ASSESSMENTS:

In general, the procedure followed when this type of lien is involved is similar to the procedure outlined above in connection with other involuntary liens. A special procedure is required, however, when the lien is enforced pursuant to an Ordinance for Public Improvement. When an Ordinance of a city, town, or county is passed to lay out, change or repair streets, drains, et cetera or make any other public improvement, and the expense is to be paid out of assessments made on real estate, the following steps must be taken.

The Clerk of the Board passing the Ordinance must within 5 days after the Ordinance has been passed, file a notice of its passage with the Registrar and a memorial must be noted on the Register.(14)

If the Ordinance is repealed, the officer authorized to collect the assessments must within 5 days after the repeal notify the Registrar in writing. The Registrar will then cancel the memorial.(15)

Two cases, Board of Pension Commissioners v Hurlburt(16) and Rutledge v City of Eureka(17), have passed on the effect of the failure of the officer to give the proper notices to the Registrar. These cases both held that the requirement of filing the special notice was merely directory and failure to file did not affect the existence of the lien against registered property for street improvements. The result would be that a subsequent purchaser or encumbrancer of this property would be subject to this lien although it did not appear on the original or duplicate certificate of title. This, of course, is an instance in which the certificate of title does not show the true state of the title, and therefore, is not conclusive evidence of title. For other instances in which the certificate is not conclusive see Chapter 4.

## IV. PROCEDURE FOLLOWED WITH RESPECT TO MISCELLANEOUS TRANSACTIONS INVOLVING REGISTERED LAND

### A. COURT SALES:

When registered property is under the court's jurisdiction due to an insolvency, probate, or equity proceeding, the transfer of such property is made in the manner required by State law. When the court orders a sale, lease, et cetera of such property the decree must order the Registrar to issue a new certificate of title or make a memorial on the existing certificate (whichever the case requires) in accord with the decree.(18)

The executor or other party involved must file a certified copy of this decree with the Registrar together with a deed or instrument executed in accord with that decree and a certified copy of the order confirming the sale of the property if one is required.(19)

The Registrar will then issue a new certificate or make a proper memorial on the existing certificate as required by the court decree. The certificate or memorial is then stated to be "conclusive evidence in favor of all persons thereafter depending thereon."(20)

When registered property is sold by court order to satisfy a judgment, the purchaser under such sale must file a certified copy of the decree of of the court ordering such sale, together with a confirmation if required and a certificate of the officer that the terms of the sale have been complied with. The property is then transferred on the register and a new certificate issued to the purchaser.(21)

### B. PARTITION:

The owner of an undivided interest in registered land may bring an action for partition. He must include as parties in such action all persons that are shown by the Register to have an interest in the property. He must then file a notice of this action with the Registrar who enters a memorial thereof on the Register. If the property is ordered sold by the court a

certified copy of the decree, a certified copy of the confirmation of the sale, and a certificate of the officer making the sale, must be filed with the Registrar. The Registrar then transfers the property on the Register and issues a certificate of title to the purchaser.(22)

If the property is merely allotted to various persons, those persons must file a certified copy of the court order with the Registrar who issues new certificates to those persons.(23)

If the owner of an undivided interest has given a mortgage on this interest and the property is then partitioned, this mortgage will only affect the interest which this party has in the property as set off by the partition. The Registrar must make a notation on the instrument creating the lien on file in his office, stating that the property has been so partitioned. A new certificate is then issued containing a memorial of this lien.(24)

C. SUIT DISMISSED OR JUDGMENT SATISFIED:

When any suit involving registered land is dismissed or any judgment satisfied, the instrument showing the dismissal or satisfaction must be filed with the Registrar by the proper officer or clerk of the court and certified by the person filing the instrument. The Registrar then cancels the memorial of such suit or judgment on the certificate of title and enters a memorial of the dismissal or satisfaction.

The same procedure is followed when an attachment or execution is released or discharged.(25)

D. LIS PENDENS:

A notice of pendency of suit dealing with registered land must be filed with the Registrar and a memorial made on the register. No notice of pendency of action is given until this has been done. This does not apply to attachment proceedings when the officer making the levy files his certificate as discussed above in the section on Attachments.(26)

E. RIGHT OF EMINENT DOMAIN:

The right of eminent domain is not affected by the Land Title Law. When an action has been brought to exercise this right, a certified copy of the judgment must be filed and a memorandum made on the Register. A new certificate is then issued to the person, corporation or other body entitled to the property taken by eminent domain.(27)

F. POWER OF ATTORNEY:

When a person is given a power of attorney to act for another in conveying or dealing with registered land, the instrument giving him such power

must be filed with the Registrar and a memorial entered on the original and duplicate certificates. The agent may on request have a certified copy of the power of attorney endorsed by the Registrar.

Revocation of a power of attorney is made in the same manner.

G. PENDENCY OF APPEAL FROM ACTION UNDER LAND TITLE LAW OR DECREE AFFECTING REGISTERED LAND:

When an appeal is taken from any action under the Land Title Law or decree affecting registered lands the clerk of the court in which the notice of appeal is filed must notify the Registrar who then enters a memorial of this appeal.(28)

H. TERMINATION OF JOINT TENANCY:

When non-registered property is involved and death of a joint tenant occurs, the survivor must obtain a court order terminating the joint tenancy. Probate Code Sections 1170-1175 provide for the procedure to be followed in such case.

When registered property is involved and the joint tenancy is terminated by death Section 98 of the Land Title Law requires the survivor to petition the court for an order terminating the joint tenancy and ordering the Registrar to issue a new certificate in the survivor's name. Notice of the pendency of this must be filed with the Registrar who notes it on the certificate. After notice and hearing the court orders the termination of the joint tenancy if it is proper and orders the Registrar to issue a new certificate to the survivor. The survivor must then file with the Registrar a certified copy of the decree and the duplicate certificate of title (if it is available) and an affidavit as to whether the property is to be held as community property or separate property. The Registrar will then issue a new certificate in accordance with the decree of court, a copy of which has been filed with him.

The same procedure is followed when a life estate or homestead is terminated.(29)

I. TAX SALE OF REGISTERED LAND:

When registered land is sold for delinquent taxes, the procedure is the same as that involved when non-registered land is sold for delinquent taxes. The property is declared sold to the State, held by the State for 5 years, and then sold at a tax sale to the highest bidder, who receives a deed to the property after paying his bid. When Torrens property is involved this purchaser at the tax sale must comply with additional requirements as follows:

1. NOTICE OF PURCHASE:

The purchaser who buys registered property at a tax sale must, within five days after the purchase, file a written notice of such purchase with the Registrar's office. He must file a sufficient number of copies to send to persons who have an interest in the property.

The Registrar then enters a memorial of this purchase on the original certificate of title in his office. He then mails to the persons named in the certificate and memorials, a copy of the notice.(30)

2. TAX DEED:

After the purchaser pays the amount of his bid, a deed to the property is issued to him. This deed must then be presented to the Registrar who makes a memorial of it on the Register. This filing of the deed is an agreement to transfer the title in effect.(1) The purchaser does not actually receive title until the following steps are complied with:

1. The purchaser who holds this tax deed files with the clerk of the Superior Court an application for a decree showing title to this land to be vested in him.(2)

2. After proper notice is given to all interested parties, and a proper hearing is held, a decree is rendered showing the condition of the title and who is the owner of the property.

3. A certified copy of the decree is then filed with the Registrar who issues a certificate in accordance with the terms and conditions of the decree.(3) The Registrar cancels the old certificate in the usual manner.

All these formalities are required before a purchaser can actually acquire title to registered property at a tax sale. These requirements are for the protection of the original owner whose property has been sold for delinquent taxes.

When the property is first declared sold to the State for taxes and before the five year holding by the State, a similar procedure is followed. The tax collector must within five days file a notice that this property has been declared sold to the State. The Registrar then enters a memorial on the Register and mails notices to the interested parties.(4) Section 77 of the Land Title Law states: "Unless such notice is filed as herein provided, the land shall be forever released from the effect of such sale, and no deed shall be issued in pursuance thereof." The case of In Re Seick(5) declared that the provision for notice within five days is mandatory and if not complied with a new sale to the State would have to be declared and a notice filed within five days from the date of that sale. The five year period during which the State must hold and which is the period for redemption, begins running from the date of the second sale.

If the property after five years' holding by the State is not purchased by a private individual, a deed to the property is given to the State. This deed must then be filed with the Registrar who issues a new certificate of title to the State and cancels the old certificate. It is not necessary in this case to obtain a decree of court as required when the purchaser at the tax sale is a private individual.(6)

If the owner of the property redeems the property during the period of redemption, a certificate of redemption must be filed with the Registrar. The Registrar then cancels the memorial of the sale to the State upon the certificate of title.(7)

## V. PROCEDURE INVOLVED IN MAKING ALTERATIONS, CORRECTIONS AND CHANGES IN CERTIFICATE OF TITLE OR INSTRUMENTS FILED WITH THE REGISTRAR

Section 97 of the Land Title Law requires changes in a certificate to be made in the manner provided by Section 98 of the statute. Section 98 requires a petition to the court, notice and a hearing. This is discussed in more detail below.

The grounds for correction, alteration, or cancellation are as follows:

1. An interest appearing on the certificate has terminated or ceased. (see discussion of termination of joint tenancy above).
2. New interests have arisen which are not shown on the certificate.
3. The certificate or memorial has been made by mistake.
4. Change of name.
5. Owner registered as married is no longer married.
6. Corporation has been dissolved.
7. Any other reasonable ground.

A person in interest begins the proceedings by a petition to the court. The court then issues an order for a summons to be issued to all persons interested in the property. After service is made on these parties and notice given to the Registrar who makes a notation of the petition on the certificate, a hearing is held. The court then grants an order to the Registrar to make the correction if the court determines it is necessary.

A certified copy of the court order is then filed with the Registrar who makes the correction.

An illustration of the operation of Section 98 of the Land Title Law providing for correction of a certificate is as follows:

Blackacre, which was registered in O's name, was owned by O. A judgment and attachment had been obtained against X by a creditor of X and had been entered on the certificate of title covering Blackacre, by mistake. X was not the owner of Blackacre and the property was not registered in X's name. An action was brought by O to have the memorial of this judgment removed. This is a proper situation in which to bring an action under Section 98 and the court would order the Registrar to remove the memorial of the judgment.(8)

More serious problems are presented, however, when rights of bona fide purchasers are involved. Section 98 states that the court may not impair the rights of a bona fide purchaser even in connection with the correction of a certificate of title. In addition, Section 98 does not permit the court to open the original decree of registration in a proceeding to correct a certificate. It would seem that this section has been overlooked and disregarded by the court in several decisions discussed in connection with the inconclusiveness of the certificate of title.

Section 28 of the Torrens Act provides for a simpler method of a change of name in a certificate. The owner whose name incorrectly was registered or becomes changed, may file an application with the court for a change of name in the certificate. When he proves the requisite facts and produces the duplicate certificate the court orders the new certificate to be issued by the Registrar with the necessary change in name. This may be heard and acted on by the court with or without notice, in its discretion. This method appears to be the sole method of change of name when marriage is involved. If the change of name is for some other reason either the procedure in this Section 28 or the procedure in Section 98 discussed above may be used to acquire the necessary change in the certificate.

When a deed or other instrument is filed with the Registrar, the address of the grantee must be contained in the deed. If the address is changed a written statement of such change, duly acknowledged, must be filed with the Registrar. The Registrar then endorses this change on the deed or other instrument.(9)

When a duplicate certificate is lost or destroyed the owner of registered property may apply to the court for an order directing the Registrar to issue a certified copy of the original certificate. The court grants such order after proper notice and hearing. A certified copy of the order must be filed with the Registrar who then makes a certified copy of the original certificate and notes on the Register the fact of the issuance of this certified copy.(10)

A certified copy may also be issued by the Registrar for use as evidence upon court order. Similar notations are made as described above.(11)

## VI. PROCEDURE INVOLVED IN WITHDRAWAL OF PROPERTY FROM THE OPERATION OF THE TORRENS SYSTEM

Prior to November 1950, property could not be withdrawn from the Torrens System. Due to the difficulties connected with registered property a measure (proposition 11) was passed in November 1950 permitting registered owners to withdraw their property. Sections 48.1 to 48.9 were added to the Land Title Law and provide for the following procedure for withdrawal:

The registered owner files with the Registrar of Titles a verified petition for withdrawal stating:

1. The names of the registered owners.
2. The name of the person in whose name the property was originally registered.
3. Description of the property.
4. Number of last certificate of title.
5. Name and address of all persons with an interest in the property as shown on the last certificate.
6. Request that the property be withdrawn and put back under the provisions of the general recording laws.

The duplicate certificate of title must be presented to the Registrar for cancellation. When the above petition is filed this certificate must be filed with it. The Registrar then cancels the original and duplicate certificates and issues a certificate of the cancellation of these certificates and withdrawal of the land.

The Registrar then makes a notation of the fact of issuance of this certificate of withdrawal in the Register of Titles and notes the same in the name and property indexes. He then files a copy of this certificate with the documents that have been filed in connection with the last certificate of title.

The last certificate of title and certificate of withdrawal are then recorded with the County Recorder of the county in which the land lies and are returned to the Registrar to be filed with a notation of the fact and place of recording endorsed on them.

The Recorder then indexes the certificate of withdrawal and the cancelled certificate of title under the name of each person shown on the certificate of title to have an interest in the property and under the name of the last registered owner and the first registered owner.

When these certificates are recorded the property is again subject to the recording acts and all subsequent parties dealing with the property are deemed to have constructive notice of all documents filed previously with the registrar in connection with this property.

Withdrawal does not affect the original determination of title by the court in the initial registration proceedings. All instruments filed with the Registrar in connection with that property are then part of the record chain of title.

If any person has not consented to the withdrawal he shall continue to have any rights against the Insurance fund which he had before withdrawal.

FOOTNOTES TO CHAPTER 3: PROCEDURE INVOLVED IN SUBSEQUENT DEALINGS WITH REGISTERED LAND

1. Land Title Law, Section 44.
2. Ibid, Section 110.
3. Ibid, Sections 48 and 53.
4. Ibid, Sections 47 and 53.
5. Ibid, Section 54.
6. Ibid, Section 48. Fitzsimmons v Raiche, 63 Cal App (2) 398.
7. Land Title Law, Section 55, Section 32.
8. Thompson, Real Property (Perm. Ed.) Vol. 8, Sec. 4415.
9. See 7 California Law Review, p. 75 for further items in connection with the Torrens System that are time consuming.
10. Land Title Law, Section 58.
11. 10 Atty. Genl's Ops. 42.
12. Land Title Law, Section 50.
13. Ibid, Section 48.
14. Ibid, Sections 51 and 52.
15. Ibid, Section 48.
16. Ibid, Section 32.
17. 151 Cal 40. This case declared the 1897 Statute which was the forerunner of the present Land Title Law constitutional. The 1897 Statute was entitled "An Act for the certification of land titles and the simplification of the transfer of real estate," Cal. Stats. 1897, p. 138. This case of Robinson v Kerrigan has subsequently been considered as applicable to the later 1915 statute which is our present Land Title Law in Frances Investment Co. v Superior Court, 189 Cal 107 and also in 10 Atty. Genl's Ops. 42. Both of these cases assumed its applicability without much discussion. The question of constitutionality has never been raised in any detail since the Robinson case. See Chapter 1 of this paper for a more thorough discussion of the constitutionality of the Land Title Law (Torrens Act). See also Powell,

Richard R., "Registration of the Title to Land in the State of New York," (1938), prepared for the New York Law Society Under a Grant From the Carnegie Corporation, Supplement A, p. 89. See 7 California Law Review p. 75 for a consideration of the question of the right of the Recorder to determine the effect of documents deposited with him, which is a constitutional question.

18. 46 Cal App 363.

19. Land Title Law, Section 53.

20. Ibid, Section 49.

21. Ibid, Section 53.

22. Ibid, Sections 54 and 47.

23. Ibid, Section 50.

24. Ibid, Section 60.

25. Ibid, Section 51.

26. Ibid, Section 61.

27. Ibid, Section 62.

28. Ibid, Sections 67-70.

29. Ibid, Section 43.

30. 7 California Law Review, p. 75. See Chapter 1 for a further discussion of the defects in the Torrens System. (Part IV)

1. Land Title Law, Section 60.

2. Drexler v Hufnagel, 76 Cal App (2) 606.

3. Land Title Law, Section 63.

4. Ibid, Section 63.

5. Ibid, Section 64.

6. Ibid, Section 60.

7. Ibid, Sections 95 and 91.

8. 7 California Law Review 75.

9. Land Title Law, Section 92.

10. Ogden, M. B., Outline of Land Titles (1947), Chapter XX.

11. 7 California Law Review, p. 87, footnote #29.

12. 104 Cal App 528.

13. See 7 California Law Review, p. 75 for a conclusion contra to the Hammond case. This, of course, was written before the court had passed on the constitutionality of this part of the Torrens Statute.

14. Land Title Law, Section 94.

15. Ibid, Section 94.

16. 7 Cal App (2) 568.

17. 195 Cal 404.

18. Land Title Law, Section 72. In 1931, Probate Code Section 1223 requiring the court to include in the decree an order to the Registrar to issue a new certificate when registered property is ordered sold in a probate proceeding. This is the same as required by Land Title Law, Section 72.

19. Land Title Law, Sections 71, 72, 73. Sections 74 and 75 indicate when a confirmation is required.

20. Land Title Law, Sections 74 and 76.

21. Ibid, Section 88.

22. Ibid, Sections 84, 104, 86.

23. Ibid, Section 85.

24. Ibid, Section 87.

25. Ibid, Sections 90 and 96.

26. Ibid, Section 89.

27. Ibid, Section 101.

28. Ibid, Section 107.

29. Title Insurance & Trust Company's Handbook for Title Men (1948) p. 145 and 146.

30. Land Title Law, Section 30. Section 56 states that when such notation has been made a transfer of the property must state that it is subject to the tax sale and the new certificate issued must so state.

1. Ibid, Section 78.

2. Ibid, Section 78.

3. Ibid, Sections 79, 80, 82.

4. Land Title Law, Section 77.

5. 46 Cal App 363. Discussed in case note, 8 California Law Review, p. 450.

6. Ibid, Sections 78, 81.

7. Ibid, Section 83.

8. Pioneer Abstract Etc. Co. v Feraud, 91 Cal App 278 is a case involving facts similar to this illustration although complicated by other factors.

9. Land Title Law, Section 54.

10. Ibid, Section 27.

11. Ibid, Section 27.

## Chapter 4: EFFECT OF REGISTRATION OF PROPERTY UNDER TORRENS SYSTEM
(By University of Southern California)

### I. INTRODUCTION

The advocates of the Torrens Registration System claim that it has two primary objectives. These consist of (1) a simplified method of conveyancing of real property and (2) a conclusive determination of title to property. The way in which these two objectives are to be carried out has been discussed in detail in former chapters. The final question of whether either of these two objectives has actually been carried out in practice to any great extent in California remains to be analyzed in this chapter. The question can best be illustrated by the following example:

A is the registered owner of Blackacre, which he desires to sell to P. A executes a deed covering the property, conveying it to P. The deed, together with A's duplicate certificate of title to the property is given to the registrar. The registrar after making appropriate entries, issues a certificate of title to the property to P. Theoretically, P has a title to the property which is subject only to the encumbrances and interests listed on his certificate. These encumbrances and interests in turn would be based on the encumbrances and interests appearing on the original certificate of title which is filed in the registrar's office. P is, theoretically, allowed to rely completely on the state of the title as it appears in this certificate. This eliminates long, tedious title searches and any off-the-record matters such as fraud, non-delivery of a deed in the chain of title, et cetera, which have been noted as serious defects connected with the recording system. The picture as painted in this way is very satisfactory. It provides a method of acquiring perfect title protection similar to the registration system used in connection with the transfer of motor vehicles. In addition, the Torrens System makes provision for an Assurance Fund to protect against loss from the operation of the System. The outward simplicity of the system is very appealing. It appears to answer all the problems that are present in the recording system and furnish insurance against loss.

In actual practice, however, it has been found, particularly in California, that the purchaser does not receive the perfect protection outlined above. In fact, on a closer scrutiny of the Torrens System in California, it is discovered that he is actually subject to many interests which do not appear on the certificate and many of which could be discovered only by a thorough investigation of the original proceedings in which the property was initially brought under the Torrens System. Wherever the purchaser is, in fact, subject to interests not appearing on the certificate, the Torrens System breaks down and fails to achieve its main purpose of providing a conclusive certificate of title.

The purchaser is subject to various interests (not appearing on the certificate) by reason of statutory provisions. These include various short

term leases, tax liens, et cetera, listed in the Land Title Law and discussed below. Other interests not shown on the certificate affect the subsequent purchaser by reason of judicial decisions. These include interests of parties not properly notified in the original proceeding for registration or interests of parties fraudulently omitted from the original proceedings, et cetera.

In addition to these matters, a purchaser must always guard his certificate of title against loss. This is important as is shown by the following illustration:

P, the purchaser of Blackacre, loses his duplicate certificate. X, a thief, finds the certificate, forges P's name to the certificate and transfers it to B, a bona fide purchaser. P has no right against B, since the certificate represents title and B has acquired it in good faith. P is left with recourse against the Assurance Fund, which is at best, merely a monetary substitute for the land which he purchased. The final disillusionment in the California situation, is that the Assurance Fund has been bankrupt, leaving P with a worthless claim. This appears to be rather a severe hardship when the owner had not been careless or negligent in losing his certificate. Of course, in order to maintain the system of a conclusive certificate B must be protected and must receive title to the property. However, it seems that some satisfaction should be allowed P for his loss.

These defects will be discussed in greater detail below under the following headings:

(1) Interests not appearing on the certificate to which a purchaser is subject by statute.

(2) Interests not appearing on the certificate due to defects in the initial proceedings for registration.

(3) Interests not appearing on the certificate which result from defective transfers in the chain of title.

(4) Events subsequent to purchase of registered land which cause loss of the purchaser's title (e.g. fraud and forgery).

## II. INTERESTS NOT APPEARING ON THE CERTIFICATE TO WHICH A PURCHASER IS SUBJECT BY STATUTE.

Section 34 of the Land Title Law states that a registered owner holds his property subject to such estates, mortgages, liens, charges and interests which are noted in the last certificate of title EXCEPT:

"1. Any subsisting lease or agreement for a lease for a period not exceeding one year, where there is actual occupation of the land under lease. The term "lease" shall include a verbal letting.

2. All land embraced in the description contained in the certificate which has theretofore been legally dedicated as or declared by a competent court to be a public highway.

3. Any subsisting right of way or other easement, created within one year before issue of the certificate upon, over, or in respect of the land.

4. Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title.(1)

5. Such right of action or claim as is allowed by this act.

6. Liens, claims, or rights arising under the laws of the United States, which the statutes of California can not require to appear of record upon the register."

Although section 36 of the Land Title Law requires section 34 to be printed on the certificate of title as a memorandum to the holder, it does not require specific data to appear there. This means that a purchaser may be forced to investigate personally to determine whether any short term leases, et cetera exist which would affect his interest in the property but which do not appear on the certificate of title filed with the registrar and which would not, therefore, appear either on the duplicate certificate which his grantor surrendered or the duplicate certificate issued to the purchaser himself.

III. INTERESTS NOT APPEARING ON THE CERTIFICATE DUE TO DEFECTS IN THE INITIAL PROCEEDINGS FOR REGISTRATION.

The majority of cases arising under this section have been the result of lack of jurisdiction of the court in the original registration proceedings. This may have been caused by failure to serve parties who had interests in the property at the time of the registration proceedings; it may have been caused by the court's lack of jurisdiction over the property which was the subject of the action; or by various other considerations. In cases where there has been such a lack of jurisdiction the courts in California have allowed the decree of registration to be attacked and set aside regardless of the fact that the property had been transferred to a bona fide purchaser and regardless of the provisions in the Land Title Law making the decree of registration and the certificate of title issued thereafter conclusive as to the status of the title.

The following case affords an illustration of the above discussion:

O, owner of Blackacre, brought an action to have his property registered under the Torrens System. He failed to name X, (who was occupying a small section of Blackacre) in the petition and X was not given personal service of the petition and summons. The Land Title Law

requires personal service to be given to all occupants of the property sought to be registered. X, having no knowledge of the registration proceedings failed to appear and consequently the property was decreed to be registered in the name of O, with no mention of X's interest which was based on a boundary agreement previously made with O. Several years later the property was sold to a bona fide purchaser, P, who had no actual notice of X's interest. X brought an action to quiet title and set aside the decree of registration so that he could assert his interest in Blackacre against P. The court in Swartzbaugh v. Sargent(2) under facts similar to those outlined above, held that X was entitled to set aside the decree of registration and assert his interest in the property. The court held that failure to give the notice required by statute in this instance meant that no due process had been given to X.(3) This holding was given in spite of Section 36 of the Land Title Law which states "... no person taking a transfer of registered land,... shall be held to inquire into the circumstances under which, or the consideration for which, such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand, or interest; and the knowledge that any unregistered trust, lien, demand, or interest in existence shall not of itself be imputed as fraud." This decision, of course, violates the principle that the decree and certificate of registration are to be considered conclusive evidence of title and breaks down the operation of the Torrens System to a considerable extent.(4) The result is that the purchaser must check the records prior to the initial registration and investigate the premises to find any outstanding interests of parties who were not properly notified in the initial registration proceedings or run the risk of losing the property which he has purchased, perhaps years later.

When there has been a lack of jurisdiction in the original registration proceedings, there is no limit on the time within which the decree may be set aside. It would seem, however, that a person who deliberately failed to bring such action within a reasonable time after discovery of his rights, might be precluded by laches from asserting his interest.

When the original decree of registration has been rendered and there has been mistake, fraud, or inadvertence connected therewith, the decree may be set aside within a stated period.(5) This, however, would not affect the rights of a subsequent bona fide purchaser of the registered property. His rights would be affected only if there were a lack of jurisdiction in the original registration proceedings.

## IV. INTERESTS NOT APPEARING ON THE CERTIFICATE WHICH RESULT FROM DEFECTIVE TRANSFERS IN THE CHAIN OF TITLE

In the report on the California Recording System it was shown that defective titles often resulted from flaws appearing in the chain of title. For example, P purchases Blackacre from O, the record owner. The record does not, however, indicate that O acquired Blackacre from the former

owner X, by means of fraud or forgery. P, although a purchaser in good faith would lose the property to X, since no title had passed to O, and thus P had acquired no title. There are various other flaws in the chain of title which affect a purchaser's title under the ordinary recording system, but of which he would have no notice from the record.

The primary purpose of the Torrens System is to eliminate such situations. A bona fide purchaser who relies on a certificate of title covering the property he is purchasing would be protected against a forgery, fraud, failure of consideration, et cetera, in his chain of title. For example: X steals the duplicate certificate of title to O's property, forges O's name to it and to a deed transferring the property to X, and registers the property in his own name. X then transfers the property to P, a bona fide purchaser, relinquishes the certificate of title and a new certificate is issued to P. O on learning of this forgery attempts to recover the property from P. The Torrens System in such a situation protects P, whereas under the recording system O would be protected. The reason for this is that the certificate of title in the registrar's office may be relied on by a purchaser to show the title to the property, at least to this extent.(6)

This illustrates the major difference between the recording and the registration systems in their operation in California. A purchaser will not be subject to defects in the intermediate transfers occurring in the chain of title. To this extent he is protected under the registration system, where no protection would be afforded under the recording system.

V. EVENTS SUBSEQUENT TO PURCHASE OF REGISTERED LAND WHICH CAUSE LOSS OF THE PURCHASER'S TITLE (e.g. fraud and forgery)

The above paragraph stressed the protection granted by the Torrens System to a subsequent purchaser. This section will emphasize the drastic effect such a rule will have on the owner of registered property. For example, O, who has purchased Blackacre, loses his certificate of title to the property. X finds it, forges O's name to a deed and transfers the property to P. According to the above discussion P is given full protection. O, on the other hand, is given little or no protection. His title has been lost and he has no recourse against P to recover the property. An assurance fund is set up by the Land Title Law to permit him to recover money damages, but as discussed in a former chapter that fund is presently bankrupt.(7) His right of action against X, the thief, would be a technical one, since X would probably have departed immediately after the sale of the property to P.

To this extent the Torrens System has created a hardship for owners of registered property. They must guard their certificates with utmost care or run the risk of loss.

The same result would occur in many types of fraud cases, where the owner of registered property would lose his property due to fraudulent actions on the part of his vendee.

A purchaser or owner of registered property is, therefore, subject to a number of interests not appearing on his certificate and must in addition guard his certificate of title carefully in order to protect his rights. This makes the operation of the Torrens System in California far from ideal.

It would seem that some of these problems might be solved by the fact that the original owner is in possession and the subsequent purchaser is not then a bona fide purchaser and should be given no protection. The courts have apparently not explored this possibility to any great extent.

## VI. EFFECT OF FAILURE TO REGISTER INTERESTS IN TORRENS PROPERTY

This subject should be briefly considered before concluding the discussion of California's Land Title Law.

As shown above, a subsequent purchaser is generally not subject to interests which are unregistered. There are a few situations in which this is not true, as discussed formerly, but for the moment let us omit any consideration of those factors.

The following example will illustrate the effect of failure to register interests in registered land:

O, owner of lot A, mortgages the property to M. Lot A has been registered under the California Torrens System. M, however, fails to see that this mortgage is properly registered and entered as a memorandum in the certificate of title in the registrar's office. O later conveys the property to P, a bona fide purchaser with no notice of the mortgage which had been given to M. The California courts have held that in such a situation the mortgage is valid between the parties thereto (namely, O and M) but that it cannot be enforced against P, a bona fide purchaser.(8) This is, of course, in keeping with the rule that a purchaser merely takes subject to interests appearing on the certificate of title, with few exceptions.

If P were not a bona fide purchaser - that is if he had not paid value, in good faith, and without notice of the mortgage, he would not then be protected under the California decisions.(9) This is, as shown above, in contradiction of Section 36 of the Land Title Law, which apparently would protect even a subsequent purchaser with notice. The courts have not indicated to what extent purchasers will be charged with notice as from possession or suspicious facts and circumstances which would affect their bona fide character. A purchaser should, however, to be safe investigate the character of the premises and determine who is in possession.

## VII. CONCLUSION

This concludes the analysis of the statutory and case law relating to the California Torrens System. The final chapter which follows summarizes the apparent flaws in this system. (See Part IV, Chapter 1.)

FOOTNOTES to CHAPTER 4: EFFECT OF REGISTRATION OF PROPERTY UNDER THE TORRENS SYSTEM

1. See Board of Pension Commissioners v Hurlburt, 7 Cal App (2) 568; Rutledge v City of Eureka, 195 Cal 404. These cases both provide illustrations of this provision of the Torrens System. 8 California Law Review p. 450 contains a case note which emphasizes the necessity for checking tax records to determine delinquent taxes. See also, Newcomb v City of Newport Beach, 7 Cal (2) 393 regarding land dedicated as a public highway.

2. 30 Cal App (2) 457. The court relies heavily on Follette v Pacific L & P Corp., 189 Cal 193.

3. See Chapter 2 for a discussion of the proper requirements for service of parties with interests in property sought to be registered.

4. For additional cases with similar results see: In re Mercereau, 126 Cal App 590; Newcomb v City of Newport Beach, 7 Cal (2) 393, cited supra, footnote #1; Petition of Furness, 62 Cal App 753; Moakley v L.A. Pacific Ry. Co., 99 Cal App 74.

5. For discussion of this refer to Chapter 1 of this paper.

6. Land Title Law, Sections 37 and 38.

7. Gill v Johnson, 21 Cal App (2) 649.

8. Land Title Law, Sections 36 and 29; Carlson v Carlson, 124 Cal App 207.

9. Warden v Wyandotte, 47 Cal App (2) 352; Johnson v Warden, 48 Cal App (2) 329; Fawell v Loop Bldg. Co., 46 Cal App (2) 426.

Chapter 5: OPERATIONS
(By Division of State Lands)

A. VOLUME AND COSTS

A survey was conducted by the Division of State Lands in 1950 of the operations in each county where there had been any activity related to the registration of titles to real property under the Land Title Law. Of the 21 counties having any record of experience with registration, seventeen were visited in person. The organization in the County Recorder's Office assigned to these activities was studied, and records were obtained as to the volume of work performed and of the costs involved, insofar as the latter were available; also, of the fees collected.

The following table contains pertinent data relating to the seven counties of the State in which over 95% of all land title registrations have been handled:

| County | Certificates Issued to 8/1/48 | Fees Collected 1949 | Instruments Filed 1949 | Number In Staff 1949 | Salaries Paid 1949 |
|---|---|---|---|---|---|
| Los Angeles | 179,949 | $24,760 | 25,728 | 49 | $106,272 |
| San Bernardino | 14,637 | 1,876 | 3,005 | 3 | 9,070 |
| Orange | 12,350 | 1,475 | 1,902 | 3 | 8,890 |
| San Diego | 10,034 | 1,199 | 1,903 | ½ | 1,692 |
| Santa Barbara | 1,280 | 201 | 258 | 0 | -?- |
| Sonora | 1,069 | 223 | 266 | 1 | 3,108 |
| Santa Cruz | 545 | 136 | 103 | ½ | 1,664 |

The wide discrepancy between the amount of fees collected and the portion of the costs of administration represented by "Salaries Paid - 1949" is of importance, indicating that the Land Title System is a substantial expense to the public. The results of a more detailed examination of this feature for Los Angeles County are shown below.

REGISTRATION OPERATIONS IN LOS ANGELES COUNTY
1941-1951 inclusive

| Year | Fees Received | Salaries Paid | Instruments Filed | Income per Instrument | Salary Cost per Instrument |
|---|---|---|---|---|---|
| 1941 | $12,721.75 | $40,513.90 | 29,521 | $0.43 | $1.37 |
| 1942 | 12,993.60 | 39,718.73 | 20,966 | 0.62 | 1.89 |
| 1943 | 11,584.40 | 39,824.70 | 15,272 | 0.76 | 2.61 |
| 1944 | 15,636.15 | 43,069.17 | 18,906 | 0.83 | 2.28 |
| 1945 | 18,142.40 | 47,362.24 | 21,455 | 0.85 | 2.21 |
| 1946 | 23,119.20 | 56,856.32 | 26,597 | 0.87 | 2.14 |
| 1947 | 27,540.60 | 71,876.18 | 31,615 | 0.87 | 2.27 |
| 1948 | 24,862.10 | 88,412.08 | 29,560 | 0.84 | 2.99 |
| 1949 | 24,760.65 | 108,272.56 | 25,728 | 0.96 | 4.20 |
| 1950 | 43,147.42 | 147,144.53 | 40,007 | 1.08 | 3.68 |
| 1951 | 40,469.10 | 159,895.57 | 33,548 | 1.21 | 4.77 |
| 11-year Average | $23,174.31 | $76,631.45 | 26,652 | $0.87 | $2.88 |

A similar situation exists in the other counties. San Bernardino County estimates the average cost of processing each document at $4.15 as against an average fee of $0.92. The records in Orange County show costs ranging between $3.50 and $5.35 per document, with fees averaging between $0.73 and $1.46. On the basis of this information it would appear that the fees being charged should be increased threefold to fourfold to put the system on a self-supporting basis.

The following extract from Section 100 of the Land Title Law of California governs the size of the fees required:

"Subdivision 1. For filing decree directing land to be brought under the operation of this act, including original registration and issuing original certificate of title and duplicate and the filing of all instruments connected therewith, for each separate parcel of land affected, one dollar.

"For each subsequent declaration and issuing of certificate of title, including one duplicate and the filing of all instruments connected therewith, for each separate parcel of land affected, one dollar.

"For filing certified copy of any petition filed in the superior court of another county in probate proceedings or any notice of any action in another county wherein registration of land is asked for, one dollar.

"For the entry of each memorial on the register, including the filing of all instruments and papers connected therewith and the indorsement upon the duplicate certificate, for each separate parcel of land affected, fifty cents.

"For filing copy of will with letters testamentary or filing copy of letters of administration with or without will annexed and entering memorial thereof, one dollar.

"For the cancellation of each memorial or charge, appearing on one certificate, twenty-five cents.

"For each certificate showing the condition of the title to all land appearing on one certificate, three dollars.

"For filing any instrument or furnishing a certified copy of any instrument or writing on file not herein specially provided for, the same fees which are allowed by law to recorders for like services."

Fees for similar services in Massachusetts and in Cook County, Illinois, are generally substantially greater. This is apparent in the following tabulation:

COMPARISON OF FEES - REGISTRATION SYSTEM

| Operation | California | Illinois: Cook County | Massachusetts |
|---|---|---|---|
| Original Registration | $1.00 | $19.00 (1) | |
| Entry of Petition | | | $5.00 |
| Entry of Decree | | | $10-$1000 (2) |
| Entry of Certificate of Title | | | 5.00 |
| Subsequent Certificates | 1.00 | 4.00 | 2.00 |
| Filing Notices of Action in Another County | 1.00 | Not Applicable | 2.00 |
| Entry of Each Memorial on Register | 0.50 | 4.00 | $1.00-$3.00 |
| Filing Will or Copy of Letters Testamentary and Entering Memorial Thereof | 1.00 | 4.00 | 2.00 |
| Cancellation of Each Memorial or Charge on One Certificate | 0.25 | 2.00 | 1.00 |
| Certificate Showing Condition of Title to All Land on One Certificate | 3.00 | 2.00 | 2.00 |
| Filing or Furnishing Certified Copy of Any Other Instrument | $0.10 per folio plus $0.50 | $0.15 per 100 words plus $0.50 | $1.00-$3.00 |
| Assurance Fund Fee | 0.10% (3) | 0.10% (4) | 0.10% (3) |

NOTES:

(1) If value of land exceeds $1500; if less, $5.00. Both include examiner's services.

(2) 0.25% of assessed value; payment to be at least $10 and not to exceed $1000.

(3) Of assessed value at time of registration.

(4) Of value as ascertained by Registrar.

B. ASSURANCE FUND

Section 100 of the Land Title Law provides for the establishment of a State Assurance Fund, as follows:

> "Subdivision 2. In addition to the fees provided in subdivision 1, for services performed by the registrar, there shall be paid to him the following fees: Upon the original registration of any land, a sum equivalent to one-tenth of one per cent of the assessed value of the land including permanent improvements thereon as the same were valued for county taxation the last time said land and permanent improvements or either thereof were assessed for county taxes next preceding the filing of the petition."

After having been in existence for about twenty years there had accumulated in the Assurance Fund approximately $47,000. By 1936 over 100,000 certificates of title, both original and subsequent, had been issued, and the assessed valuation of the property involved at the time of registration amounted to approximately $47,000,000. One claim, referred to elsewhere in this report, was decided in 1936 in favor of the claimants by the State courts, and the entire Assurance Fund was wiped out in partial payment thereof (Gill vs. Frances Investment Co.). Since then payments into the fund have practically ceased, and the deficit continues to increase since the court allowed interest at 7% on the unpaid balance. As of June 30, 1952, the total deficit was $7,921.21.

# PART III

# RECORDATION IN CALIFORNIA

Chapter 1: INTRODUCTORY MATERIAL - OPERATIVE EFFECT AND LEGISLATIVE HISTORY CALIFORNIA RECORDING ACT (By University of Southern California)

## I. CALIFORNIA HISTORY

To understand the status of title to real property in California and the effect of the recording act it is necessary to review the early history of land titles in California.

California was taken in the name of the Spanish King in 1542 and partially settled by missionaries in 1769. From 1769 to 1822 (the date of the Mexican Revolution) rights to use the land were given to individuals by the Spanish monarchs, but no ownership was given. These were not grants of title, but merely rights to use the land for grazing and agricultural purposes.(1)

In 1822, the Mexicans revolted against Spain and established an independent Republic. Mexico governed California during this period, encouraging colonization of the area. The Mexican Governors made many grants of land to the settlers in California which were approved by the Mexican Legislature. A formal document evidencing the grant was filed in the government archives. This, however, did not constitute a recording system as we have today. It was merely a method of preserving the original documents evidencing the grants. When the grant was made, monuments were set up to coincide with the boundaries of the area given to the individual by the State.(2)

In the 1830's, American settlers came to California and chaotic conditions resulted. Since there was no system of recording land transfers and since possession was difficult to maintain during this period due to the fighting between the Americans and the Mexicans, it was necessary for the owners or claimants of land to keep the muniments of title in their possession. The culmination of this disorder was the Bear Flag Republic, the Mexican War, and finally the Treaty of Guadelupe Hidalgo in 1848. California became part of the United States with the understanding that Mexican property rights would be upheld if they were valid.(3) Since the Spanish and Mexican grants were in confusion due to the uncertainty that had existed under the Spanish and Mexican monarchs and governors, it was decided that an adjudication of all claims to land should be made. In 1851, Congress passed an act for the Appointment of Land Commissioners to which all private claims had to be submitted.(4) After a determination of title by this Board, appeals could be taken to the District Court and thence to the Supreme Court of the United States. Patents were issued to the claimants who proved their right to the property and these have been held conclusive as to the validity of the Spanish or Mexican grants as to title and boundaries specified.(5)

There have been repeated criticisms of the attitude of Congress in requiring <u>all</u> claims to be adjudicated. Many of the claims were valid and perfect in all respects and actually needed no judicial determination. These claimants, however, were forced to spend as long as thirty years in litigation of their titles, which involved a considerable amount of money. In addition, this litigation cast a cloud of suspicion on all titles to California property, which to

a certain extent exists today in spite of the repeated decisions of the United States Supreme Court that the decisions of the Board were conclusive. However, as a result of these hearings, the title to all land in California became absolute and indefeasible and all questions of the soundness of titles were disposed of at the time California was admitted into the Union.(6)

When California became a State it inherited some principles of law from the Spanish and Mexican law concerning real property, but most of the principles were derived from the English common law. Since there was no requirement of recording land transfers prior to the admission of California into the Union, one of the first acts of the California Legislature was to formulate a recording system and adopt it as part of the California law.(7)

Before discussing this recording act which was adopted in 1850, it is essential to review the common law principles governing the transfer of real property without regard to the effect of a recording statute. The changes which recording make will then be discussed. Finally, the peculiarities found in the California recording system will be discussed in detail.

## II. COMMON LAW PRINCIPLES

The essential problem involved in any discussion of recording is that of priority. That is, as between two successive purchasers, mortgagees, or creditors, of the same piece of land, which claim will be satisfied first.

The common law developed the well-known maxim that "first in time is first in right." That means that if A sells and conveys his property to B, and later attempts to convey to C, B will prevail over C since he is first in time to receive a conveyance. Notice to C of the prior conveyance was immaterial and did not affect the result in any way. This common law maxim is founded on common sense, since once A has disposed of his title to the land, he cannot again transfer it to a second party regardless of the fact that the second party purchased for value and in complete good faith without notice of the former conveyance. If a vendor has no title, he can convey no title, and since A had no title left after his conveyance to B, he could convey no title whatsoever to C.(8)

This rule was followed at common law when there was a question of priority between two claimants of the legal estate or between two claimants of the equitable estate. An example of two legal interests would be two successive conveyances in fee. An example of two equitable interests would be two successive contracts of sale made by the same grantor covering the same property to two separate individuals. The equitable interest acquired under the first contract of sale would give the first vendee priority over the second vendee since the first one was prior in point of time. Of course, this rule is only true where the equities are equal. If the first vendee were guilty of any bad conduct connected with the transaction he would not be given such priority.(9) It should be emphasized again that notice on the part of the second vendee or lack of notice would not change the result in any way.

The common law varies from the rule of first in time in one very important situation. As between a party who acquires a prior equitable interest and one who acquires the full legal title to the property, the common law gave priority to the purchaser of the legal title, provided he purchased the property for value, in good faith and without notice of the prior equity. The basis for such a rule is that the purchaser of the legal title has the "best right" to the property. The court is in effect refusing to deprive the owner of his technically better right of property in such a case because it is not unconscientious for him to retain it.(10) This is the only situation at common law where priority is made to depend on notice rather than time of acquisition of the interest.(11)

III. THE RECORDING STATUTES - EFFECT ON THE COMMON LAW

The earliest recording act was the Statute of Anne adopted in England in 1708.(12) The only effect this statute had was to require transferees to record in order to maintain their common law priority. That is, if A were first to receive a deed, but failed to record, and the grantor subsequently conveyed to B who recorded his deed, B would be protected by the court as against the claim of A. A, by failing to record his deed, lost his common law priority.(13)

This method of maintaining priority has been used in all of the United States. Of course, the various statutes differ in details. For example, the statute may refer to certain types of instruments only, and may be for the benefit of certain parties only, generally, bona fide purchasers for value without notice of the first conveyance. A general explanation of the effect of recording statutes has been offered by Professor Aigler as follows:(14)

> "The effect of the statute really is that the person claiming under the instrument in question by his failure to observe the direction of the Statute confers upon the party who executed the instrument, the moving party, a sort of statutory power to displace the interest vested by the execution of the instrument. This power may be effectively exercised only in favor of those specified in the Statute, usually subsequent purchasers and incumbrancers. The recording ordinarily has no effect so far as the vesting of the intended interest in the transferee is concerned; the interest vests as fully and completely without as with recording. The failure to record simply puts someone into position to divest that interest."

The early English statute of Anne did not provide for the doctrine of constructive notice. It was limited merely to preservation of a common law priority. If at common law a party first in time did not have legal priority, he would not gain anything by recording his instrument. For example, as seen above, a person with a prior contractual equity had no priority at common law as against a subsequent bona fide purchaser of the legal estate. If the holder of the prior equity recorded his instrument it would not give constructive notice to the subsequent purchaser. He would still take free of the prior equity unless he had actual notice of its existence.

The American statutes have departed from the English interpretation and provide that recording an instrument operates to give constructive notice of its contents to subsequent purchasers. The result in the above example would be that the subsequent purchaser of the legal estate would be charged with constructive notice of the outstanding equity since it had been recorded prior to his acquisition of title. He could, therefore, not claim to be a bona fide purchaser without notice, since the record gave him notice whether he actually read the record or not.(15)

To summarize this discussion, the purpose of the recording acts in the United States is twofold:

1. Recording operates to maintain a common law priority and the failure to record results in loss of this priority as against certain designated persons.

2. Recording operates to give constructive notice from the record to subsequent purchasers, thus preventing them from claiming to be bona fide purchasers.

As seen above, the constructive notice phase is peculiar to the United States and is limited only to specific situations in which notice as such will be the determining factor. In most situations, it is unnecessary to discuss constructive notice, since the question is merely one of recording to maintain a common law priority. However, the courts in most instances have failed to recognize this distinction and decide most cases on the question of whether the subsequent purchaser had actual notice or constructive notice from the record preventing him from being a bona fide purchaser.(16) These cases could be disposed of simply by showing that the first purchaser had a common law priority and this was maintained by recording. The second purchaser can claim no rights as against the first purchaser and whether he had notice or not is immaterial.

## IV. OPERATIVE EFFECT OF THE CALIFORNIA RECORDING ACT

The California recording statute applicable to transfers of interests in real property provides for both the maintenance of the common law priority and for the doctrine of constructive notice.

Civil Code Section 1213 is the provision covering constructive notice and makes explicit the time the notice begins to run and to whom an instrument properly recorded is notice.

> "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees;..."

Civil Code Section 1214 provides for the effect of failure to record. That is, the priority which was granted by the common law to the party first

in time may be lost by failure to record. It is important to determine from the statute who can assert the invalidity of this prior unrecorded conveyance. Civil Code Section 1214 states "Every conveyance of real property,..., is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded,..." This requirement that the second conveyance be recorded makes the California statute different from statutes in force in the majority of states.(17) It puts a burden on the subsequent purchaser to prove not only his good faith, payment of a consideration, and lack of notice, but also that he recorded his instrument in the proper manner.

It should be pointed out that failure to record does not affect the validity of instruments as between the parties or against parties with notice. Civil Code Section 1217 has codified this doctrine as follows:

> "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof."

These provisions of the code apply to certain instruments only. Civil Code Section 1215 defines the types of instruments as follows:

> "The term 'conveyance,' as used in sections twelve hundred and thirteen and twelve hundred and fourteen, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills."

In addition to these statutes applying to "conveyances," there are various statutes throughout the codes providing for recordation of other instruments which are not strictly "conveyances," but which do affect an interest in real property. These include abstracts of judgment, attachments, executions, notices of non-responsibility, notices of completion, mechanics' liens, and other instruments. Although these are not instruments as defined by Civil Code Section 1215, in most instances recording of them provides constructive notice either as a result of a specific statute or by court decision. For the purposes of this paper, the discussion will involve the general recording statute relating to "conveyances" of real property, but where it is necessary for a complete understanding of the recording system as it exists today, reference will be made to the statutes relating to the specific liens and documents not included under the term "conveyance."

## V. DEFECTS IN THE CALIFORNIA RECORDING SYSTEM

Theoretically, the purpose of the requirement that instruments be recorded, is that an intending purchaser of land may examine the record and discover what encumbrances are outstanding and whether his grantor had a clear title to transfer to him. Since he has this means of acquiring knowledge, he is treated as if he had read the records and is charged with notice of what appears on the record.

In actual practice, however, it will be seen that it is virtually impossible to trace the complete chain of title from the record books. The methods of keeping records, indexing, and searching are outmoded and insufficient to meet the needs of a large community where there are so many and such rapid transfers of land.

In addition, there are many matters which affect the chain of title, but which are not deducible from a search of the public records. These include adverse possession, forgery, certain types of fraud, incapacity, infancy, and countless other defects which do not appear on the record, but affect the title to the property.(18)

These defects then consist of deficiencies in the method of keeping records, internal defects, and matters off the record which constitute external defects. Both types of defects will be discussed in more detail since they constitute the basis for the criticism of the California system.

A. INTERNAL DEFECTS

The recording system in use in California is the grantor-grantee system. The Government Code provides for the details of its administration--types of books to be kept, duties of the recorder in indexing and copying the instruments, the manner in which instruments are recorded, and types of instruments permitted to be recorded or required to be recorded.(19)

The actual recording procedure is carried on in the following manner:

1. The instrument is filed with the County Recorder's office of the county within which the real property affected thereby is situated.(20)

2. The Recorder is then required by Government Code Section 27320 to endorse on the instrument the filing number in the order in which it is deposited, the year, month, day and hour and minute of its reception, and the amount of fees for recording.

3. Government Code Section 27322 requires the Recorder to copy the instrument in handwriting, by typewriting, or photography or other reproduction process into the proper book of records. The Government Code lists the books which must be kept for the various instruments and requires separate books for different classes of instruments. For example, a book of deeds, a book of mechanics' liens, attachments, judgments, etc.

   However, in lieu of these separate books, the code allows the Recorder to record any or all of these instruments in one general series of books called "official records." In actual practice, the County Recorder in most counties of California uses just the one series of "official records."(21)

4. When the instrument is copied into the record, the Recorder is required to note at the foot of the record the filing number, the exact time of its reception, and the name of the person at whose request it is recorded, together with a notation that it has been compared.(22)

5. The instrument must then be endorsed with the time and book and page in which it is recorded and delivered to the party leaving it for record or upon his order.(23)

6. The final duty of the Recorder in the recording process is to index the instrument. Part III, Chapter 6, Article 2 of the Government Code contains a list of the type of indices required to be kept and what data is required to be recorded in the index. The code provides that separate indices should be kept for each class of instrument. For example, index of grantors, index of grantees, index of mortgagors, index of mortgagees, index of mechanics' liens, index of pendency of actions, etc.

   However, Government Code Section 27257 and Section 27260 provide that in lieu of these separate indices, the County Recorder may keep two indices only, "General Index of Grantors" and "General Index of Grantees." The majority of Recorders' offices maintain only these two types of indexes.

It is important to notice what information is put in the indices by the Recorder. The title of the instrument is first stated, followed by the date of filing, the name of the grantor, the name of the grantee, the volume, book and page where the instrument was copied. The list is kept in alphabetical order under the names of the grantors in the grantor's index and under the name of the grantees in the grantee's index.(24) There is absolutely no mention of the legal description of the property which is affected by the instrument so that it makes it necessary to go to the instrument itself or the record thereof in the record books to find out what property is involved. As will be shown later, this makes it very inconvenient for a person searching the title to a particular piece of property.

When the instrument is properly recorded it will operate as notice to subsequent purchasers as of the day the instrument was deposited with the Recorder for record.(25) The problem which is then presented is how this subsequent purchaser can find this recorded instrument. The method of search which is followed with a grantor-grantee system is as follows:

The purchaser checks the grantee indices to find a reference to the instrument by which his vendor acquired title; then he checks the grantee indices under the name of the party from whom his vendor acquired title, and in similar manner back to the original source of title, which is generally a patent from the United States government. The purchaser must then check the grantor index to find any conveyances, mortgages, liens, or other instruments

which have been created by any of the grantors in the chain of title. This must be done for each grantor to discover any instruments recorded subsequent to acquisition of ownership, which may affect the land the purchaser is interested in. It is not necessary to check for conveyances made before title was acquired by any party. The purchaser must check, however, for instruments recorded after a grantor parted with title which may have been recorded before a subsequent purchaser from the grantee acquired title.(26) This situation will be dealt with in detail in a later chapter, but requires a search of all deeds made by all grantors in the chain of title down to the date of purchase by the individual searching the records.

The index contains only an alphabetical list of the grantors and grantees. It does not contain any statement of the legal description. This means that a purchaser will have to go to the books in which the deeds are recorded and read through almost every deed made by a grantor in the chain of title to see if there is anything in it which affects the property which he is interested in purchasing. Such requirement makes it impossible for an individual to search the records where the grantors in the chain of title have made hundreds of conveyances. It would take an extremely long time just to collect the instruments which are recorded and determine which affect the land the purchaser is interested in buying. If, however, he fails to make such a search he is still treated as if he had read and interpreted every document involving this land. Such a system is primitive and makes it impossible for a purchaser to find out the state of the record title.

The system of recording and searching used in California can be better understood by an illustration:

> X desires to purchase Blackacre from Jones, who claims to be the owner of the property. In order to determine the state of the title he is about to purchase, X must check the records to discover any encumbrances outstanding and to determine whether Jones had received title to the property. He must then determine whether Jones conveyed prior to the time X purchases and records his instrument.
>
> X first takes the index of grantees in which the names of all grantees are alphabetically arranged. He traces down this list until he finds the name, Jones, as the grantee of Brown. The index shows that on a certain date Jones took a deed from Brown and that it was recorded on page 5 of book 30. This index, however, does not give a legal description of the property which Brown conveyed to Jones. X must, therefore, go to page 5 of book 30 and read the deed. It may be the deed by which Jones acquired Blackacre, but it may be a deed by which Jones acquired Whiteacre or any other piece of property. If Jones had purchased a considerable number of lots from time to time it would be necessary to read all the deeds on the record by which Jones acquired property in order to determine which one transferred title to Blackacre. Of course, Jones may have a copy of his deed with the

book and page endorsed on it and this would save some of the work in searching.

After X has found the deed from Brown to Jones and assuming that it covers Blackacre he abstracts it. He then must find the instrument by which Brown acquired title. This means he must search the alphabetical index of grantees until he finds Brown's name as grantee. Again he may find that Brown had purchased several lots at different times and he must take out the books in which all deeds to these lots were recorded, until he comes to the one by which Brown acquired Blackacre.

The next task is to find the instrument by which Brown's vendor acquired title to Blackacre. This requires the same search under his name. This must be continued for all the vendors in the chain of title back to the original government patent.

The next step is to check for any encumbrances or conveyances which any of the parties in the chain of title may have made from the time of acquisition of ownership by each party down to the date X's instrument is recorded.

This means that X must check the grantor index for Jones' name and read every instrument that Jones executed for that period of time. This is necessary since the index does not give a description of the property involved. There is no way of discovering whether a particular mortgage referred to the piece of property X is interested in buying except to look at the record of the mortgage.

X then must do the same thing for Brown and Brown's vendor and back to the original source of title.

This is, of course, only part of the task, since, the records of some encumbrances are kept in other offices besides the County Recorder's office. This requires searching in several places.(27)

From this example, it can easily be seen that the method of keeping records and searching is impossible. A title cannot be efficiently searched and even after search there is no guarantee that all outstanding encumbrances have been discovered since some office may have been overlooked.

In actual practice, the purchaser is usually able to obtain an old Certificate of Title, Guarantee of Title or Policy of Title Insurance, which he can use as a starting point. This will avoid the necessity of checking everything back to the beginning. It will only be necessary to bring this certificate down to date. That such a technique is necessary shows the glaring inefficiency of the recording system as it exists today.

Some of the additional offices in which the search must be continued include:

1. County Clerk's Office - search for actions which affect title to property or capacity of parties to execute valid instruments.

2. Probate indices - search for incompetency proceedings or probate proceedings.

3. County Tax Collector's Office and Assessor's Office - search for taxes, bonds and assessments.

4. Bureau of Assessment of the city - search for assessments and bonds.

5. Bankruptcy indices - search for adjudication of bankruptcy.

These are illustrative of the types of things which must be investigated but there are many others. It is bewildering to a purchaser who wants to find out the state of the record title to discover just where to look and what to look for to determine what outstanding encumbrances there are in existence.

When this material is finally assembled it is necessary to interpret what the documents mean and really requires the services of an attorney. The result is that a purchaser would be taking a very great risk in relying on any search that he himself had made, because he probably cannot obtain all the information without assistance, and because he does not have the ability to analyze the instruments properly and evaluate them.

B. EXTERNAL DEFECTS

The effect of the recording system is to give a purchaser the means of investigating the state of the record title. This may in some instances be very different from the actual state of the title. The title may be subjected to various equities in parties which do not appear of record. For example, there may be a right to reform an instrument on grounds of mistake, or a right to rescind for fraud or mistake. Numerous equities which cannot be discovered by any method of search may later be asserted by grantors or grantees in the chain of title and may cause a purchaser to take a very defective title. In some instances, the actual title may not even be in the record owner. Under the law of adverse possession, title may be acquired by someone in possession and it is never put on the record. A purchaser is then required to investigate the premises and decide for himself whether or not anyone has been occupying the property for a sufficient length of time to acquire a title by adverse possession. Sometimes this may be a very difficult determination to make for a purchaser especially where property is being purchased by investors in the East who are not able to make a personal survey of every parcel of land purchased.

The recording system was never intended to show a purchaser anything more than the state of the record title. It never purported to indicate defects which did not appear on the record, and never protected a purchaser against such defects. There has been a common belief that a record title gives a complete verification of the title which a purchaser receives. This is not true

since no title can be deduced completely from an examination of the public records. The ownership of land depends not only upon facts of record, but also upon a large body of extraneous facts not present on the public records.(28)

A list of some of the risks outside the record which affect the record follows. This is not intended to be a complete list. *Some* risks mentioned would depend upon ability to prove certain factors such as good faith, payment of consideration, lack of notice, and other matters.

1. Adverse possession.
2. Rights obtained by prescription.
3. Fraud in the inception of documents.
4. False personation.
5. Forgeries.
6. Marital status of parties.
7. Problems of descent and heirship.
8. Capacity - age and mentality.
9. Errors in recording.
10. Errors in descriptions in the instruments.
11. Special liens - mechanics' liens.
12. Non-delivery of deeds.
13. Void judgments and decrees, due to no jurisdiction, lack of service, or defective proceedings.
14. Authority of agent or corporate officer.
15. Validity of judicial procedure under foreclosure suits.
16. Violation of usury laws.

In some cases, a bona fide purchaser who takes the legal title will not be subjected to equities in other parties. For example, a right to rescind for fraud unless it is fraud in the execution of the instrument, may not be asserted against a bona fide purchaser. This cuts down the effect of the off the record risks to a certain extent, but it is still not sufficient to answer the problem. The doctrine that a purchaser may take a clear title if he takes through a bona fide purchaser regardless of whether he has notice of defects in the title is another safeguard. Again, this has only a limited effect and does not do away with the defects in the recording system.(29)

When the defects are analyzed it seems inconceivable that a purchaser could ever feel secure that his title is clear. He has serious difficulty in discovering the existence of the encumbrances, is unable to interpret them properly, and is then possibly subjected to defects which are off the record and cannot be discovered by any method of search.

It is the recognition of these problems which face a purchaser of real property, that has caused consistent criticism of the recording system as archaic, primitive, and unable to achieve the purpose for which it was originally adopted. It is because of these problems that attempts have been made to remodel the method of recording by use of a plat system or by consolidation of the various offices in which encumbrances may be found.

Finally, it is the realization that a recording system as operated in California is unsatisfactory that led to the adoption of the Torrens System in the 1890's.(30) Just how far that system is able to avoid these difficulties will be discussed subsequently.

## VI. LEGISLATIVE HISTORY OF THE RECORDING ACT - CALIFORNIA

The provisions of the recording act as it exists today in the codes had their origin in an 1850 statute entitled "An Act concerning Conveyances," passed by the California Legislature April 16, 1850(1). Discussion of the legislative history from 1850 to the present will be divided into two sections: 1850 to 1872 (the date of the adoption of the codes) and 1872 to present.

### A. 1850 to 1872

The provisions in the 1850 statute which related to recording of instruments affecting real property were chiefly contained in Sections 24, 25, 26 with some minor sections relating to definitions, powers of attorney and discharges of mortgages.

These sections provided as follows:

Section 24: "Every conveyance whereby any real estate is conveyed, or may be affected, proved, or acknowledged, and certified in the manner prescribed in this Act, to operate as notice to third persons, shall be recorded in the office of the Recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such record."

Section 25: "Every such conveyance, certified and recorded in the manner prescribed in this Act, shall, from the time of filing the same with the Recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice."

Section 26: "Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this Act, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

Section 36 defined the term "conveyance" as including "every instrument in writing by which any real estate or interest in real estate is created, aliened, mortgaged, or assigned, except wills, leases for a term not exceeding one year, executory contracts for the sale or purchase of lands, and powers of attorney."

The first amendment to this statute, occurring in 1855, changed Sections 24 and 25 allowing the recording of an agreement to convey real property. The amendment provided that such agreement when recorded would operate as constructive notice to third persons.(2) Prior to this, the statute gave no authority to record executory agreements to convey.(3)

In 1860, an amendment to the 1850 statute provided that instruments recorded prior to that date would constitute constructive notice notwithstanding defects in acknowledgment.(4) The reason for such a statute was that the courts had previously held that the record of a defectively acknowledged instrument was void and did not impart notice to anyone. Curative acts similar to the 1860 statute have been passed from time to time and at present Civil Code Section 1207 contains such a provision.(5)

Section 25 of the act was amended in 1864 to provide for the recording of patents to land, duly executed and verified according to law. When properly recorded, the record would constitute notice to subsequent persons.(6)

In 1866, Section 25 was again amended to clarify what persons are charged with notice from the record. As noted above the 1850 statute provided that "subsequent purchasers, mortgagees, and lien holders shall be deemed to purchase and take with notice." When instruments have been properly recorded this effect occurs, but not otherwise. The 1866 amendment added a provision that the records would not be notice to a purchaser at a foreclosure sale if notice of the pending of the action had been properly filed unless an instrument had been recorded prior to the commencement of the action in which the decree and order of sale were entered.(7)

B. 1872 to present

The 1850 statute concerning conveyances was completely superseded by the codes, but the code commissioners incorporated the basic recording provisions of that statute into the 1872 code with very few changes.(8) The provisions of Sections 24, 25 and 26 of the early statute are now found in Civil Code Sections 1213, 1214, 1215, 1217.

1. CIVIL CODE SECTION 1213:

This code section as adopted in 1872 included the constructive notice provisions of Section 24 and 25 of the 1850 act. The only change that was made was a clarification of what persons would be charged with notice of the record. The statute before the code was ambiguous since it stated a conveyance properly recorded imparts notice to all persons of the contents thereof. The statute then modified this by declaring that "all subsequent purchasers and mortgagees shall be deemed to purchase with notice." The court before 1872 had resolved this ambiguity by holding that the notice was limited to subsequent purchasers and mortgagees. It did not apply to all persons in spite of the language of the statute.(9)

Civil Code Section 1213 was amended in 1897 and again in 1919 to provide for recording of certified copies of instruments that have already been recorded.(10) Civil Code Section 1218 was adopted in 1905 and amended in 1913(11) covering recording of certified copies to amplify the addition to Section 1213. With the exception of these slight changes, Section 1213 is in the same condition at the present time that it was in when adopted by the legislature in 1872, and only slightly changed from the original statute of 1850.

2. CIVIL CODE SECTION 1214:

This code section as adopted in 1872 combined Sections 24, 26 and 36 of the 1850 statute. It 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 mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded."

Prior to the code there had been a problem as to what parties could assert the invalidity of an unrecorded instrument. This was caused by the fact that Section 24 of the Conveyances Act stated that it was necessary to record in order to give notice to third parties. The implication from that would be that an unrecorded deed would not be notice and could not be asserted against any third party. However, an exception was expressly made that the deed was valid between the parties. In addition, Section 26 of the 1850 statute provided expressly that an unrecorded deed was void against a subsequent purchaser, in good faith and for a valuable consideration where his own conveyance was first duly recorded. In the case of Hunter v Watson(12) it was held that Section 26 was intended to modify Section 24 and therefore the invalidity of an unrecorded instrument could only be asserted by a subsequent bona fide purchaser who first records.

When the code was adopted, the position taken in Hunter v Watson was followed and Civil Code Section 1214 expressly states that the instrument is void as against a subsequent purchaser or mortgagee in good faith and for a valuable consideration, whose conveyance is first duly recorded.

It should be noted, of course, that the code added "mortgagees" to the persons who could assert the invalidity of an unrecorded instrument.

Civil Code Section 1214 was amended in 1895 to provide that an instrument would also be invalid against any judgment affecting the title unless it was duly recorded prior to the record of notice of action. This provision is similar to the 1866 amendment to Section 25 of the 1850 statute, but it is more inclusive since it is not limited to foreclosure decrees as the 1866 amendment was.(13)

No other changes have been made in Civil Code Section 1214 and it stands today virtually as it did in 1872 with the one exception mentioned above.

3. CIVIL CODE SECTION 1215:

This section provides for the types of instruments that may be recorded under Sections 1213 and 1214 and is based on Section 36 of the 1850 statute.

The early statute provided that the term "conveyance" included every instrument in writing by which any real estate or interest in real estate is created, aliened, mortgaged, or assigned, with certain exceptions.

Section 1215 of the Civil Code adopted in 1872 and which has not been amended since that time contains practically the identical language. It is in the exceptions that the statutes differ. In the 1850 statute the exceptions were "wills, leases for a term not exceeding one year, executory contracts for the sale or purchase of lands, and powers of attorney." The code makes only the exception of "wills."

4. CIVIL CODE SECTION 1217:

This statute adopted in 1872 and never amended states that an instrument is valid as between the parties thereto and those who have notice thereof. It is based on the provision in Section 24 of the 1850 statute that an unrecorded conveyance is valid and binding between the parties thereto.

No provision was contained in the 1850 statute for purchasers who had actual notice of an unrecorded conveyance. It was left to court decision to determine whether such an instrument would be void against a purchaser with actual notice. Mr. Justice Baldwin in the case of Hunter v Watson reviewed the authorities in other jurisdictions and concluded that the intent of the legislature was that only bona fide purchasers would be protected by the statute. He stated that one who had actual notice was not a bona fide purchaser and could not assert the invalidity of an unrecorded deed.(14)

Other types of notice were recognized before the code and these prevented a purchaser from claiming as a bona fide purchaser. These included notice from adverse possession and notice from facts and circumstances which would lead a reasonable man to make an inquiry.

In 1872, the code commissioners included the statement that the unrecorded instrument was valid against those with notice. This codified the view expressed in Hunter v Watson. The problem of what notice consists of is still left to the courts, however. Actual notice, notice from possession and notice from certain facts and circumstances will prevent a purchaser from asserting the invalidity of an unrecorded instrument.

C. MISCELLANEOUS PROVISIONS IN THE CIVIL CODE RELATING TO RECORDING

1. MODE OF RECORDING

Sections 1169 to 1172 inclusive of the Civil Code cover in a very general manner the place where instruments are required to be recorded, the types of

books used by the Recorder, and the date when an instrument is deemed to be recorded. The details on the duties of the County Recorder were originally listed in the Political Code, but in the 1949 session of the California Legislature these provisions were transferred to the Government Code.(15)

Civil Code Sections 1169 to 1172 were enacted in 1872 and have not been amended. Sections 1169 and 1171 were based on the New York Civil Code. Section 1170 was based on "An Act establishing Recorders' Offices, and defining the Duties of the Recorder and County Auditor," passed April 4, 1850.(16) This provision deals with the time when an instrument is deemed to be recorded and must be construed with Code Section 1213 discussed above.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS

Civil Code Sections 3458-3466 prescribe the recording requirements when property is transferred for benefit of creditors. These provisions were originally based on the New York Civil Code and enacted in California in 1872.

3. DECLARATIONS OF HOMESTEAD

Recording is required for a valid declaration of homestead and this is covered by Civil Code Sections 1242, 1262, 1264, 1268, 1269. These statutes were put in the code in 1872 and were originally based on various early statutes on homestead property.(17)

For the purposes of this paper the history of homestead provisions is not pertinent, except for the requirement of recording for the validity of a homestead.

4. MORTGAGES

The provisions on recording mortgages of real property and discharges of mortgages are contained in Civil Code Sections 2934 to 2953. These sections were mainly based on the New York Civil Code and enacted in California in 1872. Of course, the 1850 statute concerning conveyances was applicable to mortgages and therefore the Civil Code sections can be said to be based partly on the 1850 statute.(18)

Civil Code Section 2939½ was added to the code in 1895, providing for a special procedure for foreign executors, administrators, and guardians to satisfy mortgages on the county records.

For the purposes of this paper "conveyances" will generally be considered as including mortgages and, therefore, the basic rules regarding recording apply to them. It will not be necessary to discuss recording of mortgages separately unless required for clarity.

5. POWERS OF ATTORNEY

Although the 1850 statute expressly stated the term "conveyance" did not include powers of attorney, Section 27 of that act provided for recording of

powers of attorney to convey real estate. This has been carried over to a certain extent in the codes. Government Code Section 27322 permits powers of attorney to convey real property to be recorded and the exception made in the 1850 statute is not contained in the Civil Code definition of "conveyance."

Section 28 of the 1850 statute required revocation of recorded powers of attorney to be recorded also. This provision has been incorporated into Civil Code Section 1216 and remains there in the same form today.

An express provision covering powers of attorney to execute mortgages is contained in Civil Code Section 2933. This provides for recording in like manner as a power of attorney for a grant of real property. This section was enacted in 1872 but not based on any specific provision of the 1850 statute on conveyances. The Code Commissioners probably thought it would be better to make special provisions covering mortgages, although the term includes mortgages as discussed above. This is in keeping with the option given to the recorder to keep separate books for mortgages and deeds.(19)

6. MISCELLANEOUS

There are other provisions in the Civil Code and Code of Civil Procedure involving recording of various types of liens, such as Mechanics' liens, Judgment liens, Attachments, Lis Pendens, etc. These are based on statutes enacted in the 1850's. For the purpose of this study, however, it is advisable to limit the legislative history and detailed analysis of cases and statutes to the basic recording provisions covering real property and to give only slight mention to these specific liens covered by the codes.

D. GOVERNMENT CODE PROVISIONS INVOLVING DUTIES OF THE COUNTY RECORDER

Title III, Chapter 6, Articles 1, 2, 3, 4, 5 of the Government Code now consolidates the provisions on the Duties of the Recorder. It describes his duties in general, the books which he must keep for indexing and recording, the documents which he must record, the manner of recordation, and the fees which he must charge. These sections were formerly in the Political Code Sections 4130-4142.

The majority of the Government Code Sections regarding the duties and the types of books which the recorder is required to keep were originally based on the 1850 statute establishing Recorders' Offices. The sections involving the manner of recordation and the punishment for neglect of duty are also based on the 1850 statute mentioned above.(20) Some of the statutes were added later, however. For example, Government Code Section 27327, providing for notice when instruments are incorrectly recorded, but properly indexed was added in 1909.(21) Filing of liens for internal revenue taxes is another statute added at a later date.(22) For the most part the provisions have been preserved in practically the same condition they were in when adopted by the code commissioners in 1872 and very similar to the original statutes of the 1850's on which they are based.

The sections involving what instruments may be recorded were formerly in the Civil Code as discussed above. Some of these provisions have been amended recently to provide for additional types of instruments which may be recorded. Government Code Sections 27280 to 27294 now contain the list of types of instruments which may be recorded. Section 27322 lists instruments which the recorder must accept for recordation.

It will not be necessary to go into more detail as to the various amendments to these sections which have been passed from time to time. It is sufficient to state that the policy of the legislature has changed very little from 1850. The purpose of recording remains the same—the collection of instruments which may be inspected by purchasers for the purpose of determining the state of the title they are receiving. The courts have been liberal in allowing instruments to be recorded that are not expressly mentioned in the code, so that protection will be accorded to both purchasers and owners of interests in real property.

FOOTNOTES to CHAPTER 1: INTRODUCTORY MATERIAL - OPERATIVE EFFECT AND LEGISLATIVE HISTORY CALIFORNIA RECORDING ACT

1. Rice, L. J., "Land Titles in California," Real Estate Handbook of California, (1929) p. 338 et seq.
Ogden, Melvin B., "Escrow and Land Title Law in California," (1938) Chapter 14.

2. "State of California Division of Real Estate Reference Book and Guide," Third Revision Published by Division of Real Estate, Clarence Urban, Commissioner, Sacramento, California.

3. Ogden, M. B., op. cit., Chapter 14.
Real Estate Reference Book and Guide, op. cit.

4. Act of March 3, 1851, c. 41, 9 Stat. 631.

5. Hogan v United States, 72 Fed (2) 799; petition for writ of certiorari denied by United States Supreme Court, 295 US 752, 9 L. Ed 1696.

6. Rice, L. J., op. cit., p. 338 et seq.

7. Cal. Stats. 1850, c. 101, p. 249, An Act concerning Conveyances, passed April 16, 1850.

8. Tiffany on Real Property, Third Edition, Section 1257 (1939) Aigler, "The Operation of the Recording Acts," 22 Michigan Law Review 405 (1924).

9. Tiffany, op. cit., Section 1260.

10. Tiffany, op. cit., Sections 1258 and 1261.

11. Aigler, op. cit., p. 405 et seq.

12. St. 7 Anne, c. 20, 1708.

13. Aigler, op. cit., p. 405 et seq. Burby on Real Property (1943) p. 444.

14. Ibid, Aigler.

15. Ibid, Aigler.

16. Cady v. Purser, 131 Cal 552 (1901).

17. Patton on Titles (1938) Section 10, p. 44.

18. Gage, D. D., "Land Title Assuring Agencies", (1937) p. 34 et seq.
See footnote in Gage's book on page 36 for discussion of the authority on the California defects.

19. Title III, Chapter 6 of the Government Code contains this information. Prior to this revision of the code much of the material was found in the Civil and Political Codes.

20. Civil Code Section 1169.

21. Government Code Section 27323.

22. Government Code Section 27320.

23. Government Code Section 27321.

24. Government Code Section 27257.

25. This result is arrived at by construing Civil Code Sections 1170 and 1213 together. See Cady v Purser, footnote #16 supra.

26. Mahoney v Middleton, 41 Cal 41(1919).

27. Home, W. S., "Escrow and Land-Title Procedure" (1948), p. 219 et seq.

28. Gage, D. D., op cit., p. 34 et seq. Haymond, T. W., "Title Insurance Risks of Which the Public Records Give No Notice," Southern California Law Review, I, (1928) p. 422.

29. Tiffany, op. cit., Section 1263.

30. "An Act for the Certification of Land Titles and for the Simplification of the Transfer of Real Estate," Cal. Stats. 1897, p. 138. This statute was replaced by the "Land Title Laws," an initiative act, which became effective in December, 1915. Cal. Stats. 1915, p. 1932.

1. Cal. Stats. 1850, c. 101, p. 249.

2. Amend. Stats. 1855, c. 140, p. 171.

3. Mesick v Sunderland, 6 Cal 298.

4. Amend. Stats. 1860, c. 366, p. 357.

5. Added by Code Amends. 1873-74, p. 228; Amend. Stats. 1897, p. 64; Stats. 1901, p. 398 (unconstitutional); Stats. 1903, p. 108; Stats. 1909, p. 45; Stats 1913, p. 75; Stats. 1915, p. 1211; Stats. 1919, p. 244; Stats. 1921, p. 94; Stats. 1927, p. 828.

6. Amend. Stats. 1863-4, c. 85, p. 85.

7. Amend. Stats. 1865-6, c. 620, p. 848.

8. "Index to the Laws of California, 1850-1920, prepared by Legislative Counsel (1921) Sacramento, p. 78.

The California Civil Code was approved March 21, 1872 and went into effect January 1, 1872.

9. Dennis v Burritt, 6 Cal 670. See discussion of this problem in the annotated draft of the Civil Code prepared by Haymond and Burch, First Edition, Sacramento, State 1872, p. 333.

10. Amend. Stats. 1897, c. 68, p. 59; Amend. Stats. 1919, c. 179, p. 278.

11. Added by Stats. 1905, p. 604; Amend. State. 1913, p. 335.

12. 12 Cal 373. Annotation p. 334 of 1872 Draft of Civil Code by Haymond and Burch.

13. Amend. Stats. 1895, p. 50.

14. Civil Code prepared by Haymond and Burch, p. 334 et seq. See footnote #9 supra. Also see early cases discussing the problem: Pixley v Huggins, 15 Cal 127; Chamberlain v Bell, 7 Cal 292; Rose v Munie, 4 Cal 173; Dennis v Burritt, 6 Cal 670.

15. Cal. Stats. 1947, c. 424, p. 1039.

16. Cal. Stats. 1850, c. 58, p. 151.

17. Cal. Stats. 1860, p. 311; Cal. Stats. 1860, p. 88.

18. Call v Hastings, 3 Cal 179, held conveyances include mortgages. For information as to the various sections of the New York Civil Code which the California Code Commissioners used for models see Revised Laws of the State of California, Civil Code, Sacramento 1871, prepared by Lindley, Burch & Haymond, Commissioners.

19. See Civil Code Section 1171 and Government Code Section 27322.

20. Cal. Stats. 1850, c. 58, p. 151.

21. Added by Cal. Stats. 1947, c. 424, sec. 1.

22. Government Code Sections 27330 and 27331. Added by Cal. Stats. 1947, c. 424, sec. 1.

Chapter 2: INSTRUMENTS WHICH ARE AUTHORIZED TO BE RECORDED
(By University of Southern California)

## I. INTRODUCTION

There are various statutes providing for the recordation of instruments. The statute which is most important for the purposes of this paper can be termed the General Recording Statute. This statute, Government Code Section 27280, permits the recordation of certain documents which meet the requirements of the statutory definition of "conveyances." Civil Code Sections 1213, 1214, 1215, 1217 provide for the effect of recordation and the effect of failure to record in general.

In addition to the general statute, there are a series of statutes providing individually for the recordation of specific instruments which do not meet the statutory definition of the term "conveyance." These can be termed Specific Recording Statutes.

When an instrument which is authorized by the general recording statute is properly recorded, the results are as follows:

(1) A prior purchaser who properly records his instrument before a subsequent purchaser records will have priority. At common law the purchaser who was first in time was given priority. By recording, the purchaser retains this priority and is protected against subsequent purchasers.

(2) The record of the instrument operates as constructive notice to subsequent purchasers and mortgagees, preventing them from qualifying as bona fide purchasers. Civil Code Section 1213.

(3) A subsequent purchaser or mortgagee who records his instrument first is generally protected against prior instruments which have not been recorded. Civil Code Section 1214.

(4) The original record of such instrument or a certified copy of the record of such instrument is admissible in evidence with the same force and effect as the original instrument. Code of Civil Procedure Section 1951.

When such an instrument is not properly recorded, Civil Code Section 1214 provides that it will be void as against subsequent purchasers or mortgagees who acquire interests in the property in good faith, for value, without notice, and who record their instruments first. The instrument is valid, however, between the parties and purchasers with notice according to the terms of Civil Code Section 1217.

The purpose of this section will be to determine which documents are authorized by the general recording statute. Government Code Section 27280 establishes what instruments may be recorded. It provides that "any instru-

ment or judgment affecting the title or possession of real property may be recorded pursuant to this chapter." The Civil Code Sections 1213 and 1214 provide for the effect of recording or failure to record as stated above. They, however, apply only to "conveyances." It is, therefore, necessary to determine what a "conveyance" consists of for the purpose of these sections of the code. If the document in question meets the requirements of this term it will be authorized to be recorded and when recorded will have the effects discussed above. If it does not meet these requirements the instrument will be treated as if it had never been recorded. See Chapter 7 for a discussion of the effect of recording an unauthorized instrument.

The statutory definition of the term "conveyance" is in Civil Code Section 1215 and is as follows: "Every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered or by which the title to any real property may be affected, except wills." There are, therefore, two basic requirements of a "conveyance":

(1) The document must constitute an "instrument" as defined by the courts.

(2) The document must affect real property in the manner designated by Civil Code Section 1215.

These two requirements will be discussed individually.

The definition of the term "instrument" was established by the court in Hoag v Howard(1) and has been applied consistently by subsequent cases in determining what documents meet the requirements of an "instrument." The definition is: "Some paper signed and delivered by one person to another, transferring THE TITLE TO, or giving a LIEN ON, PROPERTY or giving a right to a debt or duty." There have been many decisions involving the question of whether a particular document is an "instrument" within the meaning of the general recording statute. Some of the important decisions are discussed below. It must be remembered that a document may not be classified as an "instrument" under the general statute, but may still be capable of recordation under a specific statute. In such a situation it will be necessary to refer to that specific statute and the cases interpreting it to determine what the effect of recording and failure to record will be. For example, a special statute involving recording of Mechanics' Liens is provided, a special statute involving Declarations of Homesteads is provided, et cetera. These statutes each provide for the effects of recording or the court decisions have interpreted what the effects would be when an instrument covered by that particular statute is recorded. This will be discussed below in more detail.

The first part of this chapter will discuss which documents are "instruments" under the general recording statute. The second part will discuss the question of whether the "instruments" affect real property.

II. DOCUMENT MUST BE AN "INSTRUMENT"

A. NOTICES OF MECHANICS LIENS (Government Code Section 27322, Code of Civil Procedure Section 1186)

In the case of Rose v Munie,(2) it was held that a Mechanics' Lien was not an "instrument" under the 1850 Registry Act. The Mechanics' Lien Act, however, provided for its recordation, and provided that when recorded the Mechanics' Lien would have priority over claims asserted by subsequent purchasers.(3) The statute at that time did not, however, protect a lien claimant of this type against interests created under prior unrecorded instruments. The result in Rose v Munie, therefore, was that a prior unrecorded mortgagee was given priority over a subsequent mechanics' lien claimant who had properly recorded his instrument.

Another explanation of this result is that the general recording act provides for the protection of subsequent purchasers or mortgagees. It does not protect subsequent creditors. Therefore, it is only a subsequent purchaser or mortgagee who can assert the failure of a prior party to record his instrument. A subsequent creditor, such as a Mechanics' Lien claimant, cannot assert this failure, and therefore, takes subject to the rights under the prior unrecorded instrument. This is in fact a more proper explanation of the situation than the holding that a Mechanics' Lien is not an "instrument."

The present statute providing for Mechanics' Liens was passed in pursuance of authority given the Legislature by Article XX, Section 15 of the California Constitution. This provision guarantees a lien to mechanics, artisans, and laborers upon the property they have worked on. It states: "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

The legislature has provided in Section 1183 of the Code of Civil Procedure that mechanics, materialmen, contractors, subcontractors, et cetera who do work or furnish materials in connection with construction, alteration, et cetera of a building, or other structure, "shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power..." The lien is limited to the amount in the contract, provided the lien claimant has notice of the contract when he performs the work. The contract may be recorded and this given constructive notice to the workers who may not then claim to be without notice of the contract. Section 1183 goes even further and states that filing the contract gives "actual notice" to all persons performing work or furnishing materials.

Although the lien arises when the materials are furnished, it is not enforceable until the lien claim is filed. Section 1187 provides for the

filing of the lien claim. Time and place of Recording such claim are discussed in Chapter 3. It must be filed within a certain time limit or the lien will not be given priority under Section 1186 of the Code of Civil Procedure.(4)

If properly recorded, the Mechanics' Lien has priority over any liens, mortgages, or other encumbrances "which may have attached subsequent to the time when the building, improvement, structure, or work of improvement in connection with which the lien claimant has done his work or furnished his material, was commenced," according to Section 1186.

In addition, the code now protects a Mechanics' Lien claimant against a prior unrecorded instrument. This remedies the situation which the court faced in Rose v Munie. Section 1186 now provides that such a lien is preferred "to any lien, mortgage, deed of trust, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, structure or work of improvement with which the lien claimant has done his work or furnished his material was commenced."

It should be noted that the protection given by the statute relates back to the time when the work on the building was commenced. The notice which arises as the result of recordation of an "instrument" under Civil Code Section 1213 begins when the instrument is properly transcribed and relates back merely to the date of filing the instrument for record. As a result of this distinction a lien claimant is protected against certain instruments recorded before any record is made of the Mechanics' Lien claim.(5) This is one of the defects of the Recording System in that it puts a purchaser or mortgagee on notice of a Mechanics' Lien which may not have been filed at the time the purchaser or mortgagee recorded his instrument. This is one of the off the record matters which a purchaser is put on notice of. It is similar, however, to interests acquired by adverse possession, since it is possible for the subsequent purchaser to make an investigation of the land involved and determine whether a building had been started.(6)

B. WRIT OF ATTACHMENT (Government Code Section 27322; Code of Civil Procedure 542a)

Hoag v Howard,(7) the case which established the definition of an "instrument", held that the lien of an attachment was not within the definition. The court held that the word "instrument" is not used in the code to embrace a writ of any kind issued by a court, or officer, or any authority. In two subsequent cases, People v Fraser(8) and Foorman v Wallace,(9) the court expanded the definition established in Hoag v Howard to mean an "agreement" signed and delivered by one person to another, transferring the title to, or giving a lien on, property or giving a right to a debt or duty. This is better than the terminology "some paper" as used in the Hoag v Howard definition. Defined in the manner of the Fraser and Foorman cases it is clear that a writ of attachment is not an agreement and therefore, should not be classified as an "instrument."

When a copy of the writ of attachment is recorded, there are two re-

sults. Section 542a of the Code of Civil Procedure provides that "The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated."

An attachment lien is generally protected from the time it is filed against subsequent liens, mortgages, and other claims asserted by other parties against the property in question.(10) In this respect there would be generally no difference whether the writ of attachment is termed an "instrument" or not.

There is, however, a difference as to the question of priority between a prior unrecorded instrument and a subsequent writ of attachment. Since an attachment is not protected under Civil Code Section 1214 because it is not an "instrument", a prior unrecorded deed or mortgage or other encumbrance will be given priority over the subsequent attachment lien. This means that a claimant of an attachment lien is protected against subsequent encumbrances recorded or not, but is not protected against prior encumbrances whether recorded or not. This was the holding in Hoag v Howard(11) based on the fact that Civil Code Section 1214 which is protection to subsequent purchasers and mortgagees only protects persons who claim under an "instrument." A writ of attachment is not an instrument and therefore, a person claiming under it is not protected under Civil Code Section 1214.

A better analysis of the problem, however, would be to hold that Civil Code Section 1214 protects only subsequent purchasers or mortgagees who comply with its terms. It does not apply to a subsequent creditor, which a claimant under a writ of attachment would be.

A claimant under an "instrument" which meets the requirements of the above definition would be protected in a situation like this against a prior unrecorded instrument, provided he complied with the requirements of the Civil Code Section 1214.

Another difference is found in the effect of failure to record. When an "instrument" as defined above by Hoag v Howard(12) is not recorded it remains valid as between the parties. It is merely ineffective against certain third parties. When a writ of attachment is not recorded no lien exists. The Code of Civil Procedure Section 542a requires the writ to be recorded before any rights will be created under it. "The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ..."

C. JUDGMENT LIEN (Government Code Sections 27322, 27326, Code of Civil Procedure Section 674)

The term "instrument" is used in Civil Code Section 1107 in the same manner as it is used in the general recording statute. This section states: "Every grant of an estate in real property is conclusive against the grantor,

also against everyone subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded."

This code section can be illustrated as follows:

(1) O conveys his interest in Blackacre to X, who fails to record.

(2) O subsequently conveys to Y, by means of a proper "instrument" and Y records before X records.

Under Civil Code Section 1107, Y would be given priority over X who was prior in time, but subsequent in recording.

This is the same result that would be reached by the application of Civil Code Section 1214, which protects subsequent purchasers against prior parties claiming under an unrecorded instrument. Civil Code Section 1214 is broader than Civil Code Section 1107 since it refers to "conveyances" while Civil Code Section 1107 applies merely to "grants" of real property. In addition, Civil Code Section 1107 states subsequent encumbrancers are protected, but by court decisions it has been held that only persons claiming under an "instrument" will be protected. Therefore, in actual practice, Civil Code Sections 1214 and 1107 accomplish much the same purpose and have been interpreted in the same way.

In the case of Wolfe v Langford,(13) the court stated that a judgment is not an "instrument" within the meaning of the word as used in Civil Code Section 1107. Therefore, a judgment creditor was not protected against a prior unrecorded deed. The same result would be reached under Civil Code Section 1214, since the term "instrument" is defined in the same manner for the purpose of both these sections.

A better analysis of the situation is given in the case of Bank of Utah v Petaluma S.B.(14) in which there was a question of priority between a judgment lien and a prior unrecorded mortgage. The court in this case held that a judgment creditor is not a bona fide purchaser or mortgagee under Civil Code Section 1214 and, therefore, is not protected against a prior unrecorded mortgage. Civil Code Section 1214 applies only to protect subsequent bona fide purchasers or mortgagees who record first. It is not intended to protect subsequent creditors, whether they be judgment creditors or not.

Section 674 of the Code of Civil Procedure provides for the recording of a judgment and the creation of a judgment lien. "An abstract of the judgment or decree of any court of this State, including a judgment of a court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at

the time, or which he may afterwards and before the lien expires, acquires."

According to judicial decision, when the abstract of judgment is recorded it operates as constructive notice to subsequent parties. Therefore, the effect of recording a judgment is the same as the effect of recording an "instrument".(15)

There is a difference in result, however, as illustrated by the Wolfe case discussed above. When an authorized "instrument" is recorded it is protected against prior unrecorded instruments. When a judgment is recorded it is not protected against prior unrecorded instruments.

There is also a difference in the results of failure to record. When an "instrument" is not recorded it does not affect the validity between the parties to the instrument. It may still constitute a valid lien or encumbrance. When a judgment is not recorded, it does not constitute any lien on the property of the debtor.

It should be noted that this discussion does not involve judgments affecting the title to the real property in question. These judgments are discussed under the heading "Lis Pendens." This discussion refers to all other types of judgments, however.

D. HOMESTEADS (Civil Code Sections 1237-1265a; 1266-1269)

The rules pertaining to Homesteads are found in the code sections cited above. The rules which involve "conveyances" generally do not apply to Homesteads. The courts have been very strict in holding that only the statutes which specifically cover Homesteads will be applied in determining the respective rights of parties in Homestead property.(16)

Civil Code Section 1241 determines what instruments may have priority over a declaration of homestead and what liens and encumbrances such homestead property would be subject to. The section provides: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises.

2. On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendor's liens upon the premises.

3. On debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant.

4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record."

In the case of Ontario St. Bk. v Gerry(17) the court refused to listen

to the argument that the wife was not a subsequent bona fide purchaser and that, therefore, her homestead property would be subject to a prior unrecorded mortgage. The court held that the homestead property could only be subjected to a prior recorded mortgage. In effect, the court held that Homestead property is not controlled by Civil Code Sections 1213, 1214, 1215 in any manner. The inference from the case is that a Declaration of Homestead is not the type of "instrument" contemplated by the general recording statute.

A Declaration of Homestead may be filed by the head of a family, or by any other person, but the value of the property which may be Homesteaded varies depending on whether it is the head of the family who is homesteading or some other person. The effect of filing a Declaration of Homestead is to constitute the property a "Homestead", from the date of filing. Recordation is a condition precedent to the creation of a Homestead.(18) This property will then be exempt from all execution or forced sales with the exception of those situations enumerated by Civil Code Section 1241.(19)

There is authority that the record of a Declaration of Homestead is notice to all subsequent parties dealing with that property, including creditors. They will, therefore, be bound by the rules and statutes applicable to Homestead property. For example, the Homestead property may only be encumbered if the instrument is executed and acknowledged by both husband and wife and subsequent parties dealing with the property take subject to this requirement.(20) If it is not complied with, the subsequent purchaser must suffer the consequences.

There is authority contra, however, stating that there is no provision in the law making the record of a Declaration of Homestead notice to anyone and the provision requiring recordation is insufficient to give notice to anyone. However, it is held that notice is unimportant. Recordation of the Declaration causes the property to become "Homestead" property and therefore, subject to the provisions relating to Homesteads. There is no necessity for discussing notice from the record.(21) This is similar to cases in which the courts discuss constructive notice when the problem of notice is not involved. For example, those cases which could be disposed of by a statement that a prior purchaser recorded and preserved his common law priority. Here, the homeowner, when he recorded, created a "Homestead." Notice need not be discussed since it is a Homestead as to subsequent parties by the mere act of filing.

An important situation in which Homesteads differ from "instruments" which are authorized by the general recording statute is as follows. If a subsequent purchaser obtains an interest in real property with notice of a prior unrecorded instrument, he will take subject thereto. This is to avoid the perpetration of frauds. According to the case of Lee v Murphy,(22) a party who files a Declaration of Homestead with actual knowledge of the existence of a prior unrecorded mortgage will not be subjected to that mortgage. The basis for this is that only prior recorded mortgages can be foreclosed against homestead property under Civil Code Section 1241. There is no statutory provision pertaining to prior unrecorded mortgages of which the

homestead claimant has notice.

Special provisions are contained in the Civil Code for the abandonment or encumbrance of homestead property.

Civil Code Section 1243 provides: "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

1. By the husband and wife, jointly or by separate instruments, if the claimant is married;

2. By the claimant, if unmarried."

Civil Code Section 1242 provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife."

Civil Code Section 1244 provides: "A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded."

B. CERTIFICATES OF SALE OF REAL PROPERTY UNDER EXECUTION (Code of Civil Procedure Section 700a)

Under the 1850 Civil Practice Act,(23) adopted April 22, 1850, a sale on Execution was absolute, and no period of redemption was permitted. A sheriff's deed was immediately executed after the sale as provided in the Practice Act.(24) This being an absolute conveyance was recorded under the 1850 recording statute and the normal effects of recording followed.

The Practice Act was repealed in 1851 and a new one substituted which provided for a period of redemption.(25) The provision was Section 229 of the Practice Act and read as follows:

"Upon a sale of real property, when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases, the real property shall be subject to redemption, as provided in this chapter. The officer shall give to the purchaser a certificate of sale containing

1st. A particular description of the real property sold;

2d. The price bid for each distinct lot or parcel;

3d. The whole price paid;

4th. When subject to redemption, it shall be so stated, a duplicate of which certificate shall be filed by the officer with the Recorder of the County."

The early case of Page v Rogers(26) held that when a certificate was filed by the Sheriff it operated to give constructive notice to subsequent purchasers. The court felt that this conclusion should be reached regardless of whether the document was considered an "instrument" under the general recording statute or not.

The case of Foorman v Wallace,(27) decided under the codes, concluded that a Sheriff's Certificate of Sale was an "instrument" under the provisions of Civil Code Section 1107. The result was, therefore, that the holder of such a certificate would be protected against a prior unrecorded "conveyance" of the property.

The court in the Foorman case in arriving at this conclusion stated that a Certificate of Sale is a memorial signed by the sheriff. It is evidence of a sale whereby, subject to right of redemption and possession in the judgment debtor, for the time allowed, the entire equitable title is conditionally vested in the purchaser, subject to be defeated by a redemption, but if not so redeemed, the certificate is evidence of his right to a deed which shall vest in him the legal title which remained in the judgment debtor. The sheriff's certificate to the purchaser is evidence of an equitable interest which the purchaser has in the land and is an "instrument" whereby an interest or title is created.

The court contrasts this with the situation where a writ of attachment or execution is involved since these two do not constitute the memorial of any agreement. Neither of these writs constitute "instruments" under the general recording statute nor under Civil Code Section 1107. This means as seen above, that the claimant under such a writ is not protected against prior unrecorded instruments.

The present code section providing for issuance and filing of Sheriff's Certificates of Sale is Section 700a, Code of Civil Procedure:

> "Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, and file a duplicate thereof for record in the office of the county recorder of the county, which certificate must state the date of the judgment under which the sale was made and the names of the parties thereto, and contain:
>
> 1. A particular description of the real property sold;
>
> 2. The price bid for each distinct lot or parcel;
>
> 3. The whole price paid;
>
> 4. If the property is subject to redemption, the certificate must so declare, and if the redemption can be effected

only in a particular kind of money or currency, that fact must be stated."

Political Code Section 4133 provides for the filing of these certificates. It states:

"The recorder must keep in his office a book, to be called "Certificates of Sales," and record therein all certificates of sales of real estate sold under execution, or under order made in any judicial proceeding. He must also prepare an index thereto, in which, in separate columns, he must enter the names of the plaintiff in the execution, the defendant in the execution, the purchaser at the sale, and the date of the sale."

Government Code Section 27322 lists books which should be kept by the Recorder. It does not mention Certificates of Sale, but has a catch-all provision which states "Such other writings as are required or permitted to be recorded." This provision would apparently involve certificates of sale. In Government Code Section 27323 the Recorder is given permission to include all of the documents in one series of books called "Official Records." It would seem from this provision that Certificates of Sale would not have to be filed in a separate book unless the Recorder so desired.

In Government Code Sections 27232 to 27255 lists of indices required to be kept by the Recorder are contained. Section 27256 states "The recorder shall keep such other indices as are required in the performance of his official duties." This provision would cover Certificates of Sale and the index thereof. However, Section 27257 of the Government Code provides that two indices may be kept in lieu of the indices listed in the code and they shall be labeled "General Index of Grantors" and "General Index of Grantees." It would seem from these provisions that Certificates of Sale would not have to be indexed separately but could be kept in the General Indices.

Government Code Section 27263 requires "When a conveyance is executed by a sheriff, the name of the sheriff and the party charged in the execution shall both be inserted in the index." Government Code Section 27333 provides "All conveyances of real estate, except patents issued by the State as a party, made by any public officer pursuant to law, when recorded shall be alphabetically indexed in the "Index of Grantors," both in the name of the officer making the sale, and in the name of the person owning the property so sold." See Chapter 4 entitled "Manner of Recording" for a discussion of the method in which these instruments are actually copied and indexed.

After the period of redemption has expired, a sheriff's deed is given to the purchaser. This is recorded by the purchaser and is treated in the same manner as any other "conveyance." That is, the normal results of re-

cordation follow. Of course, indexing will be under both the name of the sheriff and the party charged in the execution as well as the purchaser in accordance with Government Code Section 27263.

Section 704 of the Code of Civil Procedure provides:

> "Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale."

F. SPECIAL TYPES OF NOTICES

(1) NOTICE OF APPROPRIATION OF WATER RIGHTS

Civil Code Section 1415 requires that a person desiring to appropriate water must post a notice of this fact and file a copy of it with the county recorder of the county in which it is posted.

The court in DeWolfskill v Smith(28) was faced with the question of whether this notice could be considered an "instrument" or not. If it were held to be an "instrument" it would require an acknowledgment under Civil Code Section 1161 as a prerequisite to recording. If it were held not to be an "instrument" no acknowledgment would be necessary since Civil Code Section 1415 did not require an acknowledgment and the notice would not be subject to the requirements of Civil Code Section 1161.

The court quoted the definition of "instrument" established by Hoag v Howard(29) and concluded that the notice of appropriation of water was not within that definition. Therefore, no acknowledgment would be necessary.

The court then discussed the problem of constructive notice. If this were an "instrument" it would when recorded give constructive notice to subsequent parties under Civil Code Section 1213. Since this notice is not an "instrument" it was argued that no constructive notice should follow. The court, however, conceding that Civil Code Section 1213 was not applicable nevertheless held that recording under Civil Code Section 1415 should result in constructive notice to subsequent parties or there would be no reason for allowing recordation of the notice. The court felt that the purpose of recording was to give notice and held that in spite of the fact that Civil Code Section 1415 did not make provision for constructive notice that it was actually the intent of the legislature that notice be given by the record.

Therefore, in the case of a notice of appropriation of water, the same result was reached regardless of the fact that the notice was not an

"instrument" under Civil Code Section 1213. A different result was reached, however, as to the question of the requirement of an acknowledgment.

The court did not discuss the effect of such filing as against prior parties who had acquired interests in the water before this notice was filed but had failed to record their interests.(30)

(2) NOTICE OF RESCISSION OF A CONTRACT TO SELL REAL PROPERTY

In the case of Dreifus v Marx,(1) the court held that a notice of rescission of such a contract met the requirements of an "instrument" under the general recording statute. The court determined that the document was an "instrument" as defined by Hoag v Howard(2) and in addition, declared that it affected real property.

Therefore, when such a notice was recorded by the vendor, subsequent parties claiming through the purchaser took subject to the terms of that notice and the equity created thereby.

Since such a document is an "instrument" the various benefits of recording will follow.

(1) Protection against subsequent parties who acquire interests and record subsequently.

(2) Prior parties who acquired interests without recording their instruments are not given priority.

(3) Constructive notice of terms of the document will be given to subsequent purchasers from the record preventing them from claiming as bona fide purchasers without notice.

C. LIS PENDENS

The general rule at common law was that a person not party to an action would not be bound by the judgment.(3) An exception was made, however, in the case of a person purchasing land from a party to a pending action concerning that land. The common law doctrine was that such a person was conclusively presumed to have notice of the pending action and, therefore, took subject to the judgment rendered in the action.(4)

The common law has been slightly modified in California to protect bona fide purchasers against actions affecting the land of which they have no notice.

Section 409 of the Code of Civil Procedure provides that the plaintiff in an action affecting the title or right of possession of real property may record at the time of filing the complaint or at any time afterwards, a notice of the pendency of the action. The statute then provides

that "From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."(5)

This section also provides that the defendant, at the time of filing his answer, when affirmative relief is sought in the answer, or at any time afterwards, may record a notice of the pendency of the action. This will then give constructive notice to subsequent parties.

The statute means that if a person interested in purchasing real property wants to know the status of the title, he must check the grantor index to see if his grantor has been involved in litigation regarding this piece of real property.

The Lis Pendens when filed by the plaintiff will be binding on a purchaser who takes from the defendant. It will also be binding on a purchaser from the plaintiff if the defendant wins the law suit. It will not be binding on a purchaser from the plaintiff, however, if the defendant sought affirmative action in his answer and judgment was in favor of the defendant and the only Lis Pendens was filed by the plaintiff. It would be necessary for the defendant to file a Lis Pendens in that case in order to constitute constructive notice to subsequent purchasers from the plaintiff.

The discussion so far involves the effect of filing a Lis Pendens as against a subsequent purchaser or encumbrancer. There is a more serious problem involved in the effect of filing a Lis Pendens as against prior parties who have failed to record their instruments.

As noted above, if a document constitutes an "instrument" under the definition in the case of Hoag v Howard, the holder of such "instrument" will be protected against prior parties who have failed to record under the terms of Civil Code Section 1214.

The court in Warnock v Harlow(6) concluded that a notice of Lis Pendens did not constitute an "instrument" for the purposes of the general recording statute. Therefore, the purchaser from the party to the action who had filed the Lis Pendens would, nevertheless, be subject to any prior encumbrances against the property which had not been recorded.

This is the situation in which a difference results from recording under the general recording statute or recording under the Lis Pendens statute.

To remedy this situation, the legislature in 1895(7) added a provision to Civil Code Section 1214 which states "every conveyance of real property ...is void...as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

This means that a subsequent purchaser from the plaintiff or defendant will be protected against a conveyance of that property made prior to the filing of the notice of Lis Pendens by the plaintiff or defendant as the case may be.

There are several problems presented when there is actual knowledge of certain matters.

(1) The first situation occurs where a Lis Pendens is not filed, but a subsequent purchaser from a party to the law suit has actual notice of the pendency of the action. The court in Sharp v Lumley,(8) a case involving such a situation, held that the purchaser will take subject to the judgment rendered in the action since he had actual notice of the pendency of the action. The court in the Sharp case stated this doctrine as follows:

> "It does not appear that a notice of lis pendens was in fact filed. But the object of filing such a notice, is, to afford constructive notice of the pendency of the action. This is the only effect indicated by the statute. (Pr. Act, Sec. 27). The object being to afford notice, actual notice must certainly be as effectual as constructive notice under the statute. We can perceive no good reason why a party taking an interest in a tract of land pending a proceeding to foreclose a mortgage upon it, with actual notice of the action, should not be bound by the judgment, although no notice of lis pendens had been filed. We think it is, and so hold the law to be."

The same result is reached if the purchaser has knowledge of facts sufficient to put him on inquiry as to the existence of a law suit affecting the property he is interested in purchasing.

This is, therefore, another situation where the result is the same whether recordation is under authority of the Lis Pendens statute or the general recording statute.

(2) The second problem in connection with actual notice occurs where an unrecorded conveyance is executed and subsequently a notice of Lis Pendens is filed by a party to an action who has actual notice of the prior unrecorded conveyance. By a literal construction of Civil Code Section 1214, the prior conveyance would be void against the party to the action who filed the Lis Pendens with actual notice of the conveyance. Civil Code Section 1217 would not be available in this case since it is applicable only to persons claiming under "instruments." It states: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." However, it is generally held, in such a situation that the grantee will not be bound by the judgment unless he is made a party to the action.(9) This is, of course, the only fair result that could be reached to avoid fraud. An exception is made in the case of mortgage foreclosures under Section 726 of the Code of Civil Procedure.

This states:

> "No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action."

(3) The final problem and the one that has not been completely settled in California occurs when the person files the Lis Pendens and later learns of the prior unrecorded instrument but still in time to amend his pleadings and make the grantee under the prior instrument a party to the action.

Moore v Schneider(10) definitely holds that the grantee under the prior unrecorded instrument will take subject to the judgment. Taylor v Chapman(11) does not agree with this conclusion and the writer of a law review article in 25 California Law Review at page 480 feels that the grantee should be protected in such a situation against the judgment.

It should be noted, however, that if the plaintiff in the action who filed the Lis Pendens receives a judgment in his favor and subsequently conveys to a bona fide purchaser for value, the purchaser will be protected. The grantee under the prior unrecorded conveyance could only set up his instrument against the plaintiff who filed the Lis Pendens with notice of the prior unrecorded instrument. He could not set it up against a purchaser from the plaintiff who had no notice of the prior unrecorded instrument.(12)

There are various other problems connected with the doctrine of Lis Pendens, but the above discussion is sufficient for the purposes of this paper.

The discussion so far in this section has involved the notice of the pendency of an action affecting title to the particular real property. When the judgment is rendered which affects the title to real property that is also an instrument which is proper to record. It is not, however, an "instrument" as defined in Hoag v Howard, since it is not the memorial of an agreement. This problem was discussed above in regard to other types of judgments. There are special provisions permitting such judgments affecting real property to be recorded and provisions which state the consequences of such recordation. Government Code Section 27280 provides "Any instrument or judgment affecting the title to or possession of real property may be recorded pursuant to this chapter." In the Code of Civil Procedure provision is made for the effect of filing judgments and this would include judgments affecting title or possession of real property. It states:

"An abstract of the judgment or decree of any court of this state, including a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk or justice of the court where such judgment or decree was rendered may be recorded with the recorder or any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire."

When such a judgment has been recorded, the record operates as constructive notice as was discussed in the section above on Judgments.

Government Code Section 27322 authorizes the recorder to record "Transcripts of judgments, which by law are made liens upon real estate in this State." This would include judgments affecting title or possession of real property. Section 27322 also authorizes the recorder to record "Certified copies of decrees and judgments of courts of record; ..." This again would include judgments affecting title or possession of real property. Section 27326 provides for the effect of filing such certified copies. It states:

"The recorder shall file and record in the record of deeds, grants, and transfers, certified copies of final judgments or decrees partitioning or affecting the title or possession of real property, any part of which is situated in his county. From the time of filing with the recorder for record, the certified copy of the judgment or decree imparts notice to all persons of its contents, and any subsequent purchaser, mortgagee, and lienholder purchases and takes with the same notice and effect as if the copy of the decree were a duly recorded deed, grant, or transfer."

If an instrument is acquired before Lis Pendens is filed and is not recorded until after Lis Pendens is filed the party claiming under such instrument will not be protected against the judgment given in that action affecting the title to the property involved. This is by virtue of Civil Code Section 1214 which states that "a conveyance of real property... is void...as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to record of notice of action."

To be completely protected, a party to an action affecting the title to real property must file a Lis Pendens which will protect him against prior purchasers and will operate as constructive notice until the final judgment is given. If he desires to be protected against subsequent purchasers after that he must record a certified copy of the judgment which will then give constructive notice to subsequent purchasers.

## III. DOCUMENT MUST AFFECT REAL PROPERTY

As discussed above a document must be a "conveyance" within the definition of Civil Code Section 1215 in order to be capable of recordation under the general recording statute. This definition is "Every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to real property may be affected, except wills."

In the former section the word "instrument" was defined and certain documents were discussed which have been held to be within or without the terms of that definition. The purpose of this section will be to discuss documents which have been held to be "conveyances" because they affect real property. There are a few documents which the courts have held not to be "conveyances" since they do not affect real property. These will also be discussed in this chapter.

As mentioned above, some documents which are not "conveyances" under the recording statute either because they are not "instruments" or because they do not "affect real property," may be recorded under various specific statutes and in some instances the same results will be reached as if they had been recorded under the general recording statute.

Civil Code Section 1215 provides for several ways in which an instrument may affect real property.

(1) The instrument may create an interest in real property.

(2) The instrument may alienate an interest in real property.

(3) The instrument may mortgage real property.

(4) The instrument may encumber real property.

(5) The instrument may affect the title to real property.

The following discussion will cover instruments which are classified under these various headings.

### A. INSTRUMENTS BY WHICH ANY ESTATE OR INTEREST IN REAL PROPERTY IS CREATED OR ALIENED

#### (1) DEEDS:

A deed which transfers a present title is clearly within the definition of "conveyance" since it creates and transfers an interest in real property. In the early case of Mesick v Sunderland,(13) decided under the 1850 statute, the court held that a deed which was subject to a condition precedent to the vesting of title was not a present "conveyance" and, therefore, not entitled to be recorded. The court was in fact confused

as to whether the document was a deed subject to condition precedent or merely a contract to convey real property, which under the 1850 statute was not a proper document to record. In a subsequent decision, which reversed Mesick v Sunderland, the court made it clear that a deed subject to a condition precedent was a proper instrument to record although title did not vest until a future date. The court held in this later case, Brannan v Mesick,(14) that the record of such a deed put a subsequent purchaser on constructive notice of whether the condition precedent had been complied with. The normal effects of recording present deeds and deeds subject to condition precedent are as discussed in the introduction to this chapter. The effect of failure to record is also discussed above.

(2) CONVEYANCES BY REFEREE IN PARTITION SUITS:

Such conveyances by referees are transfers of an interest in real property. Section 787 of the Code of Civil Procedure provides specifically for their recordation and the effects thereof. It states:

> "The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action."

There is also a special provision for the filing of a Lis Pendens in a Partition suit. Section 755 of the Code of Civil Procedure states:

> "Immediately after filing the complaint in the superior court, the plaintiff must record in the office of the recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action."

This Lis Pendens is not an "instrument" which is controlled by the general recording statute as discussed in Section C above. The effects of filing or failure to file such a Lis Pendens are as discussed above.

(3) CONTRACTS TO CONVEY:

The early recording statute expressly stated that the term "conveyance" did not embrace executory contracts for the sale or purchase of lands. The case of Mesick v Sunderland(15) interpreted this as meaning that since such a contract was not entitled to recordation, it would not

impart constructive notice to subsequent purchasers if it were accepted by the recorder.

This provision excepting contracts of sale was abolished when the Civil Code was adopted. Although there was an indication in the case of Parkside v MacDonald(15) that even under the code such an instrument should not be recorded, it has definitely been established in Keese v Beardsley(17) that such a document may be recorded. The basis for holding this capable of recordation is that it is an instrument which creates or transfers an equitable interest in real property. Therefore, when a contract to convey is recorded, the benefits of Civil Code Sections 1213, 1214 and 1215 will apply. The vendee will be protected against subsequent purchasers and prior unrecorded instruments. The recording will give constructive notice to subsequent parties of the terms of the contract. Failure to record means that no protection will be given against prior unrecorded instruments and against subsequent purchasers who record first and meet the requirements of good faith, payment of value, and lack of notice as established by Civil Code Section 1214.

Government Code Section 27288 provides for the manner in which a contract to convey should be acknowledged. This can be interpreted as authorizing the recordation of such a contract.

(3a) ASSIGNMENT OF PURCHASER'S INTEREST UNDER CONTRACT TO CONVEY:

It has been intimated that the general recording statute is applicable to the assignment of an interest under a contract to convey,(18) although there has been no square holding on the point. One case, Central Construction Co. v Hartman,(19) has discussed the problem of whether it is necessary for the assignee to give notice to the vendor of the fact of assignment for priority over other assignees, as is required in the case of the assignment of a chose in action. The court held that such an assignment was a transfer of an interest in real property and not merely the transfer of a chose in action. Therefore, it would not be necessary to give notice to the vendor to maintain priority. It would be necessary to record, however, to maintain priority as against subsequent assignees who received an assignment for value, in good faith, and without notice of the prior assignment and who recorded first. It would also be necessary for protection against prior unrecorded instruments. Failure to record would mean that the assignee would not be protected against prior unrecorded instruments and against subsequent bona fide purchasers who recorded first.

Government Code Section 27289 provides for the manner in which such assignment shall be recorded, inferring that when it is properly recorded, the normal effects of recording will follow. This section states as follows:

> "An assignment of any agreement for sale,...shall not impart any notice and shall not be recorded unless the original instrument is recorded and the assignment contains a reference to the correct

book and page where the original instrument is recorded, or to the date the original document was recorded and the recorder's document number, or if the original instrument and the assignment are presented for recordation concurrently."

(4) ASSIGNMENT OF UNDIVIDED INTEREST IN OIL RIGHTS:

There are two basic types of interests in oil rights. First, a right to drill for oil, which is considered an incorporeal hereditament and therefore, an interest in real property. This has been termed a profit a prendre. There are some decisions which consider it as a conveyance of the oil in place, but the California courts prefer to consider it as merely the transfer of a profit. The second type of interest in oil is a royalty interest in oil that is produced. This again is considered to be an interest in land in the form of rent. When it is an interest in future royalties it is an interest in future rent and is another form of incorporeal hereditament or interest in land. When the interest in royalties is without restriction as to oil from any particular lease and is indefinite it is treated as a profit a prendre the same as the right to drill the oil.

These various forms were clearly distinguished in the case of Callahan v Martin(20) which involved the assignment of the royalty interests. The court after holding that the interests created by the royalty agreement and the lease to drill for oil were interests in land and therefore, could be recorded, discussed the recording of an assignment of either. The court concluded that such an assignment is a transfer of real property and when recorded will impart constructive notice to a subsequent grantee of the fee that the assignee has an interest in the oil rights. Although the case actually involved the assignment of a royalty interest, the same reasoning would apply to the assignment of a right to drill for oil.

The effect of recording the assignment of royalties is to protect the assignee against subsequent purchasers of the fee and against prior unrecorded instruments involving the property. Although the courts discuss constructive notice it is again sufficient to say that the assignee by recording merely maintains his common law priority.

(5) LEASES:

A lease creates an interest in real property, and is, therefore, a "conveyance" within the meaning of the term as used in the recording statute. Such an instrument when recorded gives constructive notice to subsequent purchasers of its contents under the provisions of Civil Code Section 1213. The lessee is protected against prior unrecorded instruments provided he obtained the lease in good faith, without notice of the prior instruments, paid value, and recorded his instrument.

Failure to record a lease makes it void as against subsequent purchasers or mortgagees who qualify under Civil Code Section 1214.(21) In addition, the lessee will not be protected against prior unrecorded instruments.

Under the 1850 statute on Conveyances a lease for a term not exceeding a year was not a "conveyance."(22) Therefore, it was not an instrument that could be recorded and if such a short term lease were recorded, the benefits of the recording statute did not apply. The present statute providing for constructive notice (Civil Code Section 1213) makes no such exception and neither does Civil Code Section 1215 which defines a "conveyance." However, Civil Code Section 1214 indicates that its terms do not apply to a lease of less than a year. It would seem from a literal interpretation of this section that failure to record such a lease would not affect its validity as to subsequent bona fide purchasers, even if they record.

(6) OPTIONS:

There appears to be a conflict in the California cases as to whether an option to purchase real property creates an interest in the optionee that is an interest in real property. Some courts treat it merely as a contract right, while others intimate that it is an equitable interest in the land.

Whether it is an interest in land or not, however, it is apparently a proper instrument to record under the general recording statute, since Government Code Section 27288 provides for the manner of acknowledgment of an option agreement presumably as a prerequisite to recordation. Such options will, therefore, be protected against subsequent purchasers and against prior unrecorded instruments if the options are properly recorded.

It has been held that a lease of land containing a provision that the lessee could renew the lease at the expiration of his term is a "conveyance" within the definition of Civil Code Section 1215.(23)

It has also been held that a lease of land for a term of five years, with an option to either party to terminate the lease upon 30 days notice in writing is a "conveyance" within the definition of Civil Code Section 1215.(24)

(7) ASSIGNMENTS OF OPTIONS OR LEASES:

Government Code Section 27289 provides for a special manner of recording assignments of options, leases, agreements for sale, agreements for leases, deposit receipts, commission receipts. It requires that the original instrument be recorded and that the assignment contain a reference to the correct book and page where the original instrument is recorded or to the date the original document was recorded and the recorder's document number. However, this may be dispensed with if the original instrument and assignment are presented for recordation concurrently.

This section does not apply to any assignment made by or contained in any deed of trust, mortgage, or other liens given to secure the payment of

bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations or made by a public utility subject to the provisions of the Public Utilities Act.

The penalty provided by Government Code Section 27289 for failure to comply with these requirements is that the instrument shall not be recorded and shall not impart notice. It can be assumed from this code provision that none of the benefits of recording would follow if these requirements were not complied with. On the other hand, it is inferred from this section that if it is complied with, all the benefits of recording provided by the general recording act would follow which are discussed above.

(8) ASSIGNMENT OF FUTURE RENTS:

Tiffany in his treatise on Real Property(25) states that such an assignment is a transfer of an incorporeal hereditament and, therefore, is entitled to be recorded as any other transfers of interests in land.

The California court in Pomona Mutual Asso. v Smith(26) required such an assignment to be acknowledged, and held that if it is recorded without an acknowledgment no constructive notice will be given by the record to subsequent purchasers. The implication from this decision is that an assignment of future rents is a proper instrument to record under the general recording statute. Therefore, when it is recorded, the various benefits of recordation should follow. If the instrument is not recorded, it should receive no protection under Civil Code Sections 1213 and 1214 against subsequent purchasers who record first and meet the requirements of Civil Code Section 1214 and no protection against prior unrecorded instruments. The record of such instrument should not give constructive notice to subsequent purchasers.

The case of Callahan v Martin discussed above in connection with oil rights and assignments of oil rights discussed the problem of future rents and the assignment thereof and concluded that future rents involve an interest in land and therefore the assignment of them involves the transfer of an interest in land. Therefore, such an instrument should be allowed to be recorded with the various benefits of recording to follow.

(9) ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Government Code Section 27292 provides that "Transfers of property in trust for the benefit of creditors...shall be recorded in the cases specified in the titles on the special relation of debtor and creditor...of the Civil Code."

The Civil Code sections involving such assignments will be discussed below. The first section which provides for an assignment for the benefit of creditors is Civil Code Section 3449 which states as follows:

"An insolvent debtor may in good faith execute an assignment of property in trust for the satisfaction of his creditors, in

conformity to the provisions of this chapter; subject, however, to the provisions of this code relative to trusts and fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specific classes or persons."

Civil Code Section 3458 provides for the formalities of the assignment. It states:

"An assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized in writing, and the transfer by the sheriff must also be in writing, subscribed by the sheriff in his official capacity. Both such assignment and such transfer must be acknowledged, or proved and certified, in the mode prescribed by the chapter on recording transfers of real property, and be recorded as required by sections thirty-four hundred and sixty-three and thirty-four hundred and sixty-four; but recording in one county constitutes a compliance with the following section."

The following section, Civil Code Section 3459 states that "unless the provisions of the last section are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto."

Civil Code Sections 3463 and 3464 referred to in Section 3458 are as follows:

Section 3463: "An assignment for the benefit of creditors must be recorded, and the inventory...filed with the county recorder of the county in which the assignor resided at the date of the assignment; or, if he did not then reside in this state, with the recorder of the county in which his principal place of business was then situated; or, if he had not then a residence or place of business in this state, with the recorder of the county in which the principal part of the assigned property was then situated."

Section 3464: "If an assignment for the benefit of creditors is executed by more than one assignor, it may be recorded, and a copy of the inventory...filed with the recorder of the county in which any of the assignors resided at its date, or in which any of them, not then residing in this state, had then a place of business."

Civil Code Section 3465 then provides that "An assignment for the benefit of creditors is void against creditors of the assignor and against purchasers and encumbrancers in good faith and for value unless it is recorded as provided in this title..."

These various provisions quoted above have been interpreted as meaning

that the assignment is valid between the assignor and assignee and against all creditors assenting to it. It is void only against creditors not assenting thereto and against purchasers and encumbrancers for value and in good faith.(27)

Civil Code Section 3466 provides that:

> "Where an assignment for the benefit of creditors embraces real property, it is subject to the provisions of article four of the chapter on recording transfers, as well as to those of this title."

This is perhaps the most important section on Assignments for the Benefit of Creditors for the purposes of this paper. This section has been construed to mean that an assignment must be recorded in every county where any of the real property is situated in order to be effective against subsequent purchasers or mortgagees. It is sufficient as against creditors if the assignment is recorded where the debtor resides.(28) See Chapter 3 entitled "Time and Place of Recording" for a more thorough discussion of this problem.

B. INSTRUMENTS BY WHICH ANY ESTATE OR INTEREST IN REAL PROPERTY IS MORTGAGED OR ENCUMBERED

(1) MORTGAGES ON REAL PROPERTY:

Under the 1850 statute the term "conveyance" was held to include mortgages.(29)

The present statute defining "conveyances", Civil Code Section 1213 expressly includes mortgages in its definition of a "conveyance". There is, therefore, no question of whether a mortgage is a "conveyance" or not and the normal results of recording under the general recording statute will follow.

Government Code Section 27327 provides for their recordation by the recorder.

In spite of these provisions, however, the legislature has enacted a special section covering mortgages. Government Code Section 27292 states that liens on property by way of mortgage shall be recorded in the cases specified in the chapter of the Civil Code on mortgages. This chapter is Chapter II, Title XIV. Section 2952 of this chapter provides that "mortgages and deeds of trust of real property may be acknowledged or proved, certified and recorded, in like manner and with like effect, as grants thereof:..."

There are special provisions for the recording of various instruments dealing with mortgages. Some of these are as follows:

(a) Assignment of mortgage:

Civil Code Sections 2934 and 2935 provide for the recordation of such an instrument. Civil Code Section 858 provides for the right of the assignee to sell under a power of sale if the assignment is recorded. These provisions are discussed below.

(b) Civil Code Section 2934 provides that "any instrument by which any mortgage or deed of trust of, lien upon or interest in real property..., is subordinated or waived as to priority may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof, to all persons."

(c) Instrument of Defeasance:

Civil Code Section 2950 provides:

"When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible, on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the county recorder of the county where the property is situated."

Civil Code Section 2925 provides, however, that:

"The fact that a transfer was made subject to defeasance or a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument."

(d) Power of Attorney:

Civil Code Section 2933 provides:

"A power of attorney to execute a mortgage, must be in writing, subscribed, acknowledged, or proved, certified, and recorded in like manner as powers of attorney for grants of real property."

This type of instrument is discussed below.

(e) Certificate of Discharge of Mortgage:

Civil Code Section 2940 provides:

"A certificate of the discharge of a mortgage, and the proof

or acknowledgment thereof, must be recorded at length, and a reference made in the minute of the discharge made upon the record of the mortgage to the book and page where the discharge is recorded."

Civil Code Sections 2938-2940 provide for the methods of discharging a mortgage. These sections are discussed in Chapter 4, "Manner of Recording."

Section 675a of the Code of Civil Procedure provides for the method of recording a satisfaction of a mortgage when the property is sold at a foreclosure sale. This also is discussed in Chapter 4, "Manner of Recording."

(f) Fictitious Mortgages:

Civil Code Section 2952 provides for the recordation of fictitious mortgages and the effects thereof. This is discussed in Chapter 4, "Manner of Recording."

(g) Notice of Default - Mortgage:

Civil Code Section 2924 provides that where a mortgagee has a power of sale in the mortgage to be exercised after a breach of the obligation for which the mortgage is a security, such power of sale shall not be exercised (with some exceptions), "until (a) the...mortgagee...shall first file for record, in the office of the recorder of each county wherein the mortgaged...property or some part or parcel thereof is situated, a notice of default..." The statute provides for what information the notice shall contain.

Civil Code Section 2924b gives any person desiring a copy of the notice of default or notice of sale under mortgage the right of filing with the recorder of any county in which any part or parcel of the real property is situated, "a duly acknowledged request for a copy of any such notice of default and of sale." A notation shall then be made by the recorder on the margin of the record of the mortgage giving a reference to the place where the request is recorded.

(2) DEEDS OF TRUST:

A deed of trust is a security transaction in which title to real property is transferred to a trustee to hold as security for the payment of an indebtedness. It differs from a mortgage in the fact that title is transferred in a deed of trust, whereas a mortgage merely gives the mortgagee a lien against real property.

A deed of trust is considered to be a "conveyance" within the definition of Civil Code Section 1215. Therefore, it is subject to the general recording statute and the benefits of recording follow the recordation of

a trust deed.

There are special provisions in the code, however, relating to deeds of trust and providing specifically for their recordation.

Civil Code Section 2952 provides that "mortgages and deeds of trust of real property, may be acknowledged or proved, certified and recorded, in like manner and with like effect, as grants thereof;..."

In addition to this general provision for the recording of trust deeds, there are specific statutes covering matters affecting or related to trust deeds.

(a) Assignment of beneficial interest under trust deed:

Civil Code Section 2934 provides for the recording and effect of recording such assignment. Civil Code Section 2935 covers the extent of the notice given by the record of such an assignment. Civil Code Section 858 covers the right of the assignee to sell under a power of sale. These provisions are discussed below.

(b) Civil Code Section 2934 also provides for recordation of any instrument by which a deed of trust is subordinated or waived as to priority. This provision states that from the time such instrument is filed for record it operates as constructive notice of the contents thereof to all persons.

(c) Fictitious Deeds of Trust:

Civil Code Section 2952 provides for the recordation of "dummy" or fictitious deeds of trust and the effects thereof. These instruments and their recordation are discussed in Chapter 4, "Manner of Recordation."

(d) Civil Code Section 2934a provides for the recordation of an instrument substituting the trustee under a deed of trust. "The trustee under a trust deed upon real property given to secure an obligation to pay money and conferring no duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by all of the beneficiaries under such trust deed, or their successors in interest...From the time the substitution is filed for record, the new trustee shall succeed to the powers, duties, authority and title of the trustee named in the deed of trust."

(e) Notice of Default - Trust Deed:

Under Civil Code Section 2924 when the trustee has a power of sale and the debtor defaults in his payment, the trustee must record a notice of default and election to sell under the power of sale. This is the same

type of notice discussed above under "Notice of Default" when mortgagor defaults. Mortgages and trust deeds are treated in a similar manner in this respect.

Civil Code Section 2924b provides for requests of such notice. These are treated in the same manner as requests for notice of default and sale under power of sale contained in a mortgage. This subject was discussed above under "Notice of Default" in the section on mortgages.

(3) MORTGAGES ON PERSONAL PROPERTY OR CROPS:

These mortgages are discussed below in the section involving instruments which affect personal property.

(4) MORTGAGES ON FIXTURES:

These mortgages are discussed below in the section involving instruments which affect personal property.

(5) AGREEMENT TO ASSUME A MORTGAGE:

Although such an agreement does not create or transfer any interest in real property it seems to be logical to discuss recordation of an assumption agreement in connection with the discussion of different types of mortgages and instruments connected with mortgages.

When real property which has been mortgaged is sold and transferred to a third party by the mortgagor, a problem arises as to whether the third party will be required to pay the debt secured by the mortgage. If the purchaser expressly assumes the mortgage and agrees to pay it, he will be liable for such payment. The statement of agreement to pay is ordinarily contained in the deed to this third party. It has been held, however, that the agreement to assume the mortgage may be contained in a separate instrument rather than in the deed itself.(30)

This instrument containing the assumption agreement may then be recorded under the general recording statute. The court in Weaver v McKay held that since such instrument could be recorded, a certified copy thereof was admissible in evidence.(1) The other benefits of recordation would not be involved in this case, since the assumption agreement is not an encumbrance against the land, but merely a contractual agreement between the vendor and vendee of land which has been formerly mortgaged.

(6) ASSIGNMENT OF MORTGAGE OR BENEFICIAL INTEREST UNDER A DEED OF TRUST

The former section dealt with a transfer of the mortgaged property by the mortgagor. This section deals with the transfer of the debt by the mortgagee or beneficiary, which is secured by either a lien against the property in the case of a mortgage, or by the transfer of title to the

trustes in the case of a trust deed.

The courts have apparently not treated the assignment of a mortgage or interest under a deed of trust as "conveyances" under the general recording statute. Such documents are governed by Civil Code Section 2934 which provides for recordation of assignments of this nature.

The court in Security Mfg. Co. v Delfs(2) interpreted Civil Code Section 2934 as meaning that the record of such an assignment would give constructive notice to subsequent purchasers but would not affect prior parties who had acquired interests under prior unrecorded instruments.

The basis for such a decision is that Civil Code Section 1214 which protects certain subsequent parties against prior unrecorded instruments does not apply to assignments of mortgages. In addition, the court states that there is no provision that recordation should have "like effect" as recordation of grants and there is no provision specifically giving protection to an assignee of a mortgage or interest under a trust deed against prior unrecorded instruments.

Even if the assignment were considered a "conveyance", an assignee would not be protected under Civil Code Section 1214 since it is designed to protect subsequent bona fide purchasers or mortgagees. Under a literal interpretation of this statute an assignee is neither a purchaser nor a mortgagee and therefore, is not entitled to protection.

Civil Code Section 2934 which provides for the recordation of such assignments states:

> "Any assignment of a mortgage and any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons;..."

The following section, Civil Code Section 2935 provides for the extent to which such an assignment will be notice when recorded. It will not be notice to the debtor, his heirs or personal representatives to invalidate any payment made by them to the person holding the note. It would be notice to them if payment were made to a person not holding the note. This section reads as follows:

> "When a mortgage or deed of trust is executed as security for money due or to become due, on a promissory note, bond, or other instrument, designated in the mortgage or deed of trust, the record of the assignment of the mortgage or of the assignment of the beneficial interest under the deed of trust, is not of itself notice to the debtor, his heirs, or personal representatives, so as to invalidate any payment made by them, or any of them, to the person holding such note, bond, or other instrument."

It should also be noted that Civil Code Section 2934 provides that the record gives notice only to subsequent persons by judicial decision and does not give notice to the mortgagor. The only notice to the mortgagor is by implication from Civil Code Section 2935 when he pays a person who does not have the note.

Civil Code Section 858 provides for the right of the assignee to sell when the mortgage or deed of trust contains such a power. The power may be executed by the assignee whenever the assignment is duly acknowledged and recorded. This section reads as follows:

> "Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded."

C. INSTRUMENTS BY WHICH THE TITLE TO REAL PROPERTY MAY BE AFFECTED

(1) DECLARATION OF TRUST:

At common law a prior equitable interest was cut off by a sale to a bona fide purchaser without notice of the prior equitable interest. Recording of an equitable interest is now sufficient to give a subsequent purchaser notice from the record that there is an outstanding equitable interest in some party. This means that a subsequent purchaser who obtains the legal title will not have priority over a prior equitable interest if that equitable interest has been properly recorded, since he is not a bona fide purchaser without notice since he has notice from the record. This is one of the rare instances in which it is necessary to discuss constructive notice from the record in order to protect a prior person. If the subsequent person acquired merely an equitable interest but not legal title, the familiar rule of first in time prevails would apply. It will not apply, however, as between an equitable interest and legal title. In that case it is necessary to rely on the doctrine of constructive notice which prevents the subsequent purchaser of the legal title from claiming as a bona fide purchaser without notice.

The cases of Kellogg v Huffman(3) and Moore v Schneider(4) both indicate by way of dicta that a declaration of trust is within the definition of "conveyance" as used in the general recording statute in California. The benefits of recordation will follow and failure to record means no protection is given to the beneficiary against subsequent bona fide purchasers who meet the requirements of Civil Code Section 1214 nor against prior unrecorded instruments.

(2) RESTRICTIVE AGREEMENTS:

A restrictive agreement is an example of the type of document which cannot be classified as creating an interest in real property, transferring such interest or encumbering real property in the ordinary manner. However, such agreements do affect the title to real property, since they restrict the manner in which the property may be used, the persons who may use property and other matters affecting the property directly.

The courts have been liberal in construing these agreements as "conveyances" which may be recorded under the general recording statute.

These restrictions were originally enforced in equity against subsequent purchasers who had notice. This is another situation similar to declarations of trust in which notice from the record determines priority. There was no common law priority given to such agreements since they were merely equitable and would be cut off by a purchase of the legal title by a subsequent bona fide purchaser. However, the courts now hold that by recording the parties to such an agreement are protecting themselves because the record prevents a subsequent purchaser of the legal title from claiming as a bona fide purchaser without notice. Of course, the rule of first in time prevails will apply as between two successive equitable titles.

Two cases illustrating the modern view are Wayt v Patee(5) and Cornbleth v Allen.(6)

The case of Wayt v Patee, which involved an agreement made between lot owners for restrictions against occupancy by negroes, held that such an agreement was a "conveyance" and required recording for the agreement to be effective against subsequent parties.

The case of Cornbleth v Allen involved an agreement to change restrictions and referred to the original deed which established the restrictions. The court stated "The agreement was an instrument affecting the title to the real property described therein and in the deed to which it referred (sec. 1215, Civ. Code), and its recordation was constructive notice to respondents. (Civ. Code, sec. 1213)."

In addition to protection against subsequent purchasers and mortgagees, the parties to such an agreement would be protected against prior unrecorded instruments. If not recorded, however, there would be neither protection against prior parties or subsequent bona fide purchasers or mortgagees who recorded their instruments first.

IV. MISCELLANEOUS DOCUMENTS NOT CLASSIFIED AS "CONVEYANCES" WHICH REQUIRE RECORDING FOR VARIOUS PURPOSES

A. WILLS:

Civil Code Section 1215 defines a "conveyance" but makes the exception of WILLS. Therefore, a will is not authorized to be recorded under the general recording statute. However, there are provisions involving the re-

cording of wills in specific statutes and these statutes provide for the effects of such recordation.

Government Code Section 27322 provides that the recorder shall record "Wills admitted to probate." The only provision in the Probate Code involving recording of wills in the office of the County Recorder is Probate Code Section 322, which provides as follows:

> "The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless within four years after the devisor's death the instrument containing such devise is duly proved as a will, or written notice of such devise is recorded with the recorder of the county where the land lies."

There is a provision for recording in the minutes of the court. Probate Code Section 332 provides that when a will is admitted to probate it must be recorded in the minutes of the court by the clerk, with the notation "Admitted to probate" and the date.

The meaning of the Section 322 cited above is that a purchaser who buys from an heir in good faith, for value, without notice, acquires a title which will remain inconclusive for four years. If at the end of that period, no record has been filed of the will as required in Probate Code Section 322, his title will become conclusive. As between the devisees and the heir, however, there would be no time limit for probating the will. If the property were distributed on the supposition that the decedent died intestate and a will is then produced, the heir would not be protected if he received property under the decree of distribution, but a purchaser from him in good faith, for value, and without notice, would be protected if the will were not recorded or probated within four years.

There are no provisions covering the purchaser who buys in good faith, for value, without notice, from a devisee under a first will, when a second will is later found which replaces the first one and devises this real property to another devisee.

Probate Code Section 1021 states that when a decree of distribution is final it "is conclusive as to the rights of heirs, devisees and legatees." This does not, however, prevent the probate of a second will, or the production of any will if the first proceedings involved intestacy. There is no limitation on the time in which such will may be probated. It may be probated at any time after the decedent's death, according to Probate Code Section 323. In such a case the new will is probated, but the old proceedings are not reopened.

The devisees under the new will may then bring a suit in equity against the distributees under the first decree of distribution which was based either on probate of another will or on a finding of intestacy.(7)

The theory on which such action is based is that the original distributees are holding the property in trust for the beneficiaries of the new will.

When the property has been transferred by the original distributees under the first will to third parties and then a second will is discovered a more complicated situation is presented. The equitable principle that would be relied on in such a situation would be that a purchaser of the legal title who buys in good faith, for value, and without notice of any prior equities existing in favor of third parties would not take subject thereto. This means that a purchaser from a devisee under the first will is protected if he buys in good faith, for value, and without notice. His title cannot be affected by any devisee under a later will.

However, if the purchaser buys from an heir when there has been a distribution based on a supposed intestacy, he will not be so fully protected. Probate Code Section 322 provides that his title will be subject to inconclusiveness for four years. If a will is probated within four years after the decedent's death, or written notice thereof is recorded within that time, the purchaser will not be protected against a devisee of the will. Otherwise, the purchaser will be protected if he meets the requirements of a bona fide purchaser.

B. PROBATE ORDERS AND DECREES AFFECTING REAL PROPERTY:

Probate Code Section 1222 provides:

> "When an order is made setting apart a homestead, confirming a sale or making distribution of real property, or determining any other matter affecting the title to real property, a certified copy thereof must be recorded in the office of the county recorder of each county in which the land, or any part thereof, lies; and from the time of filing the same for record, notice is imparted to all persons of the contents thereof."

The result of this provision of the code is that a purchaser of real property must check the records of the county recorder's office to find whether any probate orders or decrees have been filed affecting the real property he is interested in purchasing. Also, he must check to see if any written notice of any devise has been recorded in the county recorder's office under Probate Code Section 322. He must then check the minutes of the clerk of the probate court to find whether a will had been admitted to probate involving a devise of this real property.

Some of the types of orders required to be recorded include:

(1) Order to complete contract of sale of real property by a conveyance. Probate Code Section 852.

(2) Order to lease real property. Probate Code Section 842.

(3) Order to give trust deed. Probate Code Section 832.

(4) Order to enter contract of sale or give option to purchase mining claim or property worked as a mine. Probate Code Section 811.

C. POWERS OF ATTORNEY:

The previous discussion has involved instruments which involve an encumbrance on real property or which affect real property in some manner. Powers of attorney in themselves do not affect real property. They merely create an agency relationship between two parties. The types of powers that are important for the purposes of this paper are those which authorize the agent to make "conveyances" of real property. The question of whether they are proper to record or not is partly settled by statute and partly by judicial decisions.

The 1850 statute concerning Conveyances expressly stated that a power of attorney was not a "conveyance" within the meaning of the recording statute.(8) However, Section 27 of the 1850 statute provided for the recording of certain types of powers of attorney, the most important being a power of attorney to convey real estate. The case of Jones v Marks,(9) decided under the 1850 statute, held that this did not authorize the recording of powers of attorney to make wills, leases for a term not exceeding one year, executory contracts for the sale or purchase of lands, and powers of attorney, since these documents were not classified as "conveyances".

When the codes were adopted in 1872, only one provision was made for the recordation of a power of attorney. This provision is Civil Code Section 2933, which states:

> "A power of attorney to execute a mortgage must be in writing, subscribed, acknowledged, or proved, certified, and recorded in like manner as powers of attorney for grants of real property."

Prior to 1947 there was no provision for the recordation of powers of attorney for grants of real property. In 1947 there was added Government Code Section 27322, providing for the recording of powers of attorney to convey real property.

Before this section was added, it was held that a power of attorney to execute an instrument other than a mortgage was not authorized to be recorded since it did not constitute a "conveyance" under Civil Code Section 1215 and there was no specific provision covering such powers of attorney.(10)

Before Government Code Section 27322 was added it was held that a

power to release a mortgage was not to be recorded, since it was neither a "conveyance" nor a power to execute a mortgage.(11) At the present time it would probably be treated as a power of attorney to "convey" since the term "convey" includes any instrument which may affect title to real property. A release of a mortgage does affect the title to real property and, therefore, a power of attorney to release a mortgage would be a power of attorney to convey.(12)

The effects of recording a power of attorney are as follows. The record will be notice to subsequent purchasers of the extent of the attorney's authority. For example, if the power merely gives him authority to lease but not to sell real property, a subsequent purchaser will be charged with notice that the attorney had no authority to sell. If there is then a conveyance by that attorney the subsequent purchaser would be on notice of the fact that the attorney was unauthorized to transfer title to the property and that therefore, there is a defect in the title which the purchaser is acquiring.

In addition, the power of attorney may be admitted in evidence without further proof of authenticity if it has been properly recorded. This was held in the case of Jones v Marks, discussed above.

When a power of attorney is not recorded, it will not affect the validity of the power as between the parties to it.(13) There is a question, however, as to whether third parties will be treated as having notice of the existence of the power if the conveyance made by virtue of the power is recorded, but the power of attorney is not recorded. Some courts have held in states other than California, that a subsequent purchaser who checks the record will be put on inquiry when he discovers a conveyance made by an attorney and will have to investigate to discover whether the attorney in fact was authorized under a power of attorney even though the power was unrecorded.(14) This would seem a logical conclusion although the California courts have not decided this specific question. It would seem that the subsequent purchaser would be required to investigate every conveyance made by an agent to determine whether the agent was properly authorized or not and he, therefore, should be held to have notice of anything he would have discovered by a reasonable investigation.

A revocation of a power of attorney is required to be recorded if the instrument creating the power has been recorded as required by the code. Failure to record means that the power of attorney is not revoked as to third parties. Civil Code Section 1216 states as follows:

> "No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded, in the same office in which the instrument containing the power was recorded."

D. TAX LIENS:

Government Code Section 27330 provides for the filing of notices of liens for federal taxes. It states:

> "Notices of liens for internal revenue taxes payable to the United States and certificates discharging such liens may be filed in the office of the county recorder of the county within which the property subject to the lien is situated."

Section 27331 provides for a special federal lien tax index to be kept and a special book for the original notices.

Government Code Section 27332 provides for a special method of recording the certificates of discharge of any tax lien. These books are discussed in Chapter 3, "Manner of Recording."

In addition to notices and certificates involving federal tax liens there are provisions in the California Revenue and Taxation Code providing for recording of certificates of taxes not paid to the State of California. Section 11495 provides for the filing of these certificates and the creation of a lien against real property when they are recorded.

There are various other provisions in the Revenue and Taxation Code covering recording of tax deeds, Lis Pendens in actions involving tax deeds, records of conveyances to the state, and other tax matters. A brief reference here to these records is sufficient. It is important, however, to remember that some records involving taxes and assessments will not be found in the County Recorder's office and will necessitate a check of records in various other offices, when a person is interested in purchasing real property.

E. MARRIAGE SETTLEMENT CONTRACTS:

Sections 178, 179, 180 of the Civil Code provide for the formalities required for such marriage settlement contracts.

Section 178: "All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved."

Section 179: "When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract."

Section 180: "The recording or non-recording of such contract has a like effect as the recording or non-recording of a grant of real property."

F. ORDER OF CONDEMNATION:

Section 1253 of the Code of Civil Procedure provides:

"When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified."

G. ORDER OF RELEASE OR DISCHARGE OF ATTACHMENT:

Section 559 of the Code of Civil Procedure provides

"...whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner."

Section 560 provides for the method in which the attachment should be released and the release recorded. These matters are discussed in Chapter 4, "Manner of Recording."

H. REDEMPTION CERTIFICATE:

Section 703 of the Code of Civil Procedure provides for the recording of certificates of redemption given by the person to whom the debtor pays the money to redeem the property sold under execution sale by the sheriff. This section provides:

"Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale."

I. SATISFACTION OF JUDGMENT:

Section 675 of the Code of Civil Procedure provides for the manner of satisfaction of a judgment and for the manner in which the satisfaction may be entered and recorded.

When the abstract of judgment has been recorded, the manner of recording the satisfaction is as follows.

Section 675 mentioned above provides:

"Whenever an abstract of the judgment has been recorded with the recorder of any county, satisfaction thereof made in the manner of an acknowledgment of a conveyance of real property may be recorded, or an entry thereof may be made in the margin of the recorder's records, signed by the judgment creditor or assignee of record or by the attorney, unless a revocation of his authority is recorded. Said signature to the marginal release must be signed in the presence of the recorder who must certify to same as provided in section 2938 of the Civil Code for satisfaction of a mortgage."

J. Government Code Section 27322 which provides for the documents which the recorder shall record, includes:

(1) "Notices of preemption claims."

(2) "Certified copies of any petition, with the schedules omitted, filed in, and certified copies of any order or decree made or entered in any proceeding under the National Bankruptcy Act."

K. CERTIFIED COPIES:

Civil Code Sections 1213 and 1218 provide for the recording of certified copies of an instrument which has been recorded in a different county. A certified copy of the record may also be recorded in a different county. The record of the certified copy will have the same force and effect as if it was the original instrument.

Recording of certified copies is discussed further in Chapter 3, "Time and Place of Recording."

In certain cases, certified copies are recorded rather than the original instrument. For example, Government Code Section 27326 provides for the recordation of certified copies of final judgments or decrees affecting the title or possession of real property.

L. LOST OR DESTROYED INSTRUMENTS:

Government Code Section 27329 provides for the recordation of instruments when the record of an instrument has been lost, injured, or destroyed by conflagration or other public calamity.

V. INSTRUMENTS INVOLVING PERSONAL PROPERTY:

The general recording statute applies only to instruments which affect real property. Instruments involving personal property may be required to be recorded under various sections of the codes and provision made for the effect of such recordation. Some of the types of instruments involving personal property authorized by various statutes are as follows:

(1) Mortgages of personal property and crops (CC Sec. 27322, CC Sec. 2963).

(2) Inventory of spouse's personal property (CC Sec. 165-166).

(3) Notice of intended sale, transfer, or assignment, or mortgage of certain personal property. Bulk Sales Act. (CC Sec. 3440).

(4) Conditional sales of livestock and certain other chattels (CC Sec. 2980).

A. CHATTEL MORTGAGES:

Sections 2955-2978 of the Civil Code provide for the execution and recordation of mortgages involving personal property. Section 2963 provides:

> "Except as it is otherwise in this article provided, mortgages of personal property or crops may be acknowledged or proved and certified, and recorded, and when recorded as provided in this article, shall have like effect as the recording of conveyances of real property."

This code section then provides for the recordation of fictitious mortgages in a manner similar to recording of fictitious mortgages on real property.

However, a distinction is made in the effects of failure to record a real property mortgage and a personal property mortgage. When a real property mortgage is not recorded, Civil Code Section 1214 makes it void as to subsequent purchasers and mortgagees who meet the requirements of "bona fide purchasers" and who record first.

Civil Code Section 2957 states that a chattel mortgage is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value unless it is acknowledged, proved and certified, in like manner as grants of real property and recorded.

This means that an unrecorded chattel mortgage is void as against subsequent creditors as well as purchasers, whereas an unrecorded real property mortgage is void as to subsequent purchasers and mortgagees only. An unrecorded chattel mortgage is also void as to prior creditors of the mortgagor according to the terms of the statute.

Since the subject of this paper covers recording of instruments involving real property, the problems of chattel mortgages will not be considered further.

B. CONDITIONAL SALES CONTRACTS:

Generally, these contracts are not required to be recorded in California. There are, however, some contracts involving specific chattels which require recording within a specified period or they will be void as to bona fide purchasers and certain creditors and encumbrancers. These contracts are ones involving live stock and other animate chattels, equipment and machinery used for mining purposes. Civil Code Section 2980 covers this subject.

C. FIXTURES:

A fixture consists of personal property which is attached to real property or which is intended to become a part of real property. It is a hybrid form of property, but is usually classified as real property.

It has been indicated that instruments which involve fixtures such as conditional sales contracts, chattel mortgages, and leases of fixtures are subject to the general recording statute. This means that in order to constitute notice to subsequent purchasers of the land such instruments must be recorded in the same place and manner as grants of real property.(15) It would, therefore, be true that by properly recording such instruments they would be protected by the general recording statutes against subsequent purchasers of the land and against prior unrecorded instruments. This should be the logical result of holding that they need recording to give notice to subsequent purchasers of the land, but the field is still in confusion. There are conflicting views of the question of how far a chattel mortgagee or conditional seller will be protected against a subsequent purchaser of the land because of the recordation of his chattel mortgage or conditional sales contract.(16)

FOOTNOTES to CHAPTER 2: INSTRUMENTS WHICH ARE AUTHORIZED TO BE RECORDED

1. Hoag v Howard, 55 Cal 564.

2. 4 Cal 173.

3. Cal. Stats. 1850, c. 86, p. 211, Secs. 7, 9.

4. People v Moxley, 17 Cal App 466; Sunset Lumber Co. v Bachelder, 167 Cal 512; Raymond Lumber Co. v Moore, 104 Cal App 520; Raymond Lumber Co. v Hombian, 137 Cal App 155.

5. Pacific Mutual Life Ins. Co. v Fisher, 106 Cal 224.

6. See Chapter 2 of Part IV entitled "Defects in the California Recording System" for a discussion of these matters which do not appear on the record.

7. Cited supra, footnote #1.

8. People v Fraser, 23 Cal App 82; this case cites Colton v Swartz, 99 Cal 278 which held that a map is not an "instrument" within the general recording statute. Maps are recorded, however, under various other code sections. Some maps are merely filed with the recorder's office and a special index kept for unrecorded maps.

9. Foorman v Wallace, 75 Cal 552.

10. 3 Cal Jur Attachments Section 78 et seq., p. 490 et seq. Civil Code Section 3057 provides for the lien of an attachment; Civil Code Section 542 involves manner of indexing which is discussed in Chapter 4, "Manner of Recording; Section 542a involves loss of lien which is discussed in Chapter 3, "Time and Place of Recording."

11. Cited supra, footnote #1.

12. Cited supra, footnote #1.

13. 14 Cal App 359.

14. 100 Cal 590.

15. Page v Rogers, 31 Cal 293.

16. Lee v Murphy, 119 Cal 364.

17. 91 Cal 94.

18. Quackenbush v Reed, 102 Cal 493.

19. Lee v Murphy, cited supra, footnote #16.

20. Security Loan Co. v Kauffman, 108 Cal 214.

21. Quackenbush v Reed, cited supra, footnote #18.

22. Cited supra, footnote #16.

23. Cal. Stats. 1850, c. 142, p. 428.

24. Cal. Stats. 1850, c. 142, p. 428, Sec. 207.

25. Cal. Stats. 1851, c. 5, p. 88, Sec. 229.

26. Cited supra, footnote #15.

27. Cited supra, footnote #9.

28. 5 Cal App 175. Civil Code Section 1421 provides for the book to be kept for these notices. See Chapter 4, "Manner of Recording."

29. Cited supra, footnote #1.

30. 42 Cal App 104.

1. Cited supra, footnote #1.

2. 40 Cal App (2) 461.

3. Cited supra, footnote #1.

4. Ogden, M. B., Outline of Land Titles, 1947, p. 600 et seq.

5. See Giles & Co. v Bank of America, 47 Cal App (2) 315 for a discussion of constructive notice from the filing of a notice of Lis Pendens. Code of Civil Procedure Section 749 provides for the filing of a Lis Pendens in an action by an adverse possessor to quiet title. Section 755 provides for filing of Lis Pendens by plaintiff in partition action.

6. 96 Cal 298.

7. Cal. Amend. Stats. 1895, c. 48, p. 50.

8. 34 Cal 611.

9. Moore v Schneider, 196 Cal 380; see 25 California Law Review, p. 480 for discussion of extent to which plaintiff who files Lis Pendens is protected against prior unrecorded instruments.

10. Cited supra, footnote #9.

11. 17 Cal App (2) 31.

12. Ogden, Outline of Land Titles, cited supra, footnote #4, p. 606.

13. 6 Cal 308.

14. 10 Cal 95.

15. Cited supra, footnote #13.

16. 166 Cal 426.

17. 190 Cal 465.

18. Mills v Rossiter, 156 Cal. 167.

19. 7 Cal App (2) 703.

20. 3 Cal (2) 110.

21. Garber v Gianella, 98 Cal 527.

22. 1850 Statute on Conveyances; Cal Stats. 1850, c. 101, p. 249, Sec. 36.

23. Commercial Bank v Pritchard, 126 Cal 600; Dean v Brower, 119 Cal App 412.

24. Ibid.

25. Tiffany, H. T., Real Property, 1939, sec. 1263, vol. 5, p. 17.

26. 18 Cal App (2) 509.

27. Garn v Thorwaldson, 40 Cal App 62; Watkins v Wilhoit, 98 Cal 409.

28. See Chapter 3, Time and Place of Recording, for a discussion of the place of recording an Assignment for the Benefit of Creditors.

29. Call v Hastings, 3 Cal 179.

30. White v Schader, 185 Cal 606.

1. 108 Cal 546.

2. 47 Cal App 599.

3. 137 Cal App 278.

4. 196 Cal 380.

5. 205 Cal 46.

6. 80 Cal App 459.

7. Estate of Mitchell, 115 Cal App 348; Estate of Walker, 160 Cal 547.

8. 1850 Statute on Conveyances, cited supra, footnote #22, section 36.

9. 47 Cal 243.

10. Adams v Hopkins, 144 Cal 19.

11. Ibid.

12. In the case of Adams v Hopkins, Ibid., the court stated, "it was not the power of attorney but the release executed by the attorney that affected the title to real property in this case."

13. Delano v Jacoby, 96 Cal 275; Roper v McFadden, 48 Cal 346.

14. Tiffany, H. T., Real Property, 1939, cited supra, footnote #25, sec. 1263, vol. 5, p. 18; Ogden, M. B., Outline of Land Titles, 1947, Ch. XX, p. 574.

15. Bell v Mortgage Guarantee Co., 109 Cal App 203.

16. See Bell v Mortgage Guarantee Co., cited supra, footnote #15; Elliott v Hudson, 18 Cal App 642 states that a chattel mortgage on fixtures recorded as such, does not give constructive notice to and does not affect the rights of a subsequent purchaser or mortgagee of the realty, as the record of a chattel mortgage is constructive notice only of the encumbrances upon chattels. See Ogden's 1938 edition of Escrow and Land Title Law in California, p. 10 and compare with the 1947 revision of his book, p. 571, in which he discusses later cases in this field.

Chapter 3: TIME AND PLACE OF RECORDING
(By University of Southern California)

I. INTRODUCTION

The benefits of recording under the general recording statute only result when an instrument is properly recorded. The former chapter stressed the requirement that the document which is recorded must be a "conveyance". That is, it must be an "instrument" as defined in the case of Hoag v Howard and it must affect real property, in order to be recorded under the general recording statute. As was discussed above, although a document is not strictly a "conveyance" it may be recorded under a different statute and have the benefits of recording which that particular statute provides for.

This chapter stresses the time within which an "instrument" must be recorded and the effects of failure to record within that time.

Also, it emphasizes the requirement that the "instrument" must be recorded in the proper place in order to have the benefits of the general recording statute.

II. TIME OF RECORDING

The California recording statute does not require a "conveyance" to be recorded within any specified period of time. It may be recorded at any time after its execution. However, until the document is recorded, no protection will be given against certain third parties. The document will be valid as between the parties thereto, even if it is never recorded.

At common law, there was no provision for recording. The instrument which was executed first in time was given protection against subsequent bond fide purchasers claiming under instruments which were executed subsequently. There was no protection against claimants under prior instruments even though the subsequent purchaser had no notice of these prior instruments.

An exception was made when a subsequent purchaser acquired the legal title and the prior purchaser only acquired the equitable title. In that case, the common law gave the subsequent purchaser protection against the prior purchaser provided the subsequent purchaser obtained his title in good faith, for value and without notice of the prior equitable title.

These were the common law rules of priority. The California recording statute has changed these rules to a certain extent. At the present time, under the California statute, priority is dependent upon time of recording generally. There are a few exceptions to this rule which will be considered below. The rules of priority which are applied are as follows:

(1) Between two UNRECORDED instruments:

This situation is not covered by the recording acts. Here, the common law

rule is relied on, and the instrument which is executed first is given priority over any instrument executed subsequently.

(2) Between a RECORDED AND PRIOR UNRECORDED instrument:

Civil Code Section 1214 states:

> "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

This means that the subsequent purchaser will be protected against a prior unrecorded instrument, provided he complied with the terms of Civil Code Section 1214 and purchased in good faith, without notice, for value, and recorded his instrument first.

This statute requires that the subsequent purchaser must duly record his instrument. This means that the record must be proper. If there is any error made in the recording process or any prerequisites not complied with, the purchaser will not be protected.(1) He must also record an "instrument", which is of the type authorized by the general statute. Finally, of course, he must have purchased in good faith, without notice of the former "conveyance", and paid value. If any of these requisites have not been complied with, the purchaser will not be protected against these prior instruments. In addition, he will not be protected himself, against subsequent purchasers who meet the requirements of Civil Code Section 1214. The record of his instrument will not give constructive notice to subsequent purchasers under the terms of Civil Code Section 1213.

If these matters are not complied with, the result will be that the instrument will be treated as if it had never been recorded. The common law rule of first in time will then prevail as between the subsequent purchaser who improperly records and a prior unrecorded instrument. His instrument will also be treated as if unrecorded as against a subsequent bona fide purchaser who properly records.

(3) As between two RECORDED INSTRUMENTS:

This is the situation in which time of recording is so important. The general rule is ordinarily stated that the first to record will have priority over parties who subsequently record. The person who records first may be either a prior purchaser who records later, or a bona fide purchaser who purchases subsequently and records subsequently. In either situation, the first to record will be protected against purchasers who record later and against prior unrecorded instruments.

There is a question as to when an instrument is considered recorded in

order to determine which party has recorded first.

Civil Code Section 1170 states "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record."

Civil Code Section 1213 then states "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees."

If Civil Code Section 1170 were the only statute involved we could say that the instrument is recorded when deposited for record with the proper prerequisites. This would mean that the first party who dropped his instrument in the office and received the first filing number would always be protected against subsequent purchasers regardless of what happened after that in the recording process.

However, Civil Code Section 1213 requires that the instrument be recorded as prescribed by law, before the purchaser can be protected against subsequent parties who record. This means that the instrument must be properly transcribed and indexed by the recorder before any protection can be given to such a purchaser. If there is no error made in transcription or indexing, the purchaser will be protected from the time the instrument is completely recorded. The basis for this is that he is the first to be completely recorded and has, therefore, maintained his common law priority. There is generally no necessity to discuss constructive notice from the record. Proper recording will then require:

(1) Document must be an "instrument".

(2) Prerequisites must be complied with, e.g. acknowledgment or proof and certification.

(3) Document must be properly filed for record.

(4) Document must be properly transcribed and indexed.

If all these are complied with, the purchaser will be protected against subsequent bona fide purchasers and against prior unrecorded instruments. Of course, if the subsequent purchaser is not bona fide, recording will not be necessary to have protection against such purchaser.

There are some situations in which priority of record is not controlling. If a prior deed is recorded after a subsequent deed, between the grantees of these two deeds, the grantee who first records will be given priority if he is a bona fide purchaser even though he took under a subsequent deed. This is in keeping with the California rule that the first party to record properly will be given priority. If, however, the grantee of the purchaser who took under the deed executed subsequently but first recorded records his instrument

he will be put on notice from the record of the deed executed first but which was recorded later. This subsequent purchaser would be put on notice that there was a deed prior in time and therefore, he could not claim as a bona fide purchaser without notice when he purchases and would take subject to the interest of the grantee under the deed prior in time but subsequent in recordation.

However, the purchaser from the grantee under the deed subsequent in time but first in recording, can still prevail by showing his grantor was a bona fide purchaser and he takes whatever title his grantor had which as shown above is a title which is free of the conveyance which was first in time but subsequent in recording.

A discussion of this problem will be found in Chapter 9, entitled "Effect of Recording Instruments not in the Chain of Title."

Another situation in which priority cannot be completely determined by the record is as follows:

A executes a deed to C and later executes a deed to B. The deed to B is intentionally dated first and recorded first. The deed to C although actually first in time is dated later and recorded later than the deed to B. B will in fact be a subsequent purchaser in point of time and will have to prove good faith, payment of value and lack of notice in order to prevail, in addition to recording first. The date raises a presumption that the instrument was executed on that date but this can be rebutted.(2)

If B conveys to another purchaser that purchaser will not be put on notice from the record of the deed to C, since it was recorded later and dated later than the deed to B, his grantor and therefore, is not in his chain of title. Chapter 9, "Effect of Recording Instruments not in the Chain of Title" discussed problems similar to this.

The case of Donald v Beals(3) illustrates the rule that priority depends on the state of the record after the instrument has been copied. The filing dates and numbers which are stamped on the instrument when it is filed are not determinative of priority when errors in copying occur. Two instruments were deposited successively on different dates and the correct date of deposit was endorsed on the instruments as required by Government Code Section 27320. However, when the instruments were copied into the record book, the wrong dates of deposit were shown at the foot of the record. Government Code Section 27320 requires that the recorder shall show at the foot of the record the filing number, the exact time of reception, and the name of the person at whose request it is recorded. The error made by the recorder in Donald v Beals gave record priority to the mortgage which was actually deposited later. The court held that in such a situation, the record would be controlling as to priority. The court held that where there was a conflict between the actual record as it appears in the record book and the constructive record made by the endorsement upon the instrument when it was deposited for record, the latter must give way to the former. The purpose of such a rule as established in Donald v Beals

is to protect subsequent purchasers relying on the record. They will be safe in concluding that the record recites the truth. Any other rule would make the record useless. However, there are a few cases which hold that a subsequent purchaser will be required to investigate to find if an error had been made by the recorder in copying. These are usually cases in which the error is immaterial or there is something in the record giving a reasonable man an indication that an error had occurred.

Finally, there is a situation where the record of the instrument shows what the parties intended as priority. For example, in the case of Phelps v American Mortgage Co.(4) the instruments showed on their face which was to be a first lien. When they were recorded, however, an error was made and the junior lien was recorded first. The record showed this lien as having priority from the date of filing and recording. The court, however, held that a subsequent purchaser could be put on notice of the priority which was proper from reading the record of the instrument since it recited that it was a junior lien. Whenever there is a statement of priority in the instrument itself, that will have precedence over priority resulting from the date of recording endorsed in the record.

There are various documents not classified as "conveyances" which must be recorded within a certain time limit for various purposes. These should be distinguished from the instruments discussed above which were not required to be recorded within any specific time limit. Some of the documents which do require time limits are as follows:

(1) When an action is brought by an adverse possessor, Civil Procedure Code Section 749 requires that he file within ten days after the filing of the complaint a notice of the pendency of the action, in the office of the county recorder of the county where the property is situated. If this is not done, he will not receive the protection which a Lis Pendens gives against purchasers from the defendants.

(2) Code of Civil Procedure Section 755 requires the plaintiff in a partition action to file a Lis Pendens in the office of the recorder of the county or counties in which the property is situated, immediately after filing the complaint in the superior court. Failure to do this means that notice will not be given of the action to purchasers from the other parties.

(3) An attachment lien becomes effective when a copy of the writ is recorded and there is no time limit for this recording. However, the lien may be lost unless execution is levied under the writ within 15 days next following the recording of the attachment in the recorder's office. Section 542a of the Code of Civil Procedure provides for the expiration of the lien at the end of 15 days if the writ is not properly executed.

(4) Mechanics' Liens require various time limits:

As was discussed in Chapter 2, the lien is created immediately upon the furnishing of materials or performing of work on the building.(5) However, such lien cannot be enforced until the claim is filed. This appears to be true as between the parties as well as against third parties. Time of recording a Mechanics' Lien therefore, affects merely the remedy of enforcement, and not the existence of a lien. The time of filing is as follows:

(a) The original contractor must file his claim of lien within 60 days after completion of his contract.

(b) Every other person must file his claim at any time after he has ceased to perform labor, or furnish material and until 30 days after the completion of such work of improvement.

(c) The owner shall within 10 days after the completion of any contract or work of improvement, or within 10 days after there has been a cessation of labor thereon for 30 days, file a notice of completion with the county recorder where the property is situated.

"In case such notice be not so filed, then all persons claiming the benefit of this chapter shall have 90 days within which to file their claims of lien." CCP Section 1187.

(5) Mortgages of Real Property:

Civil Code Section 2937 formerly gave the mortgagee a certain period of time within which to record his mortgage depending on where he lived. During this time he was protected against intervening parties who recorded first. This provision was never enforced to any extent, however, and was repealed by California Code Amendments of 1873-74, page 261.

(6) Chattel Mortgages:

Chattel mortgages are recorded in a manner similar to mortgages of real property. Civil Code Section 2963 provides that recording shall have the same effect as recording of conveyances of real property. However, a difference exists as to creditors. As was discussed in Chapter 2, Civil Code Section 2957 states that a chattel mortgage is void as against creditors of the mortgagor as well as bona fide purchasers and mortgagees who record first. An unrecorded real property mortgage is merely void as against bona fide purchasers and mortgagees.

Time of recording a chattel mortgage is generally only important as to the establishment and maintenance of priorities. It is not necessary to the validity of the mortgage.

> However, in one situation it is necessary to record a chattel mortgage immediately. The law requires immediate recordation in lieu of immediately delivering the chattel, in order that a chattel mortgage may be valid against the creditors of the mortgagor. If a mortgage is withheld beyond a reasonable time ncesssary for its being put on record, it is void as against creditors of the mortgagor, regardless of whether they become creditors before or after its execution.(6)

There are various other instruments which are not valid even as between the parties until recorded. An example of this is a Declaration of Homestead. However, there is no time limit on when these instruments must be recorded. They are merely null and void until recorded.

## III. PLACE OF RECORDING

An instrument affecting real property that is entitled to be recorded under the general recording statute must be recorded in the office of the county recorder of the county in which the real property is situated. Civil Code Section 1169 codifies this requirement in the following manner. "Instruments entitled to be recorded must be recorded by the county recorder of the county in which the real property affected thereby is situated." This means that the instrument or a copy of it must be filed in every county in which part of the land lies. Failure to record in the proper county would mean that none of the benefits of recording would follow. The instrument would be treated as if unrecorded.

After such conveyance has been recorded in the county where the real property is situated, a certified copy of the instrument may be recorded in any other county. It will then have the same effect as if the original instrument had been recorded there.

If the original has been recorded in some county other than the one where the land lies a certified copy of that conveyance may then be recorded in the county where the land lies.

These rules apply with equal force to certified copies of the record of an instrument that has been recorded.

Civil Code Sections 1213 and 1218 provide for the recording of certified copies. These sections are as follows:

> Section 1213: "and a certified copy of any such recorded conveyance may be recorded in any other county and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance and where such original conveyance has been recorded in any county where the property therein mentioned is not situated a certified copy of such recorded conveyance may be recorded in the county where such property is situated with the same force and effect as if the original conveyance had been recorded in such county."

Section 1218: "A certified copy of an instrument affecting the title to real property, once recorded, or a certified copy of the record of such instrument may be recorded in any other county, and, when so recorded, the record thereof has the same force and effect as though it was of the original instrument."

There are very few cases interpreting these provisions since it is generally clear what county is the proper one in which to record an instrument. Three of these cases are sufficiently important, however, to warrant discussion.

In the case of Kennedy v Gloster,(7) a homestead declaration was executed in duplicate and one original was filed in one county and the other filed in another simultaneously, since the land involved was situated in these two counties. The court held this was proper and stated "When an instrument is executed in duplicate, it is in effect but one instrument. Here the declaration was evidently executed in that way that it might more conveniently and promptly be sent to the two county seats for record; and if it had not been executed in duplicate, it clearly could not have been recorded in both counties at the same time..."

In the case of Votypka v Valentine,(8) a piece of homestead property was partly situated in Napa County and partly in Lake County. The major portion of the land was situated in Lake County and the instrument was recorded there. It was never recorded in Napa. To understand this decision, it should be noted that the declaration of homestead must be filed in the county where the land lies in order to create a homestead. The court held in this case that since a substantial portion of the land was situated in Lake County, the homestead was valid as to that part of the land. It was not valid as to the part of the land situated in Napa County, however. The court stated its decision as follows: "The homestead was duly recorded in the county of Lake. So far as this record discloses, the main amount of the lands covered by said homestead declaration are located in the county of Lake. In point of fact, it has not been shown that any substantial or valuable, or not easily divisible, part of said premises is located in Napa County. This being the state of the record, we are constrained to hold that the homestead is valid as to the lands described therein which are situated within the county of Lake, wherein said homestead was duly recorded..."

Green v Green(9) emphasizes the point that the instrument must be recorded in the county in which the land lies at the time of recording. The deed in this case was executed in Pescadero township where the land was situated. At that time this township was part of Santa Cruz county. However, when the deed was recorded, this township had been severed from Santa Cruz county and annexed to San Mateo county. The deed was not recorded until after this annexation and was then recorded in San Mateo county. The court states: "The deed was properly recorded in the county in which the land was situated at the time of recording (Civ. Code, Sec. 1169), and a certified copy of the record was prima facie evidence of the execution of the deed, since it was proved that the original was not in the possession or under the control of the plaintiff."

Special provisions are contained in the codes for the recordation of homesteads, attachments, lis pendens, and other instruments which are not technically "conveyances" under the general recording statute. Many of these sections require recordation in the county where the land lies. For example, some of these include:

(1) Attachments. CCP Section 542

"The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached, with the county recorder of the county wherein said real property is situated;..."

(2) Mechanics' Liens. CCP Section 1187

The contractor and other parties may file their claim of lien "with the county recorder of the county or city and county in which such property or some part thereof is situated." Failure to file means that the lien cannot be enforced.

(3) Lis Pendens. CCP Section 409

Filing of Lis Pendens is "in the office of the recorder of the county in which the property is situated."

(4) Order of Condemnation. CCP Section 1253

This order "must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified."

There are some instruments, however, which may be recorded in counties other than the one in which the land lies. These include:

(1) Assignments for the Benefit of Creditors:

Civil Code Section 3463 provides that such assignments must be recorded in the county of the assignor's residence at the date of the assignment. If the assignor was not a resident, the assignment must be recorded with the recorder of one county where the principal place of business was then situated. If the assignor was not a resident and did not have a principal place of business in the state, the assignment must be recorded with the recorder of the county in which the principal part of the assigned property was then situated.

According to Civil Code Section 3463 if the assignment is made by several assignors, it may be recorded in the county in which any of them resided at the date of the assignment or in which any of them not then residing in this state had a place of business.

Civil Code Section 3466 provides that: "When an assignment for the benefit of creditors embraces real property, it is subject to the provisions of article 4 of the chapter on recording transfers as well as those of this title."(10)

(2) Judgments:

Section 674 of the Code of Civil Procedure provides:

> "An abstract of the judgment or decree of any court of this state, ..., may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire."

This provision shows that a judgment may be recorded in any county. The lien will extend, however, only to real property in the county where the judgment is recorded.

FOOTNOTES to CHAPTER 3: TIME AND PLACE OF RECORDING

1. Cady v Purser, 131 Cal 552. For discussion of the effect of errors in the recording process, see Chapter 8.

2. Ogden, M. B., Outline of Land Titles, 1947, pp 589 and 590.

3. 57 Cal 399.

4. 6 Cal (2) 604.

5. Hammond v Roubian, 137 Cal App 155.

6. National Bank of Bakersfield v Moore, 247 Fed 913; Ruggles v Cannedy, 127 Cal 290.

7. 98 Cal 143.

8. 41 Cal App 74.

9. 103 Cal 108.

10. Watkins v Wilhoit, 4 Cal Unrep 450, subsequent opinion in 104 Cal 395. This case discusses the effect of recording Assignments for the Benefit of Creditors.

Chapter 4: MANNER OF RECORDING
(By University of Southern California)

I. INTRODUCTION

An instrument must be properly recorded in order for the benefits of recording to apply. If it is improperly recorded, generally it will be treated as if it had never been recorded. There are a few situations in which protection will be given even though some error has occurred in the recording process, but it is only in a situation where a subsequent purchaser would not be misled by the error.

Since proper recording is a prime requisite for the benefits of recording it is necessary to discuss the actual recording process in order to understand what proper recording consists of.

II. WHEN IS AN INSTRUMENT RECORDED?

The first problem which is presented is when is an instrument actually "RECORDED"?

Section 1170 of the Civil Code provides: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record."

However, Civil Code Section 1213 requires that the instrument be properly recorded before it will operate as constructive notice to subsequent parties. Proper recording in that statute requires proper filing, indexing, and transcribing. The court in Cady v Purser,(1) construing Sections 1170 and 1213 together, concluded that an instrument is not actually recorded until it has been properly filed, transcribed and indexed. When it has thus been properly recorded, the beneficial effects of recording will follow. The purchaser will then be protected against purchasers who record subsequently.

When the instrument is not properly recorded, due to an error of the recorder in transcribing or indexing, the grantee who filed the instrument for record must suffer the loss. If the instrument is not transcribed and indexed he will not have preserved the common law priority he had and will not be protected against subsequent parties. In addition, the record will not give constructive notice to subsequent parties. This is the way most courts discuss the situation, but it is sufficient to say that the common law priority is not maintained without discussing constructive notice. The basis for the rule is that unless the instrument is put into the proper place and indexed properly, a subsequent purchaser could not find the record. He will only take subject to those instruments which he could reasonably be expected to find.

A special situation arises when the instrument is copied into the wrong book, but properly indexed so that a purchaser checking the index would find out about the instrument and be able to discover it from the

reference contained in the index. This is covered by Government Code Section 27327 which states as follows:

> "Any instrument filed for record in the office of the county recorder of the county where it is entitled to record and which is copied into a book of record other than that designated by law, but which is thereafter indexed in the proper book of indices, imparts notice of its contents to all persons from the date of such indexing, and any subsequent purchaser, mortgagee, lien-holder and encumbrancer purchases and takes with the same notice and effect as if the instrument were copied or recorded in the proper book of record."

Although the statute merely requires indexing in the proper book of indices, it would also be required that the instrument be properly indexed, since that is part of the recording process.(2)

There is a question as to whether a purchaser would be put on notice if the index contained the wrong reference to the book and page where the instrument is recorded. If it were recorded in Volume 5 of the Book of Deeds, page 5, but the index made a reference to Volume 5 of the Book of Deeds, page 10, it would seem that the purchaser could find the instrument by examination of Volume 5 of the Book of Deeds. If the reference were to the wrong book number when there are several books of deeds it would be difficult for the purchaser to check all the books of deeds. It would seem, therefore, that when the courts state that proper indexing is a necessity for proper recording that the reference to the book and page where the instrument is recorded would have to be correct. Any other holding would put a hardship on the purchaser searching the records.

There is, however, an argument that finding a reference of any kind would put a purchaser on inquiry and he would have to make a reasonable investigation and attempt to find the instrument which is indexed, but which contains an inaccurate reference to the book and page where the instrument has been copied.

This problem could arise whether the instrument were copied into the proper book or into the wrong book.

These problems should be distinguished from the situation in which the instrument is copied into the proper book and indexed properly, but an error has occurred in copying. The courts have generally held that the instrument will give constructive notice only of the contents of the instrument as it is copied in the record books. It will not be notice of any provision which has been omitted in copying. If the instrument covers lot #6, but the recorder makes an error and copies it as lot #5, a subsequent purchaser of lot #6 will take free of that instrument, since the record only gave him notice of an instrument which covered lot #5, but not lot #6.

However, if the error is immaterial the purchaser will not be charged with notice of the contents of the instrument as copied. He will then be

charged with notice of the correct statement as it appears in the original document. This is a modern trend developed by the courts as a practical solution to the problem. It does require a purchaser to look behind the record as it appears in the record books in certain instances. This problem is discussed in Chapter 8 more in detail.

## II. THE RECORDING PROCESS

### A. FILING THE INSTRUMENT

The first step in the recording process consists of a proper filing. This requires that the instrument be deposited with an officer authorized to accept such instrument for record and it must be deposited at his office.(3) Delivery at any other place is insufficient.(4) It has been held to be a valid delivery when the instrument was filed after office hours with the proper officer at his office.(5) It is not proper to leave the instrument in the office after office hours without giving it to the proper officer.(6) It is not necessary to deposit the instrument in person. It may be filed by an agent or attorney.(7)

If improperly filed, it would seem that the instrument would not operate as notice even though properly transcribed and indexed. If the instrument were filed with someone not authorized to receive it, the filing would be invalid and the instrument would be treated as if not recorded. The grantee would then be unable to set the instrument up against a subsequent bona fide purchaser who recorded properly without actual notice of this instrument.

### B. ENDORSEMENT

The first duty of the recorder is to endorse the filing number, time of reception of the instrument and the amount of fees on the instrument.(8) This must be done by the proper officer or the instrument will not be properly recorded and the benefits of recording will not accrue.(9)

There is a problem in connection with the filing numbers. These numbers are consecutive and are stamped on the instruments in the order in which they are filed. If an error is later made and the filing number which is copied on the record of the instrument is copied incorrectly, the number as copied into the record books will control. The basis for this is that a purchaser may rely on the record as it appears in the record book when there is a conflict between that and the filing number, which is endorsed on the instrument.(10) If there is an error the grantee under the first instrument will suffer the loss. It would be too much of a burden to force the subsequent purchaser to check on the correctness of the filing number copied into the record books. The priority in that case is determined by the number in the record whether correct or not.

### C. TRANSCRIBING

The recorder has an option of keeping one series of books, in which he copies all instruments, or of keeping separate books for each class of

instrument.(11) If he keeps one series that is called the "official records." Government Code Section 27322 lists the books which the recorder may keep if he prefers keeping separate books for each type of instrument.

In addition to these provisions, there are several code sections which provide for separate books which the recorder may keep if he prefers. These include:

(1) A book entitled "certificates of sales" in which are recorded certificates of sales under execution. Political Code 4133.

(2) Civil Code Section 1421 requires the recorder of each county to keep a book in which he must record the notices of appropriation of water.

(3) Section 1189 of the Code of Civil Procedure requires the recorder to record mechanics' liens in a book kept for that purpose.

It would seem from Government Code Section 27323 that it would not be necessary for the recorder to keep these instruments in separate books in spite of these individual code sections and they could be recorded along with the other instruments in the "official records."

A special book entitled "Record of Patents" must be kept however, according to Government Code Section 27264. This does not seem to be optional according to the code section.

Many instruments are filed with the recorder and left there. They must be kept in a separate place. The Recorder's Office of Los Angeles County keeps these instruments in a special file cabinet. They include the following:

(1) Instruments proved by handwriting. The original must be filed in a special book. Government Code Section 27290.

(2) Original instrument in a foreign language must be kept at the recorder's office and must also be recorded. Government Code Section 27293.

(3) Notices of Internal Revenue tax liens payable to the United States and certificates discharging them must be filed in a special book. (GC Sections 27330, 27331, 27332).

(4) Redemption certificates must be filed with the recorder and kept. Code of Civil Procedure Section 703.

(5) Discharge of attachment. Code of Civil Procedure Section 559 requires a certified copy to be filed with the recorder and kept.

If the recorder uses a separate set of books for each type of instrument it is required that he copy the instrument in the proper book. If he fails to do this, it has been held that the record will fail to operate as constructive notice.(12) The actual effect it has is that the instrument will be treated as if not recorded. None of the benefits of recording will follow. It should not be limited to a statement that the record fails to give constructive notice.

After Cady v Purser had been decided holding that no constructive notice would result if an instrument was copied into the wrong book, Political Code Section 4135 (now Government Code Section 27327) was passed giving the record the effect of constructive notice if the instrument was indexed in the proper book, even though copied into the wrong book of record.

The copying must be by an officer authorized to do this or the record will not operate as constructive notice.(13) If the grantee deposits his instrument, but an improper officer copied it into the record books, the grantee will not be able to claim that his instrument has priority over a subsequent purchaser who had no actual notice of the existence of this instrument.

The instrument must be copied into the record books in a durable manner. Copying in pencil is not sufficient. Pasting a map between the leaves of a book is not satisfactory. Instruments put in in this manner are treated as if not recorded.(14) The person offering them for record must suffer the loss.

The copying of the instrument was formerly done in longhand, which was authorized by the statute. Subsequently, the statute permitted typing. A recent amendment to Government Code Section 27322 provides for the use of photographic processes.(15) This is the method now used by the County Recorder's Office of Los Angeles County. Government Code Section 27230 now allows the recorder to use books which contain printed forms of the documents in general use to save the copying of some provisions which are frequently contained in these instruments. This would not be necessary if photography is used, of course.

At the bottom of the record of the instrument the recorder makes a notation of the filing number, the time of deposit of the instrument, and the name of the person requesting the instrument to be recorded. At the same time he endorses on the instrument the time, book and page in which the instrument has been copied.(16)

D. INDEXING

Again, the recorder is given the option of the type of indices he prefers to keep. He may keep two indices:

(1) A General Index of Grantors.

(2) A General Index of Grantees.(17)

These are the indices that are usually kept.

In the grantor index, the recorder keeps an alphabetical list of all grantors, mortgagors, and other parties who have executed and recorded instruments affecting land which they have an interest in.

In the grantee index, the recorder keeps an alphabetical list of all grantees, mortgagees, and other persons who have acquired interests in real property by recorded instruments.

At the present time, Los Angeles County has a completely alphabetized list of grantees and grantors for each year since 1946. Before 1946 the system was slightly different. A partially alphabetical and partly chronological system was used. The indices were divided into various alphabetical groups such as Hil-Him and all grantees and grantors (depending on which books are involved) whose names began with Hil to Him were put in this section, chronologically. Therefore, to find any conveyances to or by HILL it would be necessary to check through the entire section of Hil to Him in the grantee and grantor books for each year the purchaser is interested in.

The present system has a completely alphabetized list for the period of one year which aids the purchaser in searching.

The recorder may prefer to keep special indices for each type of instrument. If he does this he will have an index of grantors and an index of grantees for deeds; an index of mortgagors and an index of mortgagees for mortgages; and indices for other types of instruments. Provision for these various indices is found in Government Code Sections 27232-27256.

The information which is put in the index is as follows:

(1) Names of the parties to the instrument.
(2) Title of the instrument.
(3) Date of filing.
(4) Reference to book and page where the instrument has been recorded.

There is no provision for the legal description of the property to be inserted in the index. This causes a serious difficulty in title searching. It means that a purchaser who is searching the record title must look at the record of each instrument that his grantor was a party to in order to discover whether it involves the piece of property he is interested in purchasing. This becomes extremely burdensome when he has to check up on all conveyances made by all grantors in the chain of title to this particular piece of property. If the index contained a legal description it would assist the purchaser in searching his title.

The recorder is required to index the instrument as the parties request, but may do it as he pleases if there is no specific request.(18)

There are some special provisions regarding the manner of indexing

which should be mentioned at this point.

Government Code Section 27263 provides that "When a conveyance is executed by a sheriff, the name of the sheriff and the party charged in the execution shall both be inserted in the index. When an instrument is recorded to which an executor, administrator, or trustee is a party, the name of the executor, administrator, or trustee and the name of the testator, or intestate, or party for whom the trust is held, shall be inserted in the index."

Government Code Section 27333 provides: "All conveyances of real estate, except patents issued by the State as a party, made by any public officer pursuant to law, when recorded shall be alphabetically indexed in the "Index of Grantors," both in the name of the officer making the sale, and in the name of the person owning the property so sold."

Government Code Section 27328 may be relied on to obtain indexing under various headings. It states: "Any instrument which is filed for record with the recorder as a deed, deed of trust, mortgage, or chattel mortgage, or which is copied into any book of deeds, deed of trust, mortgages, or chattel mortgages need not be again filed for record or recorded in such office as a different instrument, but the recorder shall index the instrument in any of the indices kept in his office upon the request of the persons recording it and the payment to him of the legal fees for indexing. He shall note at the foot of the actual record where the instrument is transcribed all the indices in which it is indexed....."

Government Code Section 27334 states: "If the name of the person in whom title to real estate is vested is changed from any cause, the recorder shall alphabetically index the conveyance in the "Index of Grantors," both in the name by which title was acquired and the name by which it is conveyed."

Code of Civil Procedure Section 542 provides that when real property is attached which belongs to the defendant but is held by any other person it must be indexed in the following manner: "The recorder must index such attachment when filed, in the names, both of the defendant and of the person by whom the property is held or in whose name it stands of record."

Political Code Section 4133 provides that the recorder may keep a special index for the "certificates of sales" record book. This section states: "He must also prepare an index thereto, in which, in separate columns, he must enter the names of the plaintiff in the execution, the defendant in the execution, the purchaser at the sale, and the date of the sale."

It would seem that these certificates could be recorded in the "official records" and indexed in the General Index if the recorder prefers.

There is a provision, Code of Civil Procedure Section 559, which provides for filing a copy of discharge of attachment. This section requires the

discharges to be indexed in like manner as notices of attachment are indexed. This would seem to require them to be indexed in the General Index if attachments are indexed in that manner.

Section 1189 of the Code of Civil Procedure provides that the record books containing mechanics' liens (if a separate book is kept for them) should be indexed as deeds and other conveyances are required by law to be indexed.

There are, however, some special indices which must be kept in addition to the General Index. These include:

(1) Government Code Section 27331 provides: "When a notice of the tax lien is filed, the recorder shall forthwith enter it in an alphabetical federal lien tax index ...."

Government Code Section 27332 provides for the entering of a discharge of a tax lien in the index on the line where the notice of the discharged lien is entered.

(2) Special indices are kept for the special books that are required. In Los Angeles County, papers which are filed with the recorder and remain there permanently, such as foreign instruments, certificates of redemption, et cetera, are kept in special containers. They are then indexed in a special book entitled "Unrecorded Maps and Miscellaneous Papers."

E. REDELIVERY

When the recording process is completed, the recorder delivers the instrument to the party leaving it for record or upon his order.(19) Of course, if it is the type of instrument that must be filed, it is left permanently with the recorder.

## IV. INSTRUMENTS WHICH MUST BE RECORDED IN A SPECIAL MANNER

### A. FICTITIOUS MORTGAGES AND DEEDS OF TRUST:

An amendment to Civil Code Section 2952, added in 1947, provides for the recordation of "dummy" mortgages and other instruments.(20) These need not be acknowledged or certified, but must note on the face that they are fictitious. These are then recorded in the same manner as other mortgages and deeds of trust and indexed. It must be noted on the record and index that these instruments are fictitious. Later, the mortgages and deeds of trust which are recorded by the parties recording this fictious mortgage may refer to provisions of the dummy instrument which is on file and include them in the instrument which is being recorded without setting forth these provisions in full. The reference must contain a statement of the date the fictitious mortgage or deed of trust was recorded, the recorder's office in which it is recorded, and the book or volume and page or pages of the records in the recorder's office where it is recorded. It must

also contain a statement by paragraph numbers or any other method which will identify it, of the specific provisions of the fictitious mortgage which are being adopted. The statute provides that the instrument including the material incorporated will operate as constructive notice. This provision has reduced the expense connected with recording a series of such instruments.(21)

In 1949 another amendment followed which made it possible to record a fictitious instrument with a provision on the instrument notifying the recorder not to record certain conditions which are in the instrument and appear either on the same or reverse side.(22) This had been the practice before this amendment and was held proper in 13 Ops. Cal. Atty. Gen. 185 (1949). This opinion established that instructions could be given to the recorder to record certain provisions and omit certain other ones and the recorder would be under an obligation to do what the parties requested, provided that the instrument is otherwise entitled to be recorded.

These amendments are discussed in 23 Southern California Law Review at page 35 and the writer points out the advantage of such provisions. He states: "Thus, rather than print such provisions on separate pages in order to supply the debtor with a copy of them, a creditor may now print them on the same paper on which the recorded instrument appears." An example of provisions which would probably be omitted from the record by request of the parties would be a copy of the note which is included on the same paper as the mortgage or deed of trust, but which would not require recordation. By instructing the recorder not to record the note, it would be possible to have it on the same page and it would not be necessary to have a separate copy of it on a different paper for the debtor's copy.

B. DISCHARGES, RELEASES, SATISFACTION OF CERTAIN INSTRUMENTS

(1) Discharge of Mortgage:

Civil Code Section 2938 provides for the manner of discharging a mortgage. "A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the acknowledgment in form substantially as follows: "Signed and acknowledged before me this... day of ..., in the year... AD, Recorder."

Civil Code Section 2939 gives an alternative method of discharge: "A recorded mortgage, if not discharged as provided in the preceding section, must be discharged upon the record by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified as prescribed by the chapter on 'recording transfers,' stating that the mortgage has been paid, satisfied, or discharged. Reference shall be made in said certificate to the book and page where the

mortgage is recorded."

Civil Code Section 2939½ provides for satisfaction of mortgages by foreign executors, administrators and guardians.

Civil Code Section 2940 provides that "A certificate of the discharge of a mortgage, and the proof or acknowledgment thereof, must be recorded at length, and a reference made in the minute of the discharge made upon the record of the mortgage to the book and page where the discharge is recorded."

Whenever a mortgage is foreclosed it is the duty of the sheriff "to enter upon the margin of the county records where such mortgage is recorded, if the same be recorded, a satisfaction of the same." This provision is Section 675a of the Code of Civil Procedure.

(2) Release of Attachment: CCP Section 560.

"An attachment as to any real property may be released by a writing signed by the plaintiff, or his attorney, or the officer who levied the writ, and acknowledged and recorded in the like manner as a grant of real property; and upon the recording of such release, it is the duty of the recorder to note the same on the record of the copy of the writ on records in his office. Such attachment may also be released by an entry in the margin of the record thereof, in the county recorder's office, in the manner provided for the discharge of mortgages under section 2938 of the Civil Code."

(3) Certificate of Redemption: CCP Section 703.

"Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale."

(4) Satisfaction of Judgment: CCP Section 675.

Satisfaction may be made in the margin of the record of the judgment. When an abstract of the judgment has been recorded a satisfaction may be recorded, "or an entry thereof may be made in the margin of the recorder's records, signed by the judgment creditor or assignee of record or by the attorney, unless a revocation of his authority is recorded."

(5) Request for Notice of Default under Mortgage or Deed of Trust: Civil Code Section 2924b.

"Immediately upon the filing for record of such request, the recorder shall enter upon the margin of the record of the deed of trust or mortgage therein referred to a reference to the place where such request is recorded, which reference shall be substantially in the following form:

"Request recorded in Book...page...of... for copy of notice of default and sale."

FOOTNOTES to CHAPTER 4: MANNER OF RECORDING

1. 131 Cal 552.
2. 220 Cal 629.
3. Edwards v Grand, 121 Cal 254.
4. Ibid.
5. Ibid.
6. White Co. v Winton, 41 Cal App 693.
7. Farley v Hopkins, 79 Cal 203.
8. Government Code Section 27320.
9. Smith v Brannon, 13 Cal 107.
10. Donald v Beals, 57 Cal 399.
11. Government Code Section 27323.
12. Cady v Purser, 131 Cal 552.
13. Smith v Brannan, cited supra, footnote #9.
14. Caldwell v Center, 30 Cal 539.
15. Beatty v Hughes (1943) 61 Cal App (2) 489 held photography was not authorized by the statute. This resulted in the amendment to Government Code Section 27322 allowing for "photography or any reproduction process." Cal. Stats. 1947, ch. 550, s. 2.
16. Government Code Sections 27320 and 27321.
17. Government Code Sections 27257-27261 cover the General Indexes and the form in which they are kept.
18. Government Code Sections 27324 and 27325.
19. Government Code Section 27321.
20. Cal. Stats. 1947, ch. 1497.
21. See discussion of this amendment in 23 Southern California Law Review at page 35.
22. Cal. Stats. 1949, ch. 443.

Chapter 5: PREREQUISITES TO RECORDING
(By University of Southern California)

## I. INTRODUCTION

"Instruments" relating to real property which are authorized to be recorded under the general recording statute, Government Code Section 27322, are required to be acknowledged or proved and certified by the officer taking the acknowledgment or proof.

The question of what documents are "instruments" was discussed in a former chapter entitled "Instruments Which are Authorized to be Recorded". A document may be authorized to be recorded under specific statutes other than the general recording statute and whether an acknowledgment would be a necessary prerequisite would depend on the terms of the statute authorizing the recordation of that particular document. Examples of such documents are:

1. Homesteads.

2. Writ of Attachment.

3. Mechanics' Liens.

These documents and their necessary prerequisites will be discussed below.

If the specific statute authorizing recordation does not require an acknowledgment and the document is not qualified as an "instrument" within the definition of Civil Code Section 1215, no acknowledgment will be necessary as a prerequisite to recordation of that instrument.(1)

In addition, there are special code provisions, allowing certain documents to be recorded without any special prerequisites regardless of whether they are "instruments" in the technical sense or not.

It should be noted that certain documents require additional prerequisites, such as consent of the grantee or deposit of the original instrument to be retained by the recorder.

These various matters will now be considered in detail.

### A. PREREQUISITES TO RECORDATION OF "INSTRUMENTS" UNDER THE GENERAL RECORDING STATUTE

Government Code Section 27287 provides for the steps that must be taken prior to the recording of an "instrument" under the general recording statute. This code section states:

"Unless it belongs to the class provided for in either Sections 27280 to 27289, inclusive, or Sections 1202 or 1203, of the Civil Code, or is a fictitious mortgage or deed of trust as provided in Section 2952 of the Civil Code, before a document can be recorded its execution shall be acknowledged by the person executing, or if executed by a corporation, by its president or secretary or other person executing it on behalf of the corporation, or proved by a subscribing witness or as provided in Sections 1198 and 1199 of the Civil Code, and the acknowledgment or proof certified as prescribed by law."

Government Code Section 27288 requires agreements for sale, option agreements, deposit receipts, commission receipts, or affidavits referring to any of these to be acknowledged or proved in the same manner as provided in Government Code Section 27287 by the party who appears by the instrument to be the party whose real property is affected or alienated thereby. This refers only to agreements, options, etc. which affect an interest in real property.

Government Code Section 27289 requires the same preliminary formalities for assignments of agreements for sale, option agreements, agreements for leases, commission receipts or affidavits referring to any of these. This, however, does not pertain to an assignment made by or contained in any deed of trust, mortgage or other liens given to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or made by a public utility subject to the provisions of the Public Utilities Act.

The code sections discussed so far relate merely to documents which are "instruments" within the definition of Civil Code Section 1215.

B. PREREQUISITES TO RECORDATION OF DOCUMENTS UNDER SPECIFIC STATUTES

Various documents which are not classified as "instruments" may nevertheless be authorized to be recorded by specific statutes which provide for certain prerequisites to recordation. Some of these statutes are as follows:

1. Assignment for Benefit of Creditors:

   These must be acknowledged, proved and certified in the same manner as a transfer of real estate. Civil Code Section 3458.

2. Homesteads:

   "In order to select a homestead, the husband...or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record." Civil Code Section 1262.

"Any person other than the head of a family, in the selection of a homestead, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a 'Declaration of homestead.'" Civil Code Section 1266.

3. Encumbrance of Homestead:

"The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." Civil Code Section 1242.

4. Abandonment of Homestead:

"A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

1. By the husband and wife, jointly or by separate instruments, if the claimant is married;

2. By the claimant, if unmarried."
Civil Code Section 1243.

5. Marriage Settlements:

These are required to be executed and acknowledged as grants of real property. Civil Code Section 178.

6. Mechanics' Liens:

No acknowledgment is required, but the lien claimant must file a claim of lien which has been verified by oath of the claimant or some other person. Code of Civil Procedure Section 1187.

C. DOCUMENTS WHICH DO NOT REQUIRE ACKNOWLEDGMENT OR PROOF AND CERTIFICATION

Documents which are authorized by specific statutes which do not mention acknowledgment and which do not meet the requirements of an "instrument" as defined in Civil Code Section 1215 do not need to be acknowledged. An example of such a document is a notice of appropriation of water. This notice is required by Civil Code Section 1415 to be recorded, but no acknowledgment is required. Such a notice is not an "instrument" as required by the definition of Civil Code Section 1215.

Government Code Section 27287 lists certain documents which do not need to be acknowledged before recordation. These include the following:

1. Judgments affecting title to or possession of real property properly authenticated.

2. Notices of location of mining claim may be recorded without acknowledgment, certificate of acknowledgment, or further proof.

3. Letters patent from the United States or from the State, executed and authenticated pursuant to existing law.

4. Governmental leases and certain instruments in regard to them.

5. Fictitious mortgages and deeds of trust.

6. Instruments proved by a judgment of a court.

7. Maps.

These are covered by Government Code Sections 27282-6, Civil Code Section 2952, Civil Code Sections 1202-1203, but are made exceptions to the requirement of acknowledgment in Government Code Section 27287.

D. SPECIAL PREREQUISITES IN ADDITION TO ACKNOWLEDGMENT OR PROOF AND CERTIFICATION

The following documents require special prerequisites:

1. Deeds or grants conveying any interest in or easement upon real estate to a political corporation or governmental agency for public purposes shall not be accepted for recordation without the consent of the grantee evidenced by its resolution of acceptance attached to the deed or grant. Under certain circumstances a certified copy of the resolution conferring authority upon the officer or agent must be attached also. Government Code Section 27281.

2. Instruments in a foreign language shall not be recorded unless a translation of English verified and certified under seal of a court of record is attached to the original instrument. Government Code Section 27293.

3. Married women's conveyances formerly required a special form of acknowledgment and examination to avoid duress of the husband. This special requirement has been abrogated, however. Civil Code Section 1186 repealed in 1891.

4. When an instrument is proved by handwriting, the original must be deposited with the recorder to remain for public inspection. Government Code Section 27290.

5. If the grantor received title in a name other than the one by which he conveys title, the conveyance must contain the name by which he obtained title as well as the one by which title is transferred by him. Civil Code Section 1096.

Of course, before any instrument or document may be recorded, the fees must be paid, as required by Government Code Section 27201. This does not apply to instruments to which the United States is a party and which are requested to be recorded by an officer of the United States according to Government Code Section 27202.

From the above discussed material it will be seen that an acknowledgment or proof and certification is generally required as a prerequisite to recordation of nearly all documents. It is, therefore, advisable at this point to summarize briefly the procedure of taking an acknowledgment or proof and certifying the instrument. It is also necessary to discuss the purpose of an acknowledgment and the effect of failure to acknowledge. In a subsequent chapter the effects of recordation of defectively acknowledged instruments will be analyzed in greater detail.(2)

## II. DEFINITION AND PURPOSE OF ACKNOWLEDGMENT

An acknowledgment has been defined as a "formal declaration before a duly authorized officer by a person who has executed an instrument that such execution is his act and deed."(3)

The purpose of such an act is to furnish proof of the execution of an instrument. It is essentially intended as a safeguard to prevent forgery of a document.(4) However, in actual practice the acknowledgment and certification has been done in such a summary fashion by a Notary Public that it is not much of a guaranty of anything.(5) It may, however, operate as an estoppel to prevent the acknowledging party from later denying the due execution of the instrument.(6) Its main purpose is to allow a document to be admitted into evidence or to be recorded without any further proof of its execution.(7)

## III. EFFECT OF FAILURE TO ACKNOWLEDGE

### A. BETWEEN THE PARTIES

Generally, an instrument is valid between the parties thereto regardless of the lack of an acknowledgment. The presence of an acknowledgment is important only in dealing with the rights of third parties.(8) In a few instances an acknowledgment is required for validity of the instrument. These include:

1. Instruments by which a homestead is declared, conveyed or encumbered, or abandoned.(9)

2. Articles of incorporation.(10)

3. Contracts for marriage settlements.(11)

In the case of instruments other than these few, as between the parties, lack of an acknowledgment means that the instrument is not entitled to be recorded or presented in evidence by the parties or a third party, unless proof of execution is made. This proof may consist of a judgment in an action instituted to prove this specific instrument or it may be proper testimony of a subscribing witness or in some specific instances, testimony by a witness to the handwriting. These types of proof are discussed below, showing what formalities must be complied with and what an officer must certify to.

B. AS TO THIRD PARTIES

If a document is recorded without an acknowledgment or with a defective acknowledgment, the party who records will not be protected under Civil Code Sections 1213 and 1214.(12) The instrument will be treated as if it had never been recorded and will be void as against subsequent purchasers and mortgagees who have no actual notice and who record their instruments. This means that a third party who purchases the property involved will not take subject to the interest of the party who recorded the prior instrument since it was improperly acknowledged. He (the subsequent purchaser) is said to have priority even though his interest may have been acquired by an instrument executed subsequently to that of the party to the unacknowledged instrument. In addition, the party who records an unacknowledged instrument is not protected against prior parties who claim under prior unrecorded instruments. Civil Code Section 1214 merely protects parties who properly record their instruments against prior unrecorded instruments.

There are complications, however, when an instrument has been acknowledged by some of the parties but not all. This will be discussed in a later chapter on the effect of recording defectively acknowledged instruments.(13) (See Chapter 2 of Part IV)

From time to time the Legislature has passed Curative Acts giving the effect of constructive notice to recorded instruments although defectively certified.(14) The present statute which has this effect is Civil Code Section 1207:

> "Any instrument affecting the title to real property, one year after the same has been copied into the proper book of record, kept in the office of any county recorder, imparts notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate; but nothing herein affects the rights of purchasers or encumbrancers previous to the taking effect of this act..."

This type of statute has reduced the severe results of the recordation of defectively acknowledged instruments. It should be noted that this statute does not protect one who files an incorrectly acknowledged instrument against prior unrecorded instruments. By its terms it is limited to protection against subsequent purchasers after the one year has elapsed.

## IV. WHO MAY MAKE AN ACKNOWLEDGMENT

An acknowledgement must be made by the proper party in order for the record to impart constructive notice. In general, the person who executed the document must acknowledge it. It is his act of verification of the instrument.(15) In certain instances, such as an acknowledgment by an attorney in fact,(16) a corporation,(17) or a partnership,(18) other persons are allowed by statute to acknowledge a document. Conveyances of homesteads must be acknowledged by both husband and wife.(19) California has gone through an era in which married women were required to acknowledge instruments in a special way and a different type of examination and certificate were required. The main purpose was to avoid the wife's conveyance under duress of her husband. At the present time, a married woman's conveyance and acknowledgment have no special characteristics.(20)

When an acknowledgment is made by only some of the parties who have executed the instrument, special rules have been developed by the court to determine to what extent the record of such an instrument operates as constructive notice.(21)

## V. WHO MAY TAKE AN ACKNOWLEDGMENT

Many cases have arisen in which the acknowledgment has been taken by an individual not authorized by statute.(22) Such documents are not in proper condition to be recorded and if they are actually recorded no constructive notice will be imparted by the record.

Civil Code Sections 1180 through 1184 contain a list of the officers authorized to take acknowledgments. These sections are based on the list in the 1850 statute on Conveyances which has been preserved almost intact with the addition of a few other officers who may take acknowledgments. The Notary Public is the officer who generally performs this task although the number of officers with such authority is an extensive one.

### A. OFFICERS WHO MAY TAKE ACKNOWLEDGMENT WITHIN THE STATE:(23)

1. Justice or clerk of Supreme Court.

2. Judge of Superior Court.

   (Acknowledgments taken may be in any part of the State of California if taken by either of these parties)

3. Clerk of court of record.

4. County Recorder.

5. County Clerk.

6. Court Commissioner.

7. Notary Public.

8. Clerk of Justice's Court of Class A.

9. Judge of Police or other Inferior Court.(24)

(Acknowledgments by officers enumerated from #3 to #9 must be made in the city, county, city and county, township or district for which the officer was elected, or appointed.)

B. OFFICERS WHO MAY TAKE ACKNOWLEDGMENT OUTSIDE THE STATE OF CALIFORNIA BUT WITHIN THE UNITED STATES:(25)

1. Justice, judge, or clerk of any court of record of the United States.

2. A justice, judge, or clerk of any court of record of any state.

3. A commissioner appointed by the governor of this state for that purpose.

4. Notary Public.

5. Any other officer of the state where the acknowledgment is made authorized by its laws to take such proof or acknowledgment.

When an acknowledgment is taken outside of the state in accord with the laws of the place where the acknowledgment is made, a certificate is required from the clerk of a court of record of county or district where such acknowledgment is taken that the officer certifying to the same is authorized by law so to do, and that the signature of the said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made.(26)

A similar certificate was formerly required when an acknowledgment made by a Justice of the Peace was to be used in any county other than the one where the Justice resided. This provision was repealed in 1939.(27)

C. OFFICERS WHO MAY TAKE ACKNOWLEDGMENT OUTSIDE THE UNITED STATES:(28)

1. A minister, commissioner, or charge d'affairs of the United States.

2. A consul, vice consul, or consular agent of the United States.

3. A judge of a court of record of the country where the proof or acknowledgment is made.

4. Commissioners appointed for such purposes by the Governor of the State, pursuant to special statutes.

5. A Notary Public.

In 1943, a special provision was added to the code giving certain military personnel authority to notarize documents. This provision is at present in force until the 91st day after final adjournment of the 1951 Regular Session of the Legislature.(29)

D. RIGHT OF DEPUTIES TO TAKE ACKNOWLEDGMENT:

A deputy may under the common law do the acts his principal may perform by virtue of his office.(30) This means that if the principal may acknowledge documents, a deputy may do so also. His right does not necessarily, therefore, depend upon a specific statute covering him. However, Civil Code Section 1184 provides that a deputy appointed by law by any of the persons who may take acknowledgments will have the power to take acknowledgments in the name of his principal. Therefore, both common law and statutory law authorize deputies to acknowledge instruments for their principals provided the principals have that authority.

E. ACKNOWLEDGMENT BY OFFICER WITH PERSONAL INTEREST:

It has been repeatedly held that an officer may not take an acknowledgment if he is personally interested in the transaction.(1) This means that the grantee, mortgagee, or any beneficiary under the instrument is disqualified from taking an acknowledgment. If such officer does take the acknowledgment and the document is recorded, the record will not impart constructive notice to third parties.

Where there are several grantees, an acknowledgment taken by one of them will not completely invalidate the instrument. Such an acknowledgment will affect the rights of subsequent purchasers only. When the instrument is recorded a subsequent purchaser will not be put on notice of the interest of the particular party who made the acknowledgment. He will be put on notice of the interest of the other parties, however.(2)

The question of whether one of several grantors may take the acknowledgment seems to be an open one in California. The cases in which a party has been disqualified all seem to involve an acknowledgment by the grantee.(3)

Agents of the parties are qualified to take the acknowledgment and it seems this is true even if they have an interest in the transaction.(4)

## VI. CEREMONY OF ACKNOWLEDGMENT

The Civil Code requires the acknowledging party to appear in person and requires the notary to know or have satisfactory evidence on oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf. Civil Code Section 1185 covers this situation.

The officer is required to have personal knowledge, which is an acquaintance sufficient to establish identity.(5) If this is not complied with, the officer may be liable in damages for the results of a forgery or fraud, for certifying to the signature without sufficient personal knowledge of the person acknowledging.(6)

The actual ceremony is very simple. It merely consists of an acknowledgment by the party to the instrument that he executed it. The notary accepts this statement and makes out a certificate that such acknowledgment was made.

## VII. CERTIFICATE OF ACKNOWLEDGMENT: FORM

The final duty of the notary is to endorse the instrument or attach a certificate of acknowledgment substantially in the form prescribed by the code.(7) The purpose of this certificate is to establish the identity of the grantor and the genuineness of his signature, and of the instrument to which it is attached. It provides a guaranty that the instrument is not a forgery.(8)

Civil Code Section 1189 provides the form of certification which may be used. It is not essential that it be identical, but it must be substantially as provided in the code.

The form suggested in the code is as follows:

> "State of..., County of..., ss. On this... day of..., in the year..., before me (here insert name and quality of the officer), personally appeared..., known to me (or proved to me on the oath of...) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the same."

Special forms are provided in the code when the acknowledgment is made by a partnership, corporation, or attorney in fact. Civil Code Sections 1190, 1190a, 1192 contain these forms.

Formerly, a special form was required for acknowledgments of married women, but this requirement has been abrogated. An acknowledgment of a married woman is now taken and certified in the same manner as if she were unmarried. Civil Code Sections 1191, 1186, 1187 cover such matters.

VIII. CERTIFICATE OF ACKNOWLEDGMENT: CONTENTS

The certificate is required to show the following factors:

A. That the acknowledgment was taken within the officer's territorial jurisdiction. Both a statement of the area in which the acknowledgment was taken and a recital of the county in which the officer was appointed or elected must be included. If either is omitted or if there is an ambiguity between the two, the certificate is void and no constructive notice will be imparted from the record of such instrument.

B. The name of the acknowledging party; recital that he is known or proved to the officer by oath of witness (naming the witness) to be the person whose name is subscribed to the instrument acknowledged. If this factor is omitted the record will not constitute constructive notice.

C. The fact of acknowledgment. This estops the acknowledging party from later denying execution of the instrument in most cases. It is a validation of the instrument.

D. Name and quality of officer and seal if he is required to have official seal. If any of these three are missing, the instrument will be valid between the parties, but will not impart notice when recorded.

Civil Code Section 1189 provides a form that may be used which includes these required elements.

IX. OTHER METHODS OF PROVING EXECUTION OF AN INSTRUMENT

First: Proof of the execution of an instrument, when not acknowledged, may be made either:

By the party executing it, or either of them, or
By a subscribing witness. Civil Code Section 1195.

If by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness. Civil Code Section 1196.

The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness. Civil Code Section 1197.

Second: Proof may be made by handwriting of the party and a subscribing witness under certain circumstances. For example, when the parties and subscribing witnesses are dead, non-residents of the

state; residence is unknown; subscribing witness conceals himself or cannot be found with due diligence; refusal to testify for a certain length of time. Civil Code Sections 1198, 1199.

When proof is made in either of these two methods it must be certified to by the officer taking it. Proof may be taken by the same officers who may take acknowledgments. See Section V above for discussion of which officers may take acknowledgment or proof.

Third: Any person interested under an instrument entitled to be proved for record, may institute an action in the superior court against the proper parties to obtain a judgment proving such instrument. Civil Code Section 1203.

A certified copy of the judgment in a proceeding instituted under this section entitles such instrument to record, with like effect as if acknowledged. Civil Code Section 1204.

These methods of proof may be substituted for an acknowledgment and if the statutory requirements are complied with, the record of an instrument proved in either of these three ways will impart constructive notice to third parties. The other effects of proper recordation will follow as well.

## X. METHOD OF CORRECTION OF CERTIFICATE

If a defectively acknowledged instrument is recorded, a subsequent purchaser will acquire title free of any interest created under that instrument, provided he does not have actual notice of it. To avoid such a result, the legislature has allowed any interested party to bring an action in the superior court to obtain a judgment correcting the certificate.(9) When such a judgment is obtained, a certified copy of it attached to the instrument entitles such instrument to be recorded and it will be treated in the same manner as if acknowledged.(10) This means that a subsequent purchaser taking title after recording of the instrument with the attached copy of the judgment would be put on notice of facts contained therein, and of the legal effect of the instrument.

## XI. CONFLICT OF LAWS RULE

When an acknowledgment is made outside the State of California in accordance with the laws of the state in which it was made, the California courts are required to recognize it as a valid acknowledgment. Civil Code Section 1189 states that "any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state...." This section further provides that a certificate of the clerk of a court of record of the county or district where such acknowledgment is taken that the officer is authorized to take acknowledgments and that his signature is true and genuine, and that the

acknowledgment is taken in accordance with the laws of the place where it is made, shall be prima facie evidence of the facts stated in the certificate of said clerk. This certificate will be of importance in offering the instrument acknowledged outside the state for record or in evidence. If, however, the acknowledgment would be good under California laws and the officer is authorized by our statutes to take acknowledgments outside the state, this certificate from the clerk of the other state is not required.(11)

## XII. RETROACTIVE EFFECT OF STATUTES

The validity of an acknowledgment is dependent upon the laws in effect at the time when the acknowledgment is made. No retroactive effect is given to the statutes providing for the manner of acknowledgment, proof and certification.(12) If the instrument was acknowledged in accordance with the laws in existence at the time the ceremony was performed, it has the same force in evidence, and may be recorded in the same manner and with the like effect, as conveyances executed and acknowledged in accordance with the present statutes.(13)

## XIII. CONCLUSION

This chapter has emphasized the requirements of a valid acknowledgment and the purpose and effect of it. It has pointed out the effect of a defective acknowledgment and the possibility of curing such defect. It has considered substitute methods of proof of instruments and when they are available. In a subsequent chapter, cases involving the effect of recording defectively acknowledged instruments will be discussed.

FOOTNOTES TO CHAPTER 5: PREREQUISITES TO RECORDING

1. De Wolfskill v Smith, 5 Cal App 174.

2. See Chapter 7.

3. De Wolfskill v Smith, cited supra, footnote #1.

4. Gordon v City of San Diego, 108 Cal 264; Fogarty v Finlay, 10 Cal 239.

5. Gage, D. D., Land Title Assuring Agencies (1937), p. 28.

6. Bryan v Ramirez, 8 Cal 461.

7. Fogarty v Finlay, cited supra, footnote #4.

8. Middlecoff v Hemstreet, 135 Cal 173; Landers v Bolton, 26 Cal 393.

9. Civil Code Sections 1262, 1266.

10. Corporations Code Section 307.

11. Civil Code Sections 178, 179.

12. Hale v Pendergrast, 42 Cal App 104; Kelsey v Dunlap, 7 Cal 160; Wolf v Fogarty, 6 Cal 224.

13. See Chapter 7.

14. For citations of various curative statutes see Chapter 1.

15. Civil Code Section 1185.

16. Civil Code Section 1192.

17. Civil Code Sections 1185, 1190.

18. Civil Code Section 1190a.

19. Civil Code Section 1242.

20. See 1 Cal Jur Acknowledgments Section 34, p. 270 for a discussion of the original provisions for married women's conveyances.

21. See Chapter 7.

22. See for example McMinn v O'Connor, 27 Cal 238, in which an acknowledgment was taken by a Consular Agent. Under the statute applicable at the time of this case a Consular Agent was not authorized to take acknowledgments.

23. Civil Code Sections 1180, 1181.

24. Code of Civil Procedure Section 179

25. Civil Code Section 1182.

26. Civil Code Section 1189.

27. Civil Code Section 1194.

28. Civil Code Section 1183

29. Civil Code Section 1183.5, added by Stats. 1943, c. 28, Section 2.

30. Muller v Boggs, 25 Cal 175.

1. Chapman v Hicks, 41 Cal App 158; Lee v Murphy, 119 Cal 364; Murray v Tulare Irr. Co., 120 Cal 311; Ramsey v California Packing Corp., 51 Cal App 517.

2. Murray v Tulare Irr. Co., cited supra, footnote #1.

3. 1 Cal Jur Acknowledgments Section 14, p. 244.

4. Bank of Woodland v Oberhaus, 125 Cal 320; First National Bank v Merrill, 167 Cal 392 in which stockholder of grantee corporation took acknowledgment. Court held it was proper in spite of pecuniary interest stockholder naturally had.

5. Kelsey v Dunlap, cited supra, footnote #12.

6. Political Code Section 801; Government Code Section 8214.

7. Civil Code Section 1188.

8. Wedel v Herman, 59 Cal 507.

9. Civil Code Section 1202.

10. Civil Code Section 1204.

11. Holland v Hotchkiss, 162 Cal 366.

12. Civil Code Section 1205.

13. Civil Code Section 1206.

Chapter 6: EFFECT OF RECORDING - IN GENERAL
(By University of Southern California)

## I. INTRODUCTION

The common law had no such requirement as recording. The instrument which was first executed was given priority over any instruments subsequently executed. When recording was permitted in England by the Statute of Anne, it was merely for the purpose of maintaining the common law priority which the first purchasers already had. If a purchaser were first in time of execution and recorded his instrument before a subsequent purchaser recorded his instrument, he was said to have preserved the priority which the common law had given him. Under this statute there was no provision for constructive notice. In most situations this made no difference. In one situation, however, it did make a difference. According to the common law if a prior purchaser acquired merely the equitable title and a subsequent purchaser obtained the legal title in good faith, for value and without notice of the prior purchaser's equity, the subsequent purchaser would take the legal title free of the claim of the prior equity. This is the only instance in which the common law departed from the rule of "first in time is first in right." In this situation notice was important. The English courts held that recording the instrument under which the prior purchaser acquired his equitable title would not give notice to the subsequent purchaser of the legal title. He would still receive title free of the claim of the prior equitable owner if he had no actual notice, acted in good faith, paid value and recorded first. The statutes in the United States, including the California statute, provide that the record constitutes constructive notice to any subsequent purchaser. Therefore, in a case like the one just discussed, the subsequent purchaser of the legal title would have notice from the record of the equitable interest in the prior purchaser and would not be able to claim that he was a bona fide purchaser. Civil Code Section 1213 provides for this doctrine of constructive notice. This doctrine should not be relied on in cases where it is sufficient to state that the prior purchaser by recording has preserved his common law priority. The courts rely on the doctrine of constructive notice heavily, however, and decide most cases on the basis of whether a subsequent purchaser had notice from the record or not which would affect his standing as a bona fide purchaser without notice.

These matters are discussed in more detail and authority cited in the Introductory Chapter.

## II. EFFECTS OF RECORDING UNDER THE CALIFORNIA RECORDING STATUTE

As has been discussed before, an "instrument" must first be authorized and must comply with the prerequisites to recording before it may be recorded. The recording must then be completed in proper fashion. That is, the instrument must be properly filed with the proper officer in the proper county, and properly transcribed and indexed. When these matters have all been completed the results will be as follows:

(1) A prior purchaser who records first will have priority over subsequent purchasers who record later, since by recording he has preserved his common law priority.

(2) He will also have priority over a prior purchaser who has failed to record or who records later, according to the provisions of Civil Code Section 1214.

(3) The record of his instrument will operate as constructive notice to subsequent purchasers to prevent them from claiming as bona fide purchasers without notice. This doctrine is relied on by the courts frequently in protecting prior purchasers against subsequent purchasers. For example, the courts have reiterated the statement that the purpose of the recording statutes is to protect the true owner of the legal title against the claims of subsequent purchasers, by conclusively imputing to such purchasers notice of all previously recorded conveyances.(1) Civil Code Section 1213 provides for this notice as follows: "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees;..."

Since this statute is in derogation of the common law, it must be strictly construed.(2)

It is important to inquire as to when the notice begins to affect subsequent purchasers. Civil Code Section 1170 states: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record." Civil Code Section 1213 requires proper recording before notice begins to affect subsequent purchasers.

If an error has occurred in the recording process so that a purchaser could not find the document that has been recorded or if the document is never actually copied into the record books, no constructive notice will follow. An exception is made when the instrument is copied into the wrong book, but indexed in the proper book and in the proper manner. In that case, Government Code Section 27327 provides that the instrument will impart notice of its contents to all persons from the date of such indexing. Errors are discussed in Chapter 8.

It should also be noted at this point that the record only gives notice to certain persons. These persons include subsequent bona fide purchasers and mortgagees. It is not notice to subsequent creditors. It is not notice to prior purchasers and mortgagees. However, if a prior purchaser or mortgagee fails to record before a subsequent bona fide purchaser or mortgagee records, the prior purchaser will not be protected against the subsequent purchaser who records first and meets the requirements of Civil Code Section 1214. This result is because of the terms of Civil Code Section 1214 and not because of the doctrine of constructive notice.

Finally, there is the problem of what matters the record will give notice of. Civil Code Section 1213 states that the "record is constructive notice of the contents thereof..." This has been expanded by the cases to include some other matters which arise by reason of recitals in the recorded instrument or by inference from statements in the record. This problem is discussed in detail in Chapter 10, "Matters of Which Record Imparts Notice."

(4) An authorized instrument which has been properly recorded may be read in evidence without further proof. Section 1951 of the Code of Civil Procedure provides:

> "Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof."

## III. EFFECT OF FAILURE TO RECORD UNDER THE CALIFORNIA RECORDING STATUTE

Civil Code Section 1214 provides that an instrument which is not recorded will be void as against subsequent bona fide purchasers or mortgagees who record first. Chapter 11, "Effect of Failure to Record," discusses the question of who may assert the invalidity of an instrument which has not been recorded properly. It discusses the problems of purchaser for value, in good faith, and without notice.

This chapter is limited to recording of "instruments" which constitute "conveyances" as defined by Civil Code Section 1215. Other documents, such as writs of attachment, lis pendens, et cetera may be recorded under various statutes. Those statutes or cases interpreting them determine the effect of recording the specific documents involved. These matters were discussed in detail in Chapter 2, "Instruments Which are Authorized to be Recorded".

FOOTNOTES to CHAPTER 6: EFFECT OF RECORDING - IN GENERAL

1. Anderson v. Willson, 46 Cal App 289; Central Const. Co. v. Hartman, 7 Cal App (2) 703; Hager v. Spect, 52 Cal 577.

2. Chamberlain v. Bell, 7 Cal 292.

Chapter 7: EFFECT OF RECORDING UNAUTHORIZED, VOID, OR DEFECTIVELY ACKNOWLEDGED INSTRUMENTS
(By University of Southern California)

I. INTRODUCTION

Generally, when an instrument which is authorized by the general recording statute and complies with the prerequisites to recording, is properly recorded, several beneficial results follow. These were discussed in Chapter 6, but will be enumerated here.

(1) Recording of an instrument which has been executed first in time results in the maintenance of the grantee's common law priority. He will be protected against purchasers who later obtain interests in the same property and record their instruments even if they meet the requirements of bona fide purchasers.

For example, A purchases Blackacre from B by a deed which is properly acknowledged and certified, and which B records. Subsequently, A attempts to convey the same property to C, a bona fide purchaser, who records his deed subsequently to the recording by B of his deed.

At common law, B would have priority since he is first in time and is protected against subsequent purchasers.

According to the California view, recording by B prior to C's recording maintains the common law priority which B already had. This priority may be lost, however, by failure to record before a subsequent bona fide purchaser records under the terms of Civil Code Section 1214.

(2) By recording, B has in fact put subsequent purchasers on notice of his interest from the record. In most cases, it is not necessary to discuss constructive notice from the record, since the common law rule of first in time will apply, provided the first purchaser records first.

There is, however, one situation in which it is necessary to discuss constructive notice. That is when a party is protected by the recording statute who would not have been protected at common law.

The most familiar example of this is the purchase by A of the equitable title and the subsequent purchase by C of the legal title in good faith and for value, without notice of the prior sale of the equitable title. At common law, the purchaser of the equitable title, although first in time is not protected as against a subsequent bona fide purchaser of the legal title. Under the California recording statute, Civil Code Section 1213, the subsequent purchaser, B, is said to have constructive notice of the purchase of the equitable title by A, provided A has recorded his instrument properly before B records.

In this situation it is proper to discuss constructive notice. In any other situation in which a prior party who purchases the legal title records first he is merely maintaining his common law priority. He is not

giving constructive notice to subsequent purchasers as his main purpose of recording. However, as will be seen from cases discussed in this chapter, the courts use the doctrine of constructive notice in almost all cases, when it would have been sufficient to say the first purchaser prevails because he retained his common law priority by recording rather than by saying the subsequent purchaser was put on constructive notice from the record of the first instrument. In practical effect there is no difference which line of reasoning is followed, but technically, the courts relying on the doctrine of constructive notice in such a situation have failed to analyze the situation completely.

The doctrine of constructive notice is important in determining whether a subsequent purchaser is bona fide and meets the requirements of a bona fide purchaser. This is a proper use of the doctrine aside from the priority question. Matters which he learns from the record such as recitals, information leading to the discovery of other documents, and other data, affect the purchaser's standing as a "bfp." This in turn, of course, affects his right to protection under Civil Code Section 1214 against prior unrecorded instruments. In this sense, therefore, it is proper to discuss constructive notice in certain instances. However, the courts have a tendency to rely too heavily on this doctrine and ignore the rule of recording for the purpose of maintaining common law priority. The question of notice as it affects the status of a bona fide purchaser is discussed in Chapter 11.

(3) The recording statute makes another radical change in the common law rules of priority. At common law only a prior purchaser had priority. Under Civil Code Section 1214 a subsequent purchaser who records before a prior purchaser does is protected against that prior purchaser, provided the subsequent purchaser meets the requirements of that statute of good faith, payment of value, and no notice.

For example, A conveys to B who does not record. A then conveys to C, a bona fide purchaser, who records before B records. Civil Code Section 1214 states that the conveyance to B is void as to C, provided he meets the statutory requirements and records properly.

In conclusion, it will be seen that a purchaser who records his instrument is entitled to protection against subsequent purchasers according to one of two theories and he is also protected against prior parties who failed to record.

These results only apply in the following situation. The instrument which is recorded must be a valid instrument, must be authorized by the general recording statute, and must be properly acknowledged, certified and recorded.

If the instrument is not recorded, or fails to meet the prerequisites required by the code, or is not authorized, these results do not follow. The result in such cases is that the instrument is generally void as to subquent purchasers and is not protected against prior unrecorded instruments.

There are some instances in which this does not necessarily result. For example, an instrument may be authorized by some specific statute other than the general statute and have some of the effects of recording. For discussion of this, see Chapter 2. Also, an instrument may be acknowledged by only some of the parties who executed it, which makes it defective, but some results of recording will follow. This is discussed below.

The purpose of this chapter will be to point out the results of recording instruments which do not comply with the requirements of the type of instrument which the code contemplates in the recording statute. This may be because the instrument is not authorized, is void, or defectively acknowledged, or defective in some other manner. These problems will be discussed under the following headings:

(1) Effect of Recording Unauthorized Instruments

(2) Effect of Recording Unacknowledged or Defectively Acknowledged Instruments

  (a) Unacknowledged Instruments
  (b) Defectively Acknowledged Instruments
  (c) Instruments Acknowledged by GRANTEE only
  (d) Instruments Acknowledged by GRANTOR only
  (e) Instruments Acknowledged by Some of the Grantors

(3) Effect of Recording Void Instruments

(4) Effect of Recording Instruments Not Under Seal

(5) Effect of Recording Instruments Containing Errors (See Chapter 8)

## II. EFFECT OF RECORDING UNAUTHORIZED INSTRUMENTS

The question of what instruments are authorized by the codes and statutes to be recorded has been considered in Chapter 2. This section will deal with instruments which are clearly not authorized to be recorded.

When an instrument not authorized by the general recording statute is recorded, it is treated as if it had never been recorded. Neither Civil Code Section 1213 nor 1214 will apply to protect the grantee. This means that such a grantee will not be protected against subsequent bona fide purchasers who record properly. He will not be protected against a prior purchaser who failed to record instruments. The court generally states that the record of an unauthorized instrument will not give constructive notice to subsequent purchasers to prevent their qualifying as bona fide purchasers without notice under Civil Code Section 1214.

The instrument may possibly be authorized by some specific statute other than the general recording statute. In that case, the effects of recording will be determined by the particular statute involved. For a discussion of these various statutes and the effect of recording instruments under them, see Chapter 2.

When a void instrument is recorded it is not given any validity whatsoever. This problem was discussed in the cases of People v Harrold(1) and People v O'Brien.(2) Both of these cases involved the recording of instruments which had been forged.

Early cases decided under the 1850 statute declared that an executory contract to purchase was not entitled to be recorded. Present decisions permit recording of such an instrument, on the theory that it involves a conveyance of an equitable interest in land and, therefore, is authorized by the general recording statute, Government Code Section 27322. The early cases held that since this instrument was not entitled to record, no constructive notice would follow from the recordation of such an instrument. In addition, the vendee would not be protected against prior purchasers who failed to record their instruments. The contract was treated as if never recorded.

The modern view is that such contract may be recorded and when recorded the results of recordation will follow.(3) When the prior instrument is one conveying an equitable interest and the subsequent instrument conveys the legal title, it is necessary to rely on the doctrine of constructive notice to protect the prior party. The common law would protect only the purchaser of the legal title in such a situation. When, however, there are two successive purchasers of the equitable title (vendees under a contract of sale) the first in time will be protected if he records first. There is no necessity of discussing constructive notice in such a case although the courts do consistently. The courts generally have a tendency to say that the second purchaser has constructive notice from the record of the first instrument and, therefore, he takes subject thereto. It is better to rely on the rule that recording in such a situation results in the retention of the common law priority which the first vendee already has.

Since this is the result of recording an unauthorized instrument, the courts have been liberal in deciding that most instruments should be considered authorized.(4)

Of course, it must be noted that if the instrument of record is actually seen by the subsequent purchaser, he will be held to have notice regardless of whether it was a type authorized or not.(5) The reason for such a rule is obviously to prevent the law from protecting subsequent purchasers who do not require such protection and indeed do not deserve it. The same result is reached when the purchaser has notice of such facts and circumstances that would put a reasonable man on inquiry as to the existence of such a document. This reasoning runs through the entire law on recordation and constructive notice and is based on a sound public policy.

## III. EFFECT OF RECORDING DEFECTIVELY ACKNOWLEDGED INSTRUMENTS

In Chapter 5 the prerequisites to recordation enumerated by the code were discussed in detail. The purpose of the present discussion is to analyze those cases in which the prerequisites have not been complied with

and to determine the effect of recording these defectively acknowledged instruments.

Before discussing this effect, it is necessary to consider the question of whether such instruments are proper to be recorded. That is, will the Recorder be required to accept such documents for recordation? If they are accepted for record, the next problem to be considered is what the result will be of recording. That is, what effect it will have as to various parties.

The courts have consistently stated that no matter how large or small the defect, an instrument with a defective acknowledgment is not entitled to be recorded. This is true of the cases interpreting the present code sections and the 1850 statute.(6) The basis for this is that the formalities are a necessary part of the conveyance, without which an instrument cannot be admitted to record. Since the recording act is in derogation of the common law, the courts are very strict in their interpretation and all statutory prerequisites must be complied with.(7)

Examples of errors made in the acknowledgment include:

(1) Lack of an acknowledgment.

(2) Failure to show in the certificate that the person acknowledging the instrument was personally known to the officer.

(3) Acknowledgment taken by one with a pecuniary interest in the transaction.

(4) Acknowledgment taken by one not authorized by statute to take acknowledgments.

(5) Venue and jurisdiction omitted; no showing that the officer was within his area when he took the acknowledgment.

In all of these situations, the instrument is not proper and should not be admitted to record.

In certain instances, however, an acknowledgment is not a statutory prerequisite, and of course, in such a case the instrument may be recorded without such formality. An illustration of this is a sheriff's duplicate certificate of sale, which may be recorded without acknowledgment, proof, or certification.(8)

A situation in which the courts have compromised is in the recording of an instrument acknowledged by some but not all of the executing parties. It is entitled to record,(9) but it may not have the beneficial results of recordation. The question of what results will follow is a troublesome problem and the courts have arrived at different results depending on which individuals have acknowledged the instrument.

The effect of recording defectively acknowledged instruments is generally the same as if the instruments had never been recorded.

(1) The purchaser who is first in time by recording a defectively acknowledged instrument fails to maintain his common law priority. He will not have priority over a subsequent purchaser who records first, having met the statutory requirements of bona fide purchase. Such an instrument is treated as unrecorded and under Civil Code Section 1214 will be void against subsequent parties who record properly.

(2) The record of such an instrument fails to operate as constructive notice to subsequent purchasers under Civil Code Section 1213.(10) This means that a subsequent purchaser can claim to be bona fide and without notice from the record. He will then prevail over the prior purchaser provided he has no notice from other facts and circumstances. The record will not affect his status as a bona fide purchaser without notice.

(3) The purchaser who records a defectively acknowledged instrument will not be protected under Civil Code Section 1214 as against prior purchasers who have failed to record their instruments. The common law rule of first in time will generally prevail as between the purchaser of an instrument defectively acknowledged and recorded and a prior unrecorded instrument. It is the same as if both instruments were unrecorded.

(4) The parties may assert the validity of the instrument.(11) Lack of an acknowledgment will only affect the validity as to third parties. A few instruments, however, must be acknowledged in order to have any validity at all. An example of this is a declaration of homestead, which must be acknowledged for validity.

(5) Although a defectively acknowledged instrument is void as to certain subsequent parties it will be valid as against subsequent purchasers with notice, either actual or constructive.

When a subsequent purchaser has actual notice of an instrument which is defectively acknowledged or not acknowledged, he will take subject to the interests created thereby. This is to prevent frauds.(12)

Constructive notice from facts and circumstances is still a part of the California law to a certain extent.(13) Therefore, if a purchaser has knowledge of certain facts which would put a reasonable man on inquiry as to the effect of an instrument, whether acknowledged or not, he will be charged with notice of the facts he would have garnered from a reasonable investigation. The problems of notice other than that derived from the record are discussed subsequently in Chapter 11, and in Chapter 2 of Part IV. They present a very serious situation and lend an element of uncertainty to every conveyance. A purchaser can theoretically search the record, but it is very difficult for him to go beyond the record and decide what he should search and what he should know to be sure he is acquiring a clear title.

An illustration of the application of the rule of actual notice is contained in the case of Hammond Lumber Co. v Roubian.(14) The Hammond case involved a claim of mechanics' lien made by a mechanic who had actual notice of a prior trust deed on the property which had not been properly acknowledged but had been recorded. The court held the trust deed had priority over the mechanics' lien in spite of the defective acknowledgment, since the lien claimant had actual notice of the prior trust deed.

Henrici v South Feather Land Etc. Co.(15) involved constructive notice from facts outside the record. An agreement had been made between the original grantor and grantee of certain land in which the grantor agreed to supply the grantee with water from the land which he retained. The water was to be supplied for the use of the grantee on his land which he had purchased from the grantor. The court held this constituted an easement on the grantor's land in favor of the grantee's land. A subsequent purchaser of the grantor's retained land which was subject to this easement (the servient estate) claimed that he should not be charged with notice of the easement since the agreement was not properly acknowledged before recordation. The court held that from an inspection of the area, the easement could be determined by a reasonable man and an inquiry as to its validity should have been made. If such an inquiry was not made, the subsequent purchaser would still be charged with notice of whatever he would have discovered by a reasonable investigation. The court held, therefore, that this purchaser had failed to carry out his duty of investigating and, therefore, that he would take subject to this easement regardless of any defective acknowledgment. The court relied on Civil Code Section 19 which states: "EVERY person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

The courts have from time to time criticized this doctrine of actual notice and constructive notice from facts and circumstances since it violates the policy of the recording act which theoretically provides persons are to be put on notice only of matters which are of record. However, it is the law and has been enunciated over and over again by the courts.

When a homestead is involved, the court has refused to apply the doctrine of actual notice or constructive notice from facts and circumstances. In Lee v Murphy(16), the court has refused to apply the doctrine of actual notice or constructive notice from facts and circumstances. In Lee v Murphy(16), a defectively acknowledged mortgage was recorded prior to a homestead. The claimant of a homestead had actual notice of the prior mortgage, but was still upheld by the court when the mortgagee sued to foreclose the mortgage against the homestead claimant. This is at first glance a peculiar case, but the court came to this conclusion by a strict interpretation of the statute involving homesteads. Civil Code Section 1241 states "The homestead is subject to execution or forced sale in satisfaction of judgments obtained:...(4) On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." The court held that this mortgage was not properly

recorded before the declaration of homestead was filed due to the defective acknowledgment. The court treated the recordation as null and void and, therefore, no notice from the record would be possible. The court continued, however, and stated that the code section does not specifically provide for a sale of the homestead when the homestead claimant has actual notice, but only when there has been a proper recordation of the former instrument. An extremely strict interpretation of the code section is effected, but of course, it is true that the sympathies are with the party who homesteaded the property. Perhaps the court has done the proper thing under the facts of the case, but such a precedent does open the door to fraud on the part of persons with actual notice. It is certainly a different interpretation than that which is generally given when interests other than homesteads are involved. This is the result of the specific language, however, contained in the homestead statute. Other instruments would come under Civil Code Section 1217 which states "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." An instrument which is defectively acknowledged is treated as if unrecorded for the purposes of this code section.

There are a few situations in which the results enumerated above will not follow, so it will be necessary to go into more detail as to the effects of recording various types of defectively acknowledged instruments. The discussion will be included under the following headings:

A. Effect of Recording Unacknowledged Instruments.

B. Effect of Recording Defectively Acknowledged Instruments.

C. Effect of Recording Instruments Acknowledged by the Grantee only.

D. Effect of Recording Instruments Acknowledged by the Grantor only.

E. Effect of Recording Instruments Acknowledged by some of the Grantors.

A. EFFECT OF RECORDING UNACKNOWLEDGED INSTRUMENTS

When unacknowledged instruments are recorded, the results are as discussed above. No constructive notice is given by the record, and the instrument is treated as void as to subsequent purchasers who are bona fide and without notice and pay value and record. No protection is given against prior unrecorded instruments.

B. EFFECT OF RECORDING DEFECTIVELY ACKNOWLEDGED INSTRUMENTS

The defects may consist of failure to show the person acknowledging the instrument was known to the officer taking the acknowledgment, failure to show the proper venue, and many other irregularities in the certificate or the ceremony of acknowledgment. The effects of recording such

instruments are as discussed above. There is no protection against prior persons who failed to record and no notice to subsequent purchasers from the record.

C. EFFECT OF RECORDING INSTRUMENTS ACKNOWLEDGED BY THE GRANTEE ONLY

Government Code Section 27288 states that the party to acknowledge is the "party who appears by the instrument to be the party whose real property is affected or alienated thereby." This means that the grantee's acknowledgment is generally worthless and superfluous.(17) However, if the grantee has covenanted to do certain acts or refrain from doing certain acts on his land it would seem that his acknowledgment would then be essential since his real property would be affected by the instrument. Otherwise, his interest in the real property would not be affected, only that of the grantor. The custom seems to be to record instruments containing the acknowledgment of the vendee only, but the courts have held they do not give constructive notice to subsequent parties. It would seem that a different result would follow if the vendee had actually made covenants affecting his land.

D. EFFECT OF RECORDATION OF INSTRUMENTS ACKNOWLEDGED BY THE GRANTOR ONLY

The grantor is generally the only person who is transferring any interest in land or creating any encumbrance thereon. The policy is that the acknowledgment of the parties who actually are creating an interest in real property should be included, but not that of other persons, even if they are parties to the instrument. Therefore, when a document acknowledged by the vendor alone is recorded (when he is the only one affecting interests in property), it is perfectly proper.

The results of recording will be that the party who records will be protected against subsequent bona fide purchasers who record later and against prior parties who have failed to record. The record of such an instrument imparts constructive notice of its contents to subsequent purchasers.(18)

E. EFFECT OF RECORDING INSTRUMENTS ACKNOWLEDGED BY SOME OF THE GRANTORS

It has been shown that acknowledgment by all of the parties to an instrument is not required to admit the instrument to record. It has also been shown that acknowledgment by the vendor alone will be sufficient and the record will impart constructive notice and the vendee will be protected against prior parties who failed to record. When the vendee alone acknowledges the instrument, it may be recorded, but the benefits of recording generally do not flow.

The problem presented in this section is twofold. First, to whom will an instrument acknowledged by one vendor when there are several vendors impart notice when recorded? Second, to what extent will such instrument impart notice when it is recorded? That is, will it be notice of the entire

instrument and all rights created thereunder, or only notice of the interests created by the vendor who acknowledged?

These problems were both discussed in Bell v Sage(19) which involved foreclosure of a chattel mortgage acknowledged by one of two parties to the mortgage. The case was fairly simple to decide, however, since the court found that although two parties had executed the mortgage, only one had title to the chattel and, therefore, that party's acknowledgment was necessary. Since that party had not acknowledged, the instrument though recorded with the other party's acknowledgment, did not constitute notice to anyone. This is based on the requirement that the party who creates the interest in property by his conveyance must acknowledge the instrument.

The court in Bell v Sage, however, gave a thorough analysis of the problem and discussed the situation as if co-owners had been involved and only one had acknowledged. The first question discussed was to whom such an instrument would be constructive notice. The court, relying on Spect v Gregg(20) and Fresno Canal Etc. Co. v Rowell(21), stated "it has been held that the record of an instrument acknowledged by only one of the persons executing it is constructive notice to subsequent purchasers from the one so acknowledging." The cases relied on by the court really do not constitute strong authority for this proposition. The first case, Spect v Gregg, involved a power of attorney to convey land executed by several persons, but acknowledged by only one. The only question decided in this case was that a certified copy of such power should be admissible in evidence. It really stands for the proposition that such an instrument was properly recorded, even though acknowledged by only one party. The case does not discuss constructive notice. The second case, Fresno v Rowell, involved an instrument acknowledged by the vendor but not by the vendee. This it has been seen is sufficient to allow the instrument to be recorded and to give constructive notice. It is a situation where the only party who is affecting an interest in real property has acknowledged. That is different from the situation involved where one of the vendors acknowledges, but not the others, since there are several persons who are conveying or encumbering land, who have not acknowledged the instrument.

This conclusion that the record would be constructive notice to persons taking title from the party who acknowledged, but not as to other persons was followed by the Supreme Court in DuRoss v Trainor.(22) The court refers to Bell v Sage, which stated "the court likewise held that an effective execution or attestation by one grantor could not supply the lack of execution or attestation by another grantor, but the grantees of a grantor who had not acknowledged the instrument or whose signature had not been properly proved was not bound by the contents of the instrument." The court in the DuRoss case states that a hearing had been denied by the Supreme Court in the case of Bell v Sage and that the court is in accord with everything that was said in that case.

The second question discussed by the court in Bell v Sage was: To what extent would the instrument be notice to subsequent purchasers? That

is, would they be put on notice of the interests acquired by all persons under the instrument, or only the interests acquired from the grantor who acknowledged the instrument?

The court reviews the authorities and concludes that "where there are several grantors the acknowledgment of one of them is effective only as to his own grant and not as to those of the other grantors, in the absence of special statutory provision, and the record thereof is constructive notice only of the conveyance of the one who made the acknowledgment." (23)

This language is quoted by the Supreme Court in DuRoss v Trainor and is approved very emphatically.

The problems presented by these cases can be illustrated as follows:

(1) X and Y are co-owners and convey by deed their property to A. The deed is acknowledged by X only and then recorded. Between the parties, A has acquired a good title to the entire property.

(2) X later conveys to B his interest in the property. B is charged with constructive notice of the former deed by X and Y to A since he is dealing with the party who had acknowledged in the first place. Therefore, B takes nothing.

(3) Later Y conveys to C his interest in the property. Since Y had not acknowledged the deed to A the record of the deed does not give constructive notice to C. C then has priority over A as to half of the property and becomes a co-owner with A of the property.

(4) If X and Y subsequently join in a conveyance to K after the original conveyance to A, the result would apparently be as follows: K will be put on notice as to one-half of the property, since he is dealing with X, the party who acknowledged the original instrument to A. He will, however, take title to the one-half transferred by Y since he is not on notice of any former conveyance by Y who had failed to record. K would then be a co-tenant with A.

Before leaving the subject of defectively acknowledged instruments, it is advisable to refer only briefly to the Curative Acts which have been passed by the legislature from time to time giving the effect of constructive notice to the record of defectively acknowledged instruments after they have been of record for a certain length of time.(24) The present statute, Civil Code Section 1207, provides for constructive notice after the instrument has been of record for one year.

## IV. EFFECT OF RECORDING VOID INSTRUMENTS

A void deed is unenforceable and receives no validity from the fact of recording. The courts have from time to time discussed the problem of constructive notice in connection with void deeds. For example, in Vassault v

Austin(25) the court stated "we know of no principle justifying us in holding that the record of a deed, void as to any person, was notice to such person of anything, except, perhaps of the existence of the void instrument." The case of Haight v Vallet(26), disapproved of this language and stated that a recorded void deed is not notice of anything, not even of its existence. It should be noted that when a void deed is involved there is generally no question of constructive notice and, therefore, no need to discuss it. The problem which usually results is whether a purchaser can prove good title when one of the instruments in his chain of title was void because forged or some other reason. The courts have held in such a situation that a void deed remains void and no one can claim rights through or under it. No vitality is given by recording. There has in effect been a break in the chain of title. This problem is discussed more completely in Chapter 2 of Part IV involving defects in the recording system.

## V. EFFECT OF RECORDING INSTRUMENTS NOT UNDER SEAL

Historically, seals were required on certain instruments conveying interests in real property. Omission of such seal meant that the document was not entitled to be recorded. If recorded, the record would fail as constructive notice to third parties, and none of the other benefits of recordation would follow. This is in accord with the policy of the court to require all prerequisites to recordation to be complied with in order to obtain protection from the recording statute. It is an example of the strict interpretation of the recording acts, due to the fact that they are in derogation of the common law, which did not require recording in any instance.

Civil Code Section 1629 provides: "All distinctions between sealed and unsealed instruments are abolished." The result is that now either type of instrument may be recorded and is treated in the same manner. The normal results of recordation will follow. The few cases decided under the 1850 statute which required the seals remind us of the severity of this requirement which is merely of historical interest at the present time.(27)

## VI. EFFECT OF RECORDING MARRIED WOMEN'S CONVEYANCES

At the present time, married women are treated in the same manner as if unmarried when they convey property. Civil Code Section 1187 has codified this as follows: "A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner." This has not always been true as can be seen from a reading of the 1850 statute on Conveyances. A special form of acknowledgment was required, without which a married woman's conveyance was invalid. In addition, a privy examination was required to be held by the notary not in the presence or hearing of the woman's husband. The purpose of this was to avoid pressure or influence exerted on the wife by her spouse. The certificate of acknowledgment had to state that such an examination had been given. The examination consisted of questions involving the wife's desire to transfer this property and required a statement by her that she was doing this of her own free will and not as a result of any influence of her husband.

Many of the cases involving defective acknowledgments are those involving conveyances by married women before 1891 when this requirement was abolished. These cases all held that if the formalities were not complied with, the conveyance was void and not entitled to record. If it were recorded, none of the benefits of recordation would follow. No protection would be given against either prior or subsequent purchasers under the recording statute.

## VII. CONCLUSION

This chapter has stressed the rule that instruments which are unauthorized either because not of the type contemplated by the code, or because the statutory requirements have not been complied with, are not proper instruments to record. If, however, they are accepted for recordation, a subsequent purchaser will not be subject to the interests created under these instruments. Such a purchaser will not be held to have notice of the contents of these instruments or of inferences that could be gathered from the contents. Of course, if the purchaser has actual notice or constructive notice from possession or facts and circumstances outside the record, he will be required to investigate or be held to have notice of what he would have learned from the investigation. As has been seen in this chapter, this is a burden on the purchaser, since he does not know where to look for this information, and is in violation of the principle of the recording act which is merely to put parties on notice of what appears of record with the exception of matters of which they have actual notice. In addition, the party who records an unauthorized instrument is not protected against prior unrecorded instruments regardless of the good faith with which he received his conveyance, since he has not properly recorded an authorized instrument prior to the recordation of a former instrument as required by Civil Code Section 1214.

This chapter has distinguished the problem of recordation of a void instrument. Such an instrument is invalid and recording does not render it valid. No one can claim any rights through or under it.

FOOTNOTES to CHAPTER 7: EFFECT OF RECORDING UNAUTHORIZED, VOID, OR DEFECTIVELY ACKNOWLEDGED INSTRUMENTS

1. 84 Cal 567.

2. 96 Cal 171.

3. See discussion of this problem in Chapter 2.

4. Hale v Pendergrast, 42 Cal App 104: Supreme Court refused to hold notice of right to repurchase was an unauthorized instrument. Appellate Court had held it was unauthorized and Supreme Court refused to approve this part of the decision.

5. Parkside Realty Co. v MacDonald, 166 Cal 426.

6. Bell v Sage, 60 Cal App 149; Hale v Pendergrast, 42 Cal App 104, cited supra, footnote #4; Wolf v Fogarty, 6 Cal 224; Mayhew v Melby, 206 Cal 396; Henrici v South Feather Land Co., 177 Cal 442; Wallace v Moody, 26 Cal 387; McMinn v O'Connor, 27 Cal 238; Middlecoff v Homstreet, 135 Cal 173.

7. Bell v Sage, cited supra, footnote #6; Perkins v Farmers Bank, 12 Cal App (2) 495; Frederick v Louis, 10 Cal App (2) 649.

8. Foorman v Wallace, 75 Cal 552.

9. Spect v Gregg, 51 Cal 198; Fresno Canal Co. v Rowell, 80 Cal 114; Bell v Sage, cited supra, footnote #6 intimates contra, but note in 11 California Law Review, p. 205 states this is contrary to the other cases. When instrument acknowledged by grantee only see Keese v Beardsley, 190 Cal 465. 11 California Law Review, p. 205 states it is the custom to record contracts for sale of property acknowledged by the grantee alone, but their record is without value as constructive notice.

10. Bell v Sage, cited supra, footnote #6.

11. Lee v Murphy, 119 Cal 364; Landers v Bolton, 26 Cal 393; Hastings v Vaughn, 5 Cal 315.

12. Hammond Lumber Co. v Roubian, 137 Cal App 155; Henrici v So. Feather Land Co., cited supra, footnote #6; Hastings v Vaughn, cited supra, footnote #11. This rule does not apply to homesteads, Lee v Murphy, cited supra, footnote #11.

13. Mayhew v Melby, cited supra, footnote #6.

14. 137 Cal App 155.

15. 177 Cal 442.

16. 119 Cal 364.

17. Keese v Beardsley, cited supra, footnote #9. 11 California Law Review p. 205; Weatherbee v Sinn, 73 Cal 98.

18. Fresno Canal v Rowell, 80 Cal 114.

19. 60 Cal App 149, cited supra, footnote #6.

20. 51 Cal 198, cited supra, footnote #9.

21. 80 Cal 114, cited supra, footnote #18.

22. 122 Cal App 732.

23. 11 California Law Review, p. 205, cited supra, footnote #9.

24. McMinn v O'Connor, cited supra, footnote #6.

25. 36 Cal 691.

26. 89 Cal 245. See also Sepulveda v Apalbasa, 25 Cal App (2) 381; Hager v Spect which involved a conveyance made without authority, 52 Cal 577; Meley v Collins, 41 Cal 663.

27. Racouillat v Sansevain, 32 Cal 376; Racouillat v Rene, 32 Cal 450.

Chapter 8: EFFECT OF ERRORS IN THE RECORDED INSTRUMENT OR THE RECORDING PROCESS (By University of Southern California)

## I. INTRODUCTION

When an instrument which is authorized by the general recording statute is properly recorded (transcribed and indexed) after the formal prerequisites have been complied with, the various effects as discussed in Chapter 6 will follow. These include the following:

(1) The grantee will have priority over subsequent purchasers and mortgagees who record their instruments later. This is based on the fact that the grantee by recording has maintained the common law priority which is the result of being the first grantee in point of time.

(2) The grantee will have priority over prior purchasers who have failed to record or who record subsequently. This is based on Civil Code Section 1214 which makes a prior unrecorded instrument void as against a subsequent bona fide purchaser who first records. Of course, the grantee claiming protection under Civil Code Section 1214 must prove he purchased for value, in good faith, without notice of the prior conveyance, and that he properly recorded his instrument first.

(3) The record of the instrument will impart constructive notice to subsequent purchasers of the same property in the same chain of title. This prevents a subsequent purchaser from claiming as a bona fide purchaser without notice since he has notice from the record of the instrument. Many courts apply this reasoning when it would be sufficient to hold that a prior purchaser who records first properly preserves his common law priority. It is not necessary in such a case to hold that the subsequent purchaser was put on notice from the record and therefore, cannot claim as a bona fide purchaser and will take subject to the prior recorded instrument. The courts continue to decide these cases on the basis of constructive notice, however. The special situations in which discussion of constructive notice is necessary were covered in detail in Chapters 1 and 6.

(4) The instrument may be offered in evidence without further proof of execution.

When errors occur in the recording process an instrument is not properly recorded. Therefore, the various benefits of recording listed above should not be applicable. The instrument should be treated as if it had not been recorded. The courts generally prefer to state that the instrument does not give constructive notice to subsequent purchasers and therefore, they will take title clear of any interests acquired under that conveyance. They must, of course, meet the requirements of purchase in good faith, for value, without actual notice or notice of facts and circumstances which would lead them to an investigation and finally, they must record their instruments properly. As seen above, it is usually unnecessary to go into the question of constructive notice.

The purpose of this chapter is to discuss the extent to which the courts have failed to give protection to parties who record instruments containing errors or who record proper instruments but an error occurs in the recording process. The courts have made distinctions according to the type of errors involved. The errors may be classified as follows:

(1) Errors made by the Recorder:

(a) Instrument copied into wrong book.

(b) Errors in indexing the instrument.

(c) Instrument transcribed incorrectly into proper record book.

(2) Errors appearing in the original instrument:

(a) Errors in description of property.

(b) Errors in instrument due to typographical errors (other than errors in description).

(c) Error in name of the grantee.

## II. ERRORS MADE BY THE RECORDER:

### A. INSTRUMENT COPIED INTO WRONG BOOK

The recorder is required to keep sets of books in which he copies the documents which are deposited with him for record. The recorder may keep a different set of books for each type of document which he is required to record. That is, he may keep a series of books entitled "deeds," a series entitled "mortgages," et cetera. In lieu of these individual books, he may keep one series of books entitled "Official Records" in which he copies all the instruments deposited with him for record. For example, he will copy deeds, mortgages, trust deeds, etc. all into the same book in the order in which they are deposited for record. If the separate books are used, however, for the different types of instruments, a problem arises if an instrument is copied into the wrong book. This problem would not be so likely to occur when the one series of books is used, although the instrument could be copied into the wrong volume of "Official Records" or not copied at all. The Government Code provisions relating to the books kept by the recorder are discussed in Chapter 4. These provisions were formerly in the Political Code.

The leading case involving copying of instruments into the wrong book is Cady v Purser,(1) decided under the provisions in the Political Code involving the recording procedure, which have now been transferred to the Government Code. In this case a prior mortgage had been deposited with the recorder for record, but had been copied into a book entitled "Bills of Sale and Agreements." According to the statutes applicable at that time the mortgage should have been copied into a book entitled "Mortgages." A subsequent bona

fide purchaser of this property was held to take title without notice of this mortgage, on the basis that when an instrument is recorded in the wrong book of records it fails to operate as constructive notice to subsequent purchasers. Therefore, if a subsequent purchaser acquires title to the property in good faith, for value, without notice, and records first, he will prevail over the prior mortgagee. According to the terms of Civil Code Section 1214 this would be the result. The court construed Civil Code Sections 1170 and 1213 together and concluded that an instrument must be properly recorded in order to give constructive notice.

The court stated, in discussing the requirements of recording:

> "The policy of the law in this respect is to afford facilities for intending purchasers or mortgagees of land in examining the records for the purpose of ascertaining whether there are any claims against it, and for this purpose it has prescribed the mode in which the recorder shall keep the records of the several instruments; and an instrument must be recorded as herein directed in order that it may be recorded as prescribed by law. If recorded in a different book from the one directed, it is to be regarded the same as if not recorded at all."

The court then held that failure to record rendered the deed void as against the subsequent purchaser.

The court discussed the problem of constructive notice from the record unnecessarily. It would have been sufficient for the court to have limited its discussion to the holding that an error in copying the instrument such as occurred here made the situation the same as if it had never been recorded. The mortgagee then had failed to preserve his common law priority and a subsequent purchaser in good faith, for value, without notice, who properly recorded his instrument would have priority according to Civil Code Section 1214.

There are, therefore, two results of such an error:

(1) The instrument is treated as if never recorded.

(2) The record of such an instrument is not constructive notice to subsequent purchasers.

The philosophy on which the rule in Cady v Purser is based is that the person who deposits an instrument for record has the better opportunity of detecting the error by reading the record after the instrument has been copied. Therefore, the burden of correct transcription should be placed on him.

The court in Cady v Purser relies on Chamberlain v Bell(2) and Donald v Beals(3) which both held a subsequent purchaser could rely on the state of the record if an error had been made in recording. These cases involved errors or omissions in copying, but did not involve recording in the wrong book. They

are discussed below in the section on incorrect transcribing.

Prior to Cady v Purser there had been some cases deciding that for certain purposes the filing of an instrument is considered to be recording of that instrument. These included the filing of a declaration of homestead and the filing of an assignment of an interest in real property for the benefit of creditors. In Quackenbush v Reed(4) it was held that filing a declaration of homestead created the homestead, even though the statute required such declaration to be recorded. A subsequent error in transcribing (omission of part of the acknowledgment) the instrument did not affect the character of the property. As to homestead property, the declaration need not be properly copied into the correct book. The court in Cady v Purser distinguished this type of case by stating that where filing is an essential step in perfecting a right, proper copying will not be required. Where the purpose of recording is to give constructive notice to subsequent parties, however, the instrument must be properly recorded in the proper book before any constructive notice will be imparted from the record.

The case of Watkins v Wilhoit,(5) also prior to Cady v Purser involved the filing of an assignment for the benefit of creditors. The assignment was subsequently recorded in the wrong book. The court concluded that the assignment will be considered "recorded" when filed as against creditors in existence at the time of the assignment. In order to operate as constructive notice to subsequent purchasers and mortgagees, however, the assignment must be recorded in the same manner as transfers of real property, if the assignment involves real property which it did in this case. This requires proper copying into the proper book.

As against creditors the court held Civil Code Section 1170 applied which states: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record." In order to operate as constructive notice to subsequent purchasers and mortgagees it is necessary to comply with Section 1213, however, which reads as follows: "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees;..."

Therefore, a distinction is made in certain cases as to when an instrument is recorded and whether proper copying is necessary. The conclusion is that proper copying into the proper book is a necessary part of recording in order for the benefits of the recording statute to apply. For certain other purposes, however, this is not required. For example, for the creation of a homestead.

Another case prior to Cady v Purser was Meherin v Oaks(6) involving recording of chattel mortgages. Such mortgages are required to be recorded in the same manner as conveyances of real property. The case of Meherin v Oaks applied a theory different from Cady v Purser and stated that the grantee had fulfilled his duty by depositing the instrument for the record with the proper officer as required by Civil Code Section 1170. There was nothing more than this that he

was required to do. This put the burden on a subsequent purchaser to determine whether the instrument was properly copied. If it was incorrectly copied, the subsequent purchaser would still be put on notice of the terms of the original instrument. The error in this case involved the omission of the verification and part of the acknowledgment when the instrument was copied by the recorder, but the court held the subsequent purchaser would be charged with notice of the contents of the instrument in spite of this defect. The court in Cady v Purser held this was dictum in the Meherin case and refused to apply that theory, since in the Meherin case the subsequent purchaser had actual notice.

Other authorities have felt that the Meherin case stands for an entirely different rule ignoring the fact that the statements contained therein are purely dictum. These authorities apply a practical approach and say that the case stands for the proposition that an error in copying which is not material and does not involve the contents of the instrument will not prohibit the record from operating as constructive notice. This theory has been applied in several cases discussed below.

This section deals mainly with recording in the proper book but in order to have a complete picture, it has been necessary to discuss some cases involving errors in transcribing when the instrument has been copied into the proper book.

There are a few cases involving the question of what is the proper book. Kent v Williams(7) held that a contract affecting real property was properly recorded in a book marked "Covenants". A water right contract(8) and a contract for the sale of land(9) were held properly recorded in a book entitled "Miscellaneous Records". The case of Page v Rogers(10) held that since the statute then in effect did not require copying of certificates of sale but merely required filing, it was proper for the recorder to file a sheriff's certificate of sale with recorded deeds after copying it into the deed book and indexing it as a deed. In the case of Fogarty v Sawyer(11) a mortgage containing a power of sale was recorded in the book for "mortgages". The court held this was the proper book and it was not necessary for the instrument to be recorded also in the powers of attorney book. Recording in the mortgages book gave subsequent purchasers constructive notice of the contents including the power of sale.

In 1909, Political Code Section 4135a(12) was enacted providing that the record would impart constructive notice to subsequent purchasers even if the instrument had been copied into the wrong book, provided the instrument was indexed in the proper book. In 1947, this provision was transferred to Government Code Section 27327. The case of Central Pacific Ry. Co. v Droge(13) intimated that such instrument copied into the wrong book, but indexed in the proper book, would be admissible in evidence without further proof of execution. This would be logical since the instrument would be considered a recorded instrument and all the benefits of recording should be applicable.

In addition to being indexed in the proper book, the instrument must be properly indexed in that book. This problem of correct indexing as a requisite for constructive notice and the other benefits of recording is discussed below.

B. ERRORS IN INDEXING THE INSTRUMENT

The Government Code provides for the type of indices which the recorder may keep. He has an option of keeping one series of indices entitled "General Index of Grantors" and "General Index of Grantees". The grantors and grantees are alphabetically listed in these respective indices. The name of the instrument is then inserted with a reference to the book and page where the instrument has been copied into the "Official Records". The recorder may prefer to keep separate indices for each type of instrument. Such indices are used when the documents are copied into separate books for each class of document. For example, he may have two indices to the book in which mortgages are recorded. These will be called "Index of Mortgagors of Real Property" and "Index of Mortgagees of Real Property." The indices are discussed in more detail in Chapter 4, "Manner of Recording."

If an error is made in indexing it would be impossible to locate the instrument. The only way it could be done would be by checking the record books page by page, which would be hopeless. The only other alternative would be to refer to the records of the private title companies which are kept on a geographical system. The recording system would not be serving its purpose of giving people an opportunity to discover the record of instruments affecting their title.

There is a split of authority in the United States on the question of whether an instrument must be properly indexed in order to protect the grantee against prior unrecorded instruments or against subsequent purchasers who record later. One view is that the grantee should be protected regardless of an error in indexing provided the instrument is properly copied into the correct book. It is argued that the object the index is meant to achieve is to help persons searching the records to find the instruments on record, but it is not part of the recording process.

The California view and that followed in many states is that the index constitutes one of the official records of the state and should be properly kept in order to give constructive notice of an instrument otherwise properly recorded. The California view has been that the recorder is the agent of the grantee and the grantee will have to suffer the loss if an error occurs in recording. This is applied when an instrument is improperly indexed the same as it applies when an error has occurred in copying the instrument into the record books.(14)

The case of Rice v Taylor(15) affords an illustration of a type of error in indexing. A mortgage on real property was filed and properly recorded in the "Official Records" but indexed in the "General Index" as a "Note and Pledge as Security", rather than as a mortgage. A subsequent purchaser of the property who had no actual notice of this mortgage claimed he took title free of such mortgage since it was improperly indexed and he would not be put on notice of the mortgage from this erroneous indexing.

The court after determining that California has an "index" system of recording held that the manner of indexing used in the case of Rice v Taylor

failed to give constructive notice to a subsequent purchaser of the real property. The court stated as follows:

> "Here a reading of the index alone would not even suggest a real estate encumbrance but, on the contrary, a transaction respecting chattels would come to the mind. While the word 'pledge' may in certain connections be loosely used to denote a real estate encumbrance as well as one of chattels, still, where standing alone as a subject without qualifying surroundings, we cannot see how it can be said that real estate is even hinted at. If the index is to be held material at all it must give some direct reference to the true nature of the instrument referred to."

This case leaves a question as to what the result would be if a mortgage were indexed as a deed or a different type of real property encumbrance. It would seem that a purchaser searching the records would be put on notice of the actual type of instrument since in such a case the purchaser would be interested in any type of instrument affecting the real property whether it were a deed, mortgage or other encumbrance. He would be put on inquiry by the index and should examine the instrument recorded to find out its contents. In so doing he would be able to find what kind of an instrument it actually was. This is clearly distinguishable from indexing a real property mortgage as an instrument apparently affecting personal property only.

A situation which is related to this problem is that of constructive notice to a subsequent purchaser of the real property when a chattel mortgage on fixtures has been recorded. This was discussed in a former chapter, but is pertinent at this point. When a chattel mortgage on fixtures is properly recorded and indexed as a chattel mortgage, a subsequent purchaser of the real property will not be put on notice of this chattel mortgage. The theory for this rule is the same as discussed in Rice v Taylor. A purchaser checking the index who comes to a chattel mortgage would not consider that it involved real property, but only personal property. He is not required to look at the record of such instrument to see if it covers fixtures rather than chattels not attached to the land.(16) In actual practice, a chattel mortgagee to be fully protected would record his chattel mortgage and ask that it be indexed as a mortgage on real property as well as indexed as a chattel mortgage. In this way he would be protected against subsequent chattel mortgagees and subsequent purchasers of the real property.

Mortgages on crops are treated differently. Under the provisions of Civil Code Section 2955, mortgages may be made on all growing crops, including grapes and fruit. The court held in Congdon v Wagner(17) that a crop mortgage when properly recorded will give constructive notice to all the world. Any person dealing with such land or purchasing it subsequently will be held bound by the mortgage on the crops. The basis for this is that a crop mortgage is indexed as a crop mortgage rather than as a chattel mortgage. Subsequent purchasers of the real property would be put on notice from the index that such mortgage affected crops. They would then check the crop mortgages in the chain of title to discover whether they involved crops on the particular piece of property they were purchasing. When a mortgage on fixtures is indexed as a chattel mortgage

there is no indication to a subsequent purchaser that fixtures are involved. Therefore, it is advisable to request that a chattel mortgage on fixtures be indexed also as a mortgage on real property. This would not be necessary in the case of a crop mortgage, however, since the term crop mortgage indicates it involves something which is a part of the land.

Conditional sales contracts and leases covering fixtures are treated in the same manner as chattel mortgages on fixtures. There is some dictum in the cases to the contrary, but it seems to be unfounded.(18)

Another type of error is an incorrect reference to the book and page where an instrument has been copied into the record books. It would seem that such an error would deprive the record of the operation of constructive notice which it might otherwise have. According to Rice v Taylor(19) the indexing must be correct and since the book and page reference is part of the indexing it would seem that it would have to be correct also. Of course, it could be argued that the index would put a subsequent purchaser on notice of a fact which he should investigate. He would then have to make a reasonable investigation to discover the instrument referred to in the index. This problem has apparently not been decided in California.

C. INSTRUMENT TRANSCRIBED INCORRECTLY INTO PROPER RECORD BOOK

These errors usually consist of an error in copying such as omission of a portion of a description, omission of the certificate of acknowledgment, transposition of letters, errors in description, et cetera.

The general attitude of the California courts in such situations is to hold that the record is constructive notice only of the record as it appears in the record books. It is not constructive notice of any portions omitted and it is not notice of the correct item when it has been incorrectly copied. The basis for this rule is that the one who offers the instrument for record has the better opportunity of detecting and correcting the error. He is, therefore, the one who must suffer the loss.

This rule was established by the early case of Chamberlain v Bell(20) decided under the 1850 statute on Conveyances. This case held that a subsequent purchaser would not have notice of the conveyance of a portion of the area described in a recorded deed but omitted from the description by the recorder in copying the instrument. The court stated the design and intention of the act was to give constructive notice of facts which appeared on the face of the record, and could not operate as constructive notice of such portions of the deed as through mistake or carelessness, were not entered of record.

This rule has been followed in a much later case, People v Southern Pac. R.R. Co.(21) in which the recorder had omitted the description of a highway in a map when it was copied into the record books. The court held that purchasers who bought property in the area covered by that map received a title clear of of this highway.

In the case of Donald v Beals(22) the error made by the recorder consisted of copying the wrong date of deposit of a mortgage into the record books. The effect of this was to make the record appear as if this mortgage had been filed before another mortgage given on the same property which had in fact been recorded later. The correct dates of filing had been endorsed on the instruments themselves when they were filed. As was discussed formerly, when two instruments have been recorded properly with no errors, priority depends on a determination of which was properly copied into the record books first. The court in Donald v Beals held that the date appearing on the instruments did not affect the priority between these two instruments. The one which appeared by the record books to be prior in time was given priority even though it had been deposited later. This is another illustration of the rule that the record as it appears in the record book will be controlling even though an error has occured in copying.

It would seem that the same result should follow if the filing number stamped on the instrument when it is received is incorrectly copied.

It should be noted, however, that if the instrument as recorded states what priority it is to have, an error in recording one before the other or giving one a lower filing number than the other will not affect the true priority. In Phelps v American Mortgage Co.(23) two instruments were recorded. One stated it was to have priority over the other. However, an error was made and this instrument was not recorded until after the other one. The court held the priority in such a case depended on the statement in the instruments and not on the question of which instrument was first recorded.

The rule established by Chamberlain v Bell has been departed from occasionally when an error of minor importance has occurred. For example, in Dawes v Tucker(24) a trust deed was recorded with a provision that publication was to be once a week in case of foreclosure. In copying this instrument the recorder made an error and copied it as "twice" a week. A subsequent purchaser claimed that since an error in recording had occurred he should take title free of such trust deed. The court stated, "We do not think, however, that the error of the recorder in the instant case was of such consequence as to render the recordation of the instrument in respect to which it happened entirely and utterly void." Since the material items, such as the names, description of the property, et cetera were correctly copied, the court held that an immaterial error would not prejudice the subsequent party. He could easily find out what the proper requirement for publication was. This theory puts a purchaser on inquiry as to the true contents of the document as to immaterial items. This is a satisfactory theory when immaterial items are involved. If carried too far, however, it would destroy the entire purpose of the recording system and require a purchaser to look behind the record to the original document in every instance. As stated before, the burden of errors should rest with the grantee, not the subsequent purchaser.

## III. ERRORS APPEARING IN THE ORIGINAL INSTRUMENT

### A. ERRORS IN DESCRIPTION OF PROPERTY

The rule generally applied by the courts when an error appears in the instrument and is copied into the record is that the record is notice of the contents of the instrument as recorded. The subsequent purchaser may rely on the state of the record as it appears.

For example, in Davis v Ward,(25) the leading case on this subject, a mortgage had an incorrect description of the property so that it appeared that the mortgage covered land several miles away rather than the actual land it was intended to cover. A subsequent purchaser of the land intended to be covered by the mortgage was held not to be subject to this mortgage since the record did not indicate it actually covered this property the purchaser was purchasing.

There are some cases limiting this rule which place the burden of discovering an immaterial error in description on the purchaser. An example of this is where the description refers to the wrong map book but there is only one map book in existence covering that area. In such a situation, it has been held that a subsequent purchaser is put on inquiry to discover this map and is put on notice of the proper description, including the proper reference to the map for that area.(26) The purchaser in such a case must look behind the record to find the map covering the area mentioned in the deed and determine whether the deed involves the specific property he is interested in purchasing. The problem of what is a sufficient description depends on the facts in each case and is decided as each case is presented.(27) The same is true of the question of whether an error is material or immaterial.

### B. ERRORS IN INSTRUMENT DUE TO TYPOGRAPHICAL ERRORS

If the error is minor, such as the transposition of letters, it has been held that the record gives constructive notice of the instrument. A subsequent purchaser is put on inquiry to investigate what the parties to that instrument originally intended. For example, a deed in the purchaser's chain of title contained a description referring to the San Bernardino Meridian. Instead of using the letters S.B.& M. the letters were transposed and read B.M.& S. Such an error is obvious to one searching the records and held easily discoverable. It would be too harsh to hold that an error of such a nature makes the instrument invalid as against a subsequent purchaser.(28)

Gray v Maier & Zobelein Brewery(29) enunciates this rule very clearly by stating that the instrument imparts such notice as a fair and reasonable construction thereof would indicate as the meaning of the terms employed. The lease involved in this case stated that the party of the first part (the lessor) had a right to renew the lease at the end of the term. The subsequent purchasers who purchased the land claimed they should not be subject to the right of the lessee to renew which was what the parties to the lease had originally intended. The court held that the mistake was so obvious that the purchaser would be put on inquiry as to the true intent of the parties. A reasonable man would investigate when he read a lease giving the lessor a right to

renew since that would be a very unusual term in a lease. If he investigated he would have discovered the lease was intended to give the lessee the option. If he failed to make a reasonable investigation he would be charged with notice of what he would have discovered had he made such an investigation.

The conclusion to be drawn from these cases is that when an immaterial error has occurred either in the drawing up of the instrument or in the copying of it into the records it will not cause the record to be void as to subsequent purchasers. The record will continue to give notice to purchasers and it will be notice of the correct terms of the instrument. This is, however, limited to the situation in which the error is immaterial.

C. ERROR IN NAME OF THE GRANTEE

When the error in a deed occurs in the name of the grantee and it is a material difference in spelling, a more serious problem is presented. The grantee under such a deed if he desires to convey the property must convey in his correct name with a reference to the name by which he acquired title. If he fails to do this there will be a break in the chain of title. For example, if Brown conveys to Moore but misspells the grantee's name as More and Moore gives a mortgage to X executing it with his correct name Moore a subsequent purchaser of this property would not connect the conveyance to More with the mortgage given to X by Moore. It would be outside the chain of title and the purchaser would not be subject to it. If, however, Moore gives the mortgage with his correct name but refers to the incorrect name, More, this mortgage will be indexed under Moore and under More. A subsequent purchaser in checking the index will then discover the mortgage and be put on notice of such an instrument. The manner of indexing such matters was discussed in a former chapter.

There are many ways of correcting such an error but the desirable method is by court action to reform the deed and the filing of a lis pendens. This will give notice to subsequent purchasers from the filing of the lis pendens that the deed is subject to correction. Other methods of correction between the parties are dangerous and may result in failure to achieve the desired result.

If the name is correct in the instrument but copied incorrectly by the recorder, a court order may be acquired to correct it. The recorder may not correct it by erasure or interlineation of the record.

There are other methods of correction but a court order is advisable, because of the difficulties connected with any attempt to correct the record by the parties.(30)

This chapter has emphasized the problems that arise in connection with errors in the recording system and in the instruments which are offered for record. The theories developed by the courts have been mainly designed to protect the subsequent purchaser and allow him to rely on the state of the record. This is in keeping with the purpose of the recording act which is to give the purchaser an opportunity to discover the state of the record title and protect subsequent purchasers who purchase in good faith, for value, and without actual or constructive notice.

FOOTNOTES to CHAPTER 8: EFFECT OF ERRORS IN THE RECORDED INSTRUMENT OR THE RECORDING PROCESS

1. 131 Cal 552.
2. 7 Cal 292.
3. 57 Cal 399.
4. 102 Cal 493.
5. 104 Cal 395; prior opinion in 4 Cal Unrep 450.
6. 67 Cal 57.
7. 146 Cal 3
8. Stanislaus Water Co. v Bachman, 152 Cal 716.
9. Keese v Beardsley, 190 Cal 465.
10. 31 Cal 293.
11. 23 Cal 570.
12. Cal. Stats. 1909, p. 784.
13. 171 Cal 32.
14. 23 California Law Review, p. 107.
15. 220 Cal 629.
16. Elliot v Hudson, 18 Cal App 642.
17. 207 Cal 373.
18. See Bell v Mortgage Guaranty Co., 109 Cal App 203 and Oakland Bank of Savings v California Pressed Brick Co., 183 Cal 295, both involving conditional sales contracts. See Western Machine v Graetz, 42 Cal App (2) 296, involving a lease covering fixtures.
19. 220 Cal 629, cited supra, footnote #15.
20. 7 Cal 292, cited supra, footnote #2.
21. 68 Cal App 153.
22. 57 Cal 399, cited supra, footnote #3.

23. 6 Cal (2) 604.

24. 178 Cal 46.

25. 109 Cal 186.

26. Rogers v McCartney, 3 Cal App 34; Leonard v Osburn, 169 Cal 157.

27. Rea v Haffenden, 116 Cal 596 is an example of a description held sufficient.

28. Black Eagle Oil Co. v Belcher, 22 Cal App 258.

29. 2 Cal App 653.

30. See Ogden, M. B., Outline of Land Titles (1947) p. 578, 579, for a discussion of problems involving incorrect spelling of names.

Chapter 9: EFFECT OF RECORDING INSTRUMENTS NOT IN THE CHAIN OF TITLE
(By University of Southern California)

## I. INTRODUCTION

It is generally understood that an innocent purchaser is not put on notice from the record of instruments which are not in the chain of title. Just what instruments are in the chain of title is not always clear and the California courts have struggled with this problem. The purpose of this section is to determine the reason for such a rule and to clarify what instruments are in a purchaser's chain of title and what instruments although closely connected with the interest of the vendee are not in the chain of title for various reasons. There is a natural division into the following classifications:

A. Instruments executed by a stranger to the title.

B. Instruments recorded before grantor obtained title.

C. Instruments executed and recorded after grantor had apparently parted with title.

D. Instruments executed before but recorded after execution of other conveyances by same grantor.

E. Conveyances of neighboring land by the same grantor containing restrictions on land retained by the grantor and later conveyed.

## II. INSTRUMENTS EXECUTED BY A STRANGER TO THE TITLE

The purpose of the recording act is to charge a purchaser with constructive notice of that which he would have discovered by a diligent search of the records. The system used in California is the grantor-grantee system and not the tract or plat system. The only way a purchaser can find instruments affecting his title is by searching the name of his proposed grantor on the grantee index to find all instruments in which the proposed grantor was a grantee. He must then read the record of each of these instruments to find the one by which the proposed grantor obtained title to this piece of property. It is necessary to read each of these since the index does not give the legal description of the property. It only gives the grantor's name and the grantee's name and a book and page reference where the particular document is recorded. See Chapters 1 and 4 for a discussion of the method of search. When the instrument is found by which the proposed grantor acquired title, the next step is to trace the name of the grantor in that instrument to find the instrument by which he acquired title. This is done in the same manner as described above. The purchaser continues this procedure until the original source of title is discovered.

The purchaser then traces each grantor on the grantor index to find

any instruments of conveyance executed by him. He then reads each of these instruments to find whether they involved the property he is purchasing.

The original source of title is generally a government patent, since all titles were judicially determined and patents issued when California became a state. This was required by the 1850 Statute of Congress which established the United States Board of Land Commissioners which was given authority to determine these titles. Appeals were allowed to the United States District Court and then to the United States Supreme Court. The adjudication of the Commission has repeatedly been held to be conclusive as to the validity of the original grants by the Spanish and Mexican governments.

From an analysis of this system of searching records, it can be seen that a purchaser will not be likely to run across instruments which although properly recorded were not in the chain of conveyances through which he deraigned title to the property. For this reason, the rule is established that a purchaser will not be put on constructive notice of instruments which although properly recorded would not be discovered by this search. That is, he would not be charged with notice from the record of instruments executed by persons not in his chain of title. This is true even though such persons had actually acquired interests in the property by unrecorded conveyances or other instruments.

This subject really involves the question of what interests a subsequent purchaser will be subject to. He will not be subject to interests acquired through an instrument executed by a stranger to the record title.

For example: O, owner of Blackacre conveys to A, who properly records the deed from O. Subsequently, O attempts to convey the same piece of property to B, who records the deed from O. B will not be protected in such a situation. A is given protection on the basis of either of two theories:

(1) The proper theory is that A was first in time and by recording preserved his common law priority.

(2) The theory applied by most courts is that B was given constructive notice by the record of the conveyance to A and therefore, B cannot claim as a bona fide purchaser without notice of that conveyance.

If, however, there is a conveyance made by a stranger to the title there will be no protection to his grantee. For example: X, who claims title to Blackacre by an unrecorded instrument purports to convey Blackacre to A, who properly records his instrument. Subsequently, O, record owner of Blackacre, conveys to B, who properly records his instrument. A will not be protected against B even though he records his instrument first. It is necessary for him to claim through the record owner in order to be

protected. This means that even though A recorded first, he will not have priority over subsequent parties who record later nor against prior unrecorded conveyances from the record owner. The courts usually treat the problem as one of constructive notice when subsequent parties are involved. The courts hold that B would not take subject to any interests which he could not find out about from the record. He is not charged with constructive notice of this conveyance to A by X.

There is, however, an exception made in the case of adverse possession. If the grantor, X in this case, claimed title by adverse possession he could convey to A who could then claim that B takes with notice of the title acquired by adverse possession even though there is no record of X's claim in the Recorder's office. It has been held that constructive notice results from possession alone. This subject is quite complex and is discussed in Chapter 2 of Part IV.

The California statute, Civil Code Section 1213, which provides for the doctrine of constructive notice from the record does not by its terms confine the doctrine of notice to instruments in the chain of title. It states:

> "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees;..."

It has been left to the courts to read in the limitations as to the chain of title.

In the case of Bothin v California T. I. & Trust Co.(1) the court in discussing Civil Code Section 1213 stated:

> "This language is very general, applying in terms to every conveyance (italics), but it is held that this only contemplates conveyances by one having legal title to the property conveyed and is applied where there are conflicting conveyances made by persons claiming under the same grantor. It does not apply to a deed by a stranger; one who is not connected in any manner with the title of record. No notice whatever is conveyed by such a deed."

The court relies on two earlier California cases which had previously enunciated this rule, Long v Dollarhide(2) and Garber v Gianella.(3)

If the subsequent purchaser has actual notice of the existence of an instrument even if it is outside the record chain of title, he will take subject thereto. This policy is to avoid the perpetration of frauds by purchasers with actual notice of unrecorded conveyances and conveyances not in the record chain of title.

The California courts have also held that a subsequent purchaser may

be charged with notice of an instrument which has been recorded, although not in the chain of title, if the purchaser has notice or knowledge of facts and circumstances which would lead a reasonable man to investigate and discover the existence of such a document.(4)

If a person who has no title either of record or not of record attempts to convey property to another and the grantee records he is given no protection by recording. There would be no question of notice to subsequent purchasers in that case. The problem would be settled by holding that recording does not give any validity to an invalid instrument. No protection is given to a party who claims title through an invalid instrument.

A typical instance of a break in the chain of title occurs when property is conveyed by a person in a different name than that by which he acquired title.(5) What notice a person derives from the records in such a case is determined at the present time by a specific statutory provision, but there is an interesting history behind this statute.

In the early case of Fallon v Kehoe(6) a conveyance was made to "Darby Fallon" which was a nickname for Jeremiah Fallon the true name of the grantee. Before the 1850 recording act was passed, Jeremiah conveyed the property to plaintiff by a deed with his true name, Jeremiah Fallon. After the passage of the act, this deed was recorded. Jeremiah then attempted to convey to another party using his nickname, Darby Fallon, in the deed. Defendant, a bona fide purchaser without notice, claimed title through the grantee of this later deed, as a result of several mesne conveyances.

The court held that title passed to plaintiff, grantee #1 even though the name of the grantor was different from that which appeared in the deed by which he had acquired title. This is in accord with the common law rule that a conveyance by the true owner passes title regardless of the name used by him in the deed. This deed was of course, not in the chain of title.

The main question involved was whether the record of this deed would constitute constructive notice to subsequent purchasers claiming title through the second deed which was signed by the correct name, Jeremiah.

The court construed the 1850 statute providing for constructive notice and concluded that there would be no exception made in a situation like this. The first grantee had complied with the Recording Act and properly recorded the document and, therefore, the constructive notice the statute provided for would follow. The court refused to read in the limitation that the instrument must be in the chain of title or no notice will be imparted. The court stated:

> "It would have been better, perhaps, if the statute had contained a provision to the effect that when the owner of land conveys it by a different name from that in which he acquired it, the deed should contain a proper reference to that fact, for the security of subsequent purchasers or encumbrancers. But there is no such requirement in the statute, or at common

law, and we have no power to exact conditions not found in the law."

The legislature in 1905 took the suggestion of the court in Fallon v Kehoe and enacted Civil Code Section 1096(7) which read as follows before a 1947 enactment which amended it:

"Any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, must, in any conveyance of said real estate so held, set forth the name in which he or she derived title to said real estate."

In 1942 in the case of Puccetti v Girola,(8) the California Supreme Court declared that this code section meant that any conveyance which did not comply with this requirement would not give constructive notice to third parties when recorded and furthermore, would be invalid between the parties. The legislature apparently considering this too harsh a result amended Civil Code Section 1096 in 1947(9) by adding the following provision:

"Any conveyance, though recorded as provided by law, which does not comply with the foregoing provision shall not impart constructive notice of the contents thereof to subsequent purchasers and encumbrancers, but such conveyance is valid as between the parties thereto and those who have notice thereof."

This amendment puts the purchaser in the same position as he would be in if any other formal prerequisites to recordation had not been complied with, but does not affect the validity of the instrument between the parties.

Section 27334 of the Government Code provides for the manner of recording these conveyances. It states:

"If the name of the person in whom title to real estate is vested is changed from any cause, the recorder shall alphabetically index the conveyance in the "Index of Grantors," both in the name by which title was acquired and the name by which it is conveyed."

## III. INSTRUMENTS RECORDED BEFORE GRANTOR OBTAINED TITLE

When a person purports to convey property to another before he has acquired title to the property himself, but then later acquires title, the courts generally hold that between these two parties the grantee has a valid title. This result is based on the doctrine of "Estoppel by Deed." There are two explanations of this phenomenon which are given by various courts in the United States. The first theory is that the grantor has purported to convey a title and is later estopped from asserting the title he subsequently acquires. The other theory is that the title actually passes directly to the grantee under the conveyance to the grantor.(10)

The application of the rule of "Estoppel by Deed" is limited, generally, to a situation in which the grantor is attempting to transfer a definite interest in land, and does not apply when he merely quit claims such interest as he may have.

The California legislature has codified the doctrine of "Estoppel by Deed" in Civil Code Section 1106:

> "Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors."

The doctrine in California applies likewise to a mortgagor who acquires title subsequent to the execution of a mortgage.

A more difficult problem arises when the rights of third parties intervene. For example, A purports to convey Blackacre to B before he acquires title and subsequent to the acquisition of title conveys to C, a bona fide purchaser without notice of the former conveyance. There is a conflict of authority in the cases in the various states as to which of these two grantees would have priority. Leaving out any effect the recording acts might have, some courts have held that the estoppel will be raised against any parties to whom the grantor later attempts to convey regardless of whether they have notice or not. In other states, a contrary view is expressed, which protects the purchaser in such a situation, provided he is without notice.

The recording acts have complicated the entire situation further. For example, A conveys to B, before acquiring title. B records the deed immediately. A, after acquiring title, conveys to C, a bona fide purchaser, who records his deed. If the recording statute states that the record of a conveyance shall constitute constructive notice to subsequent purchasers for value, without notice, will C be treated as having notice of the conveyance to B and, therefore, take subject thereto? Courts in some states have mechanically applied the recording statute to this situation and protected the party who first recorded.

Other courts have followed a more practical and sensible approach by holding that the first conveyance is not in the chain of title of the second grantee and, therefore, he is not put on notice of its terms. The California courts follow this view and do not put a purchaser on notice of conveyances made by his grantor or a grantor in his chain of title before acquisition of title to property. The basis for this conclusion is that a purchaser should be put on notice only of those instruments which he would discover by an orcinary search of the records. A person in searching the records would not be likely to find conveyances made by his grantor before acquisition of title. He would search back to the source of his grantor's title, but would not in so doing find conveyances by the grantor made before he acquired title. To find these a special search would be required and the California courts have felt this additional search would

be too great a burden. It would require a purchaser to investigate conveyances by all grantors in the chain of title to find any possible conveyances made by any of them before they had acquired title. Since such a search is not contemplated and such documents will not generally be discovered, a purchaser in California will not be considered to have constructive notice from the record of conveyances made or encumbrances created by a grantor and recorded before the date on which the grantor acquired title himself. Of course, if the purchaser has actual notice, he will take title subject to such conveyance or encumbrance.

The case of Ludy v Zumwalt,(11) a leading California case on after-acquired title affords a clear illustration of this problem. Defendant acquired an option to purchase a certain area of land, but had not acquired title to the property. He made a contract with a water company to have water furnished to the area for irrigation and in the contract a permanent lien on the land was given to the company as security for the payments due under the terms of the contract. At the time of execution and recordation of this contract, the defendant did not have any interest in the land. The court holds that an option merely gave him a contract right, not an interest in real property. Subsequently, the defendant purchased the land from plaintiff giving a note and purchase money mortgage in return. The mortgage was properly recorded. Payments on the contract were not made nor payments on the purchase price. The mortgagee sued to foreclose the mortgage and the water company cross-complained to foreclose its lien which it claimed had priority over the mortgage since it was first recorded.

The court reviewed the authorities both in California and in other states and concluded that the mortgagee would not be put on notice of the contract made by the optionee nor of the lien given to secure payment of the contract. The reasoning of the court indicates that this instrument would be outside the record chain of title and could not be found by an ordinary search of the records. Therefore, to impute constructive notice of such an instrument would be unfair to the subsequent lien claimant. The opinion states:

> "The plaintiff in the present case would manifestly have no reason to investigate the public records to ascertain whether I. G. Zumwalt or any other stranger to the title had created, or any person had acquired, a lien upon the property prior to the execution of the deed by plaintiff to the Zumwalts conveying the lands to them and the simultaneous execution of the mortgage by the latter to secure the purchase price thereof, or at least so much of such purchase price as plaintiff was entitled to. And even if she had for any reason examined the records for that purpose, she would not, under any indexing system of recording written instruments required by law to be recorded, have obtained any knowledge of the lien of appellant, unless she had gone further in her investigation of the records than the law contemplates."

It was argued by counsel in this case that when title was acquired

it related back to the time the option was given and cut off any intervening rights. The court, however, refused to apply the rule of relation back. This rule is only applied to further justice and in this case it would work manifest injustice. The most important reason, however, why the court refused such relation back is that an option does not convey any interest in land. Therefore, there is nothing to relate back to. If it had been a contract to purchase, an equitable interest would have been created in the purchaser and title would relate back to the time of the making of the contract if it were desirable in the particular situation. This result, however, could be possible only if an interest in land were involved. It could not be achieved in the case of an option agreement, the court stated.

The case of Sun Lumber Co. v Bradfield(12) provides another example of the California view when different types of encumbrances are involved, e.g. a materialman's lien and a deed of trust. A deed of trust was given by a person at a time when he had not yet received delivery of the deed covering the property and therefore, was not the owner of the property. Subsequently, he received delivery of this deed transferring title to him. At that moment according to the principle of Estoppel by Deed, the trustee acquired title to the property. The trust deed had been recorded when given, which was before there was any title in the trustor to be transferred to the trustee under such trust deed. Prior to delivery of the deed to the trustor which was likewise prior to the acquisition of title by the trustee under the trust deed, materialmen had furnished materials for a building on this property. A conflict arose between the purchaser at the foreclosure sale of the trust deed and the materialman's lien claimant as to which had priority.

The court based its decision on Section 1186 of the Code of Civil Procedure which reads as follows:

> "The liens provided for in this chapter are preferred to any lien, mortgage, deed of trust, or other encumbrance, upon the premises and improvements to which the liens provided for in this chapter attach, which may have attached subsequent to the time when the building, improvement, structure, or work of improvement in connection with which the lien claimant has done his work or furnished his material, was commenced; also to any lien, mortgage, deed of trust, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, structure or work of improvement with which the lien claimant has done his work or furnished his material was commenced."

The lien of the trust deed attached when the deed conveying the property was delivered to the trustor since at that time by the principle of Estoppel by Deed, the trustee received title to the property under the trust deed. This was after the materialman's lien had attached by delivery of the materials. The result was, therefore, that although the trust deed was executed and recorded prior to the time when the lien of the materialman

had actually attached to the land, it did not actually attach until after the other lien had attached. According to the code section quoted above, the lien of the trust deed would be subordinate to the lien of the materialman since it had attached subsequent to the time when the material had been furnished by the materialman, and subsequent to the commencement of work on the building. Since the lien claimant had priority he was protected in the foreclosure sale against the purchaser.

## IV. INSTRUMENTS EXECUTED AND RECORDED AFTER GRANTOR APPARENTLY PARTED WITH TITLE

It is the California view as seen in the above section that a subsequent purchaser without actual notice will not be treated as having constructive notice of instruments executed and recorded before a grantor acquired title to the property. This same view is expressed by the California court in regard to an instrument executed and recorded after the grantor parted with title.

For example, A conveys to B, and later conveys to C by a recorded deed. If B then conveys to X, a bona fide purchaser without notice of the conveyance to C, X will not be treated as having constructive notice of the later deed to C, since it was made after A had apparently parted with title.

The practical consequences of this doctrine are illustrated in the case of Rowley v Davis.(13) A conveyance was made by the owner by an absolute deed, but the intent of the parties was that it should operate as a mortgage only. The deed was properly recorded, but did not show the fact it was given for security only. Subsequently, a document was filed by the grantor stating that the original conveyance was merely for the purpose of security. The purpose of this was to indicate to subsequent purchasers that the conveyance was in fact a mortgage. The property was then conveyed to the plaintiff by the mortgagee, the plaintiff not having notice of the instrument subsequently filed by the original grantor limiting the effect of her conveyance. Plaintiff brought this action to quiet title against the party claiming as a mortgagor since he claimed to have no notice of the fact that the deed was really a mortgage and no notice of the document limiting the effect of the original conveyance. The court held that since the record showed that the grantor had completely parted with title by the original deed, a subsequent instrument attempting to limit the effect of her conveyance would be ineffective. Such an instrument filed subsequently would not put a subsequent purchaser on notice of the fact that the parties had intended the deed to operate as a mortgage. This effect could only be achieved by a recorded contract signed by the original grantee at the same time he executed the deed and which stated the conveyance was for security only and that the property would be reconveyed when the debt was paid off.

## V. INSTRUMENTS EXECUTED BEFORE BUT RECORDED AFTER EXECUTION OF OTHER CONVEYANCES BY SAME GRANTOR

This problem can be illustrated as follows: A conveys to B by deed executed January 1, 1950. A then conveys to C by deed executed February 1,

1950. C records his deed on February 3, but B does not record until February 5. The rule which California follows is that the first purchaser for value, without notice, and in good faith to record will prevail as between B and C. This means that if C has no actual notice and no notice from facts and circumstances putting him on inquiry, on the day he purchases, and if he properly records his instrument before B, C will have priority over B. The basis for this is that under Civil Code Section 1214 a purchaser is only put on notice of instruments recorded before he records. It does not apply to instruments executed before but recorded after he records.

A more difficult problem arises when the first recorded grantee conveys the property to a third party. A conveys to B who fails to record until after A has conveyed to C who records immediately. C then conveys to X after both of the other conveyances have been recorded and X claims priority over B. The court faced with a situation like this in the case of Manoney v Middleton,(14) held that X had constructive notice of the conveyances from A to B and C at the time he purchased, since both are in his chain of title and would be discovered by a proper search of the grantor-grantee books. This forces a purchaser to search for instruments recorded after the instrument by which his grantor acquired title, involving deeds executed before the deed by which his grantor obtained title but which were recorded after that time. He must continue his search down to the date that he himself acquires title.

This result may, however, be avoided in certain cases. X may claim priority over B if he takes title through a bona fide purchaser. As shown above, as between B and C, C would prevail if he was without notice of the prior conveyance to B. The court in Jones v Independent Title Co.(15) follows this to its logical conclusion by allowing X to take the clear title which C had obtained. This would mean that X could obtain C's clear title and not be subject to B's interest even if X had actual notice of the deed from A to B. The court states this in the following manner:

> "A bona fide purchaser can convey his entire interest or title free and clear of outstanding but undisclosed and unrecorded equities prior in point of time to the claims of such purchaser, even (with one exception which is not involved here) to a transferee or grantee with notice of such equities."

However, if C were not a purchaser in good faith, that is if he had notice of B's deed at the time he made his purchase he would not be given priority over B. X in taking title from C could not then claim a clear title derived from C. He could not claim to be a bona fide purchaser in his own right since he would be charged with constructive notice from the record of the deed to B since it was in his chain of title and recorded previous to the execution of the instrument conveying the property to him. This leaves X with no alternative except to search the records to the date of the conveyance to him and ascertain what interests had been created before he acquired an interest.

The purchaser as shown above would not be charged with notice of conveyances made and recorded subsequent to the time that a grantor in the chain of title had parted with title. He would, however, be charged with notice of those made prior, but recorded subsequently to the time that that party had parted with title. This distinction is highly theoretical, however, since in searching the records for those made prior but recorded subsequently the purchaser would automatically come across those made subsequently and recorded subsequently when he is looking for those made prior but recorded subsequently. Therefore, the purchaser would have actual notice of them and be bound by any effect they might have had on the former conveyance; of course, there is the possibility that the purchaser might be put on notice of these instruments from facts and circumstances outside of the record, such as possession.

## VI. CONVEYANCES OF NEIGHBORING LAND BY THE SAME GRANTOR CONTAINING RESTRICTIONS ON LAND RETAINED BY THE GRANTOR AND LATER CONVEYED

The question presented in this section is whether a conveyance by a grantor of other property by a deed containing restrictions on the land retained by the grantor will impart constructive notice to an innocent purchaser of the property retained by the grantor simply because the deed was recorded? For example, A, owner of lots #1 and #2 conveys lot #1 to B by deed containing restrictive covenants which are mutually enforceable by A and B and which are applicable both to lot #1 and lot #2. Later, A sells lot #2 to C, who has no actual notice of the restrictions imposed on lot #2 by the former deed to B. The question the court is then faced with is whether C can be considered to have constructive notice of the restrictions contained in the deed conveying lot #1 from the record of it. This depends on whether such deed is considered as being in C's chain of title or not.

There is a split of authority in the United States on this question. The leading case of Glorieux v Lighthipe,(16) a New Jersey case, concluded that such deed was not in C's chain of title and, therefore, C was not charged with notice of any restrictions contained therein.

Other courts have, however, analyzed the situation and decided that the deed is in C's chain of title. This seems the more logical approach since the instrument does convey to the first grantee an interest in the land retained by the grantor. This interest may consist of an easement or a right to enforce certain restrictions. When such an instrument is recorded it is one of the links in the chain of title by which C became the owner of the property. It is in fact a prior conveyance of an interest in the property which C has purchased and since it is recorded and can be discovered by a proper search of the grantor-grantee books, it is logical to put a purchaser on notice of such a conveyance. The situation does not change just because the main purpose of the former conveyance was to convey neighboring land and not primarily to create an encumbrance on the land retained.(17) Any other conclusion would make the restrictive covenant to a great extent futile, since the grantor could then sell the remaining property and extinguish the effect of such a restriction.

The California District Court in Miles v Clark(18) has followed the approach that a subsequent purchaser has constructive notice of the restrictions in such a situation, even though the deed creating such restrictions is not technically in the grantee's chain of title. In this case the area had been subdivided and a general plan of development for the entire tract devised so that the property would be used for exclusive residences only. A map of the area was filed indicating that a general plan of improvement was being followed, but not expressly stating the various restrictions. The lots were all sold with reference to this map. The original owners contracted with each other as to what particular restrictions would be put on the lots and made them for the benefit of each and every lot in the tract and of the owners thereof. Several lots were sold with these restrictions in the deeds and recorded. Later, however, the original grantors rescinded their original agreement concerning the restrictions and sold lots subject to different restrictions and some lots apparently without any restrictions contained in the deed.

An action was brought by some of the owners to establish their equitable easement in all the lots in the area and to enjoin various land owners from violating the restrictions originally agreed upon. The courts in granting the injunction and declaring the existence of the easement stated that the purchasers of all the lots were subject to the restrictions whether their deed contained the express restrictions or not. The basis for this the court states is that the original deeds containing the restrictions were on record and therefore, subsequent purchasers of lots in the tract were on notice of their contents. In answer to the argument that the original deeds were not in the chain of title of the subsequent purchasers the court states:

> "Appellants insist, however, that they were only bound with constructive notice of those things which were within the course of the title to the land. While it is true that these defendants did not deraign title through a deed containing the restrictions, they did deraign title through the same grantors, the principal defendants herein, who themselves created the conditions. The deeds executed by their grantors limiting their title were of record. Mere ordinary prudence would have dictated an examination of these deeds to ascertain if the remaining lots were affected by them. The map of the tract was on file, and the sales were made with reference thereto, and it expressly indicated the existence of a building scheme. Under these circumstances we are of opinion that the documents of record constituted constructive notice not only of the existence of the building scheme, but also that the tract was burdened with certain easements."

This puts the burden on the subsequent purchaser to examine all the deeds which the grantors in his chain of title executed in regard to neighboring lands in order to determine whether any of them contained restrictions on the land which the subsequent purchaser is purchasing. He cannot tell from the index whether the particular instrument would

contain such a restriction or not and therefore, must look at each of these documents. If a plat system were used, these restrictions would show on the tract which was restricted and a subsequent purchaser of that tract could easily find this restriction. Under the grantor-grantee system, however, it is a serious burden to discover these documents.

It should, of course, be remembered that in a situation like this if there is actual notice or notice of facts and circumstances that would put a prudent man on guard, the purchaser must investigate. If he does not, he will be charged with notice of that which he would have discovered by a reasonably diligent search. The court in Miles v Clark states this very clearly: "In addition thereto, the general appearance and character of the tract, and the nature of the improvements thereon, ought to indicate to one interested the presence of some character of restrictions."

If this does not show up from the possession, however, it would seem that it is too great a burden to put on the purchaser to require him to investigate all the instruments involving neighboring lands which his grantor has executed.(19)

This chapter has developed the rule that the doctrine of constructive notice does not generally apply to instruments not in the chain of title, and has attempted to show when an instrument is not in the chain of title, although the courts are not always agreed on this point. Finally, an attempt has been made to show the difficulty a purchaser has in determining what interests of third parties his title will be subject to and what type of search he must make. This difficulty arises from the doctrine of constructive notice from facts and circumstances. It is very difficult for a purchaser to determine what facts would lead a reasonable man to make an investigation and just how far he should investigate to be fully protected.

FOOTNOTES to CHAPTER 9: EFFECT OF RECORDING INSTRUMENTS NOT IN THE CHAIN OF TITLE

1. 153 Cal 718.

2. 24 Cal 218.

3. 98 Cal 529.

4. Dobbins v Economic Gas Co., 182 Cal 616; Standard Oil Co. v Slye, 164 Cal 435.

5. Walters v Mitchell, 6 Cal App 410.

6. 38 Cal 44.

7. Cal. Stats. 1905, c. 443, p. 602.

8. 20 Cal (2) 574.

9. Cal. Amend. Stats. 1947, c. 1314, p. 2852, sec. 1.

10. Tiffany, Real Property, 1939, sec. 1230; Burby, Real Property, 1943, p. 442.

11. 85 Cal App 119.

12. 122 Cal App 391.

13. 34 Cal App 184; see also Baker v Fireman's Fund Ins. Co. 79 Cal 34; Duncan v Ledig, 90 Cal App (2) 7.

14. 41 Cal 41. Other decisions on this point are: Clark v Sawyer, 48 Cal 133; County of San Luis Obispo v Fox, 119 Cal 61.

15. 23 Cal (2) 859.

16. 88 NJ Law 199.

17. Tiffany, Real Property, 1939, sec. 1266, cited supra, footnote #10.

18. 44 Cal App 539.

19. See Moe v Gier, 116 Cal App 403 and Martin v Holm, 197 Cal 733, which limit the rule of Miles v Clark to situations in which there is a general scheme. See Chapter 10, infra, for further discussion of the rule of Miles v Clark.

Chapter 10: MATTERS OF WHICH RECORD IMPARTS NOTICE
(By University of Southern California)

I. INTRODUCTION

Civil Code Section 1213 provides for constructive notice from the record. It reads as follows:

> "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees;..."

There are many cases interpreting this code section and discussing the question of what matters a subsequent purchaser has notice of from the record. In fact, constructive notice is emphasized by the courts very often when it is unnecessary to discuss the problem. This will be considered now.

When an instrument creating legal interests is executed the grantee of any interest under that instrument is given priority over a subsequent purchaser, provided the instrument is properly recorded first. It is unnecessary to discuss constructive notice in that situation. It is sufficient to state that the grantee had a common law priority which he preserved as against subsequent purchasers by recording. The courts, however, prefer to state that the subsequent purchaser can claim no interest since he has constructive notice from the record of the prior instrument.

When the first instrument creates an equitable interest, however, and the subsequent purchaser acquires the legal title there is no question of common law priority. The subsequent purchaser in that situation will have priority unless he has taken title with notice of the former equity.

He may have actual notice, which would cut off his priority. He may have constructive notice from the record of the first instrument or constructive notice from facts and circumstances which put him on inquiry. It is necessary in such a situation to discuss constructive notice in accordance with Civil Code Section 1213.

Another situation in which constructive notice from the record is important is when a subsequent purchaser records before a prior purchaser or the prior purchaser fails to record. For example, O, owner of Blackacre gives A a lease for five years on Blackacre. This lease is not recorded. O then conveys to B with a statement in the deed that the property is subject to a lease in favor of A. This deed is recorded. B then conveys to C, but the deed does not contain any statement of the existence of the lease in favor of A. Civil Code Section 1214 protects C against this prior unrecorded lease if C purchased in good faith, without notice, and for value. Notice will be the question involved in this case. The courts hold that C would be put on notice of the lease since there was a recital of the existence thereof in a recorded instrument in C's chain of title. The basis for this is that a subsequent purchaser is

put on notice of the contents of the recorded instrument and must investigate any references pertaining to unrecorded instruments.(1)

Bearing in mind that these are the only situations in which constructive notice from the record should be discussed a brief summary of the matters of which the record gives notice will follow.

## II. NOTICE OF THE EXISTENCE AND LEGAL EFFECT OF RECORDED INSTRUMENTS IN THE PURCHASER'S CHAIN OF TITLE

A subsequent purchaser is put on notice of the existence of any instruments in his chain of title which are recorded and which might affect his title to the property. He is in addition, charged with notice of their legal effect against him.(2)

This would be important in a situation in which the prior recorded instrument conveyed an equitable estate. If it conveyed a legal estate notice would not be important since the first party would have common law priority which was preserved by his proper recordation.

An example of a situation in which notice would be important in this connection is as follows:

O, owner of Blackacre makes a contract to sell Blackacre to A who properly records his contract. O then purports to convey legal title to P who also properly records. A in such a case cannot rely on a common law priority since he had acquired merely an equitable title and P claims a subsequent legal title. However, the record of this contract of sale gives notice to P, a subsequent purchaser, as a result of the terms of Civil Code Section 1213 quoted above. P, therefore, cannot claim to be a bona fide purchaser without notice since he has notice from the record. He will not be given priority over A.

If A had received the legal title and recorded it would not be necessary to discuss constructive notice from the record.

## III. NOTICE OF RECITALS CONTAINED IN RECORDED INSTRUMENTS IN THE PURCHASER'S CHAIN OF TITLE

A purchaser of real property will be charged with notice of any recitals in the instruments recorded in his chain of title. These may consist of the following types of recitals:

1. Recitals of Legal Interests
2. Recitals of Equitable Interests
3. Recitals Referring to Unrecorded Instruments or Instruments Outside the Purchaser's Chain of Title

A. RECITALS OF LEGAL INTERESTS

Recitals in these instruments may consist of recitals of legal interests such as easements, life estates, et cetera.(3) For example, O, owner of Blackacre conveys the property to B with a statement in the deed reserving an easement for O to have a road across Blackacre. B then conveys to P without any statement in the deed concerning O's easement. P will receive title subject to the easement in favor of O on the basis of either of two theories:

The first theory and the proper analysis is that O reserved a legal interest in Blackacre and he is in effect a prior purchaser of that legal interest, the easement for a road. A subsequent purchaser, P, would have no right to cut off the easement since O was first in time and, therefore, had common law priority. This priority was preserved by O when the instrument giving him such an easement was first recorded.

The second theory and the one generally followed by the courts is that P was put on notice of O's interest from the record and, therefore, could not claim to be a bona fide purchaser without notice. It is actually unnecessary to discuss this question of constructive notice since as discussed before O was first in time to acquire the easement and had retained his common law priority by recording first.

B. RECITALS OF EQUITABLE INTERESTS

Where the interest involved is an equitable interest constructive notice from the record is very important.(4) For example, O conveys Blackacre to A subject to restrictions on the use of Blackacre. The result is that O has retained an equitable interest which consists of the right to enforce these restrictions. A conveys to P without any mention to P of these restrictions. The deed by which P acquires title has no reference to these restrictions. At common law P, a subsequent purchaser of the legal estate without notice would not be subject to the equitable interest in O since equitable interests were cut off by a purchaser of the legal title, who purchased in good faith, for value, and without notice of the prior equity. However, under the California recording system the recording of the deed from O to A would give notice to P of the restrictions in the deed from O to A. He could not, therefore, be considered a bona fide purchaser without notice and would be subject to this prior equity in favor of O.

Since there is no common law priority given to O in this situation, it is necessary to resort to the doctrine of constructive notice from the record in order to protect O's interest.

Examples of legal interests are easements, reversionary interests after termination of a lease or breach of condition.

Examples of equitable interests are restrictive covenants, interest of a beneficiary under a trust, equitable servitudes.

It is now generally agreed that these equitable interests are enforceable against subsequent purchasers with notice. There are, however, a few situations in which the courts refuse to enforce covenants against subsequent purchasers even if they have notice.(5) The extent to which such covenants, et cetera, are enforceable is not within the scope of this paper. The main purpose of this discussion is to emphasize what recitals in instruments in a purchaser's chain of title he will be considered to have notice of from the record.

C. RECITALS REFERRING TO UNRECORDED INSTRUMENTS OR INSTRUMENTS OUTSIDE THE PURCHASER'S CHAIN OF TITLE

When an instrument is unrecorded it is void as against subsequent bona fide purchasers or mortgagees who properly record their instruments. Provision for this result is made in Civil Code Section 1214. In order to claim the benefits of this code section, the subsequent purchaser must prove that he had no notice of the unrecorded instrument at the time he made his purchase. This means no actual notice and no notice from facts and circumstances putting him on inquiry.

When there are recitals in recorded instruments in this purchaser's chain of title which refer to instruments which have not been recorded, the purchaser is required to make a reasonable investigation to discover the unrecorded instrument referred to.(6) For example, O, owner of Blackacre grants an easement to A for a road across Blackacre. This instrument is not recorded. O later conveys Blackacre to B subject to the easement in favor of A. This easement is expressly referred to in B's deed which is properly recorded. B later conveys to P who takes title subject to all recorded interests. It is his duty to search the record and find what interests are outstanding against the property he is purchasing. He will discover, through such a search, the reference in P's deed to the easement in favor of A. It is then his duty to investigate to the extent that a reasonable man would and try to discover the terms of the unrecorded instrument giving A an easement. If he fails to make a reasonable investigation he will be charged with notice of the contents of that unrecorded instrument if it could have been discovered by a reasonable investigation. This will prevent him from claiming as a bona fide purchaser without notice and, therefore, he cannot claim protection under Civil Code Section 1214 against this prior unrecorded instrument. If, however, the instrument could not have been discovered by a reasonable investigation he will not be charged with notice of it. If he has no notice from other facts and circumstances he will be permitted to claim as a bona fide purchaser without notice and, therefore, not subject to this easement in favor of A. The burden of discovering the instrument is on the subsequent purchaser. He must decide what a reasonable investigation consists of. It is a difficult decision to make. It is unfortunate whenever a purchaser is put on notice of instruments not on the record. It is in violation of the spirit of the Recording Act which is to make the record a true reflection of the state of the title. It fails to do this in several respects as is pointed out in Chapter 2 of Part IV.

As stated above, a purchaser will be charged with notice of an unrecorded instrument referred to in a recorded instrument if he fails to make a reasonable investigation to discover the instrument referred to. There is case authority limiting the notice in such a situation to notice of provisions which would generally be found in that type of instrument.(7) For example, if the unrecorded instrument referred to in a recorded instrument were a lease, the purchaser who fails to investigate is charged with notice of the ordinary terms of that lease, such as a covenant to repair, or give an extension or renewal. He would not be put on notice of an unusual provision, such as a covenant to purchase all the milk required by the lessor from the lessee.

A subsequent purchaser is generally not charged with notice of matters contained in instruments outside the chain of title. An exception is made in the following situation:

O is the owner of lots #1 and #2. He conveys lot #2 to A by recorded deed. In this deed are various restrictions which O and A have agreed to and which are made by both parties. For example, both agreed in this deed not to build structures over two stories high. O agrees not to build such buildings on lot #1 and A agrees to refrain from building such buildings on lot #2. These are therefore, mutually enforceable restrictive covenants. O later conveys lot #1 to X who claims that he is not subject to the restrictions on this lot. The California courts have held that the deed conveying lot #2 to A is not in X's chain of title, but nevertheless X will take subject to the restrictions.(8) This requires X to search the records for any conveyance by O of neighboring pieces of property in which O agreed to any restrictions on lot #1 retained by him. This matter was discussed in Chapter 9.

A second situation in which a purchaser may be charged with notice of matters in a recorded instrument outside his chain of title occurs in the following case:

A recital is contained in a deed in the purchaser's chain of title incorporating provisions in an instrument which is recorded but outside the purchaser's chain of title. For example, O, owner of lots #1 and #2 conveys lot #1 to $P_1$ by a deed containing certain restrictions on the use of this lot but with no statement of restrictions on lot #2 retained by O. This deed is properly recorded. Subsequently, O conveys lot #2 to $P_2$ and states in the deed, which is properly recorded, that this lot is subject to the same restrictions as those contained in the recorded deed from O to $P_1$. This reference puts $P_2$ on notice of the restrictions in the deed from O to $P_1$ covering lot #1 and makes lot #2 subject to the same restrictions. This in effect puts $P_2$ on notice of provisions in an instrument which is outside his chain of title. If $P_2$ then conveys to $P_3$ without any mention of restrictions, $P_3$ will have notice of the contents of the instruments in his chain of title. He will be charged with notice of the reference involving restrictions in the deed from $P_1$ to $P_2$ and must investigate to determine the restrictions against this party. This requires him to look at the original instrument from O to $P_1$ which set up the restrictions. If he fails to

investigate as a reasonable man he will be charged with notice of the restrictions and their applicability to his lot. He is, in effect, charged with notice of the contents of an instrument outside his chain of title.(9)

In any situation involving recitals in a recorded instrument the recital must be clear and definite. If the recital is too vague and uncertain a subsequent purchaser will not be charged with notice of the recital. (10)

FOOTNOTES to CHAPTER 10: MATTERS OF WHICH RECORD IMPARTS NOTICE

1. See discussion of these theories in the Introductory Chapter to this paper.

2. Brainard v Whitman, 11 Cal App (2) 32; Craig v Dinwiddie, 77 Cal App 681; Page v Rogers, 31 Cal 293; Black Eagle Oil Co. v Belcher, 22 Cal App 258.

3. There are many cases involving recitals of legal interests. For a case involving reservation of an easement see Hohenshell v South Riverside Etc. Co., 128 Cal 627; For cases involving reversionary interests of various types see the following cases: Quatman v McCray, 128 Cal 285; Childs v Newfield, 136 Cal App 217. For a case involving a conveyance suoject to a condition precedent see: Brannan v Mesick, 10 Cal 95.

4. See Wayt v Patee, 205 Cal 46, for an illustration of recitals of equitable interests in the form of restrictive covenants. See also: Hunt v Jones, 149 Cal 297; McBride v Freeman, 191 Cal 152; Martin v Holm, 197 Cal 733; Guaranty Co. v Recreation G. Club, 12 Cal App 383.

5. L.A. Terminal Landing Co. v Muir, 136 Cal 36; Berryman v Hotel Savoy Co., 160 Cal 559.

6. Guerin v Sunburst Oil & Gas Co., 218 Pac. 949 (Mont.); Tiffany, Real Property, (3d Ed.) Sec. 1293.

7. Wilkerson v Thorpe, 128 Cal 221; See also: Garber v Gianella, 98 Cal 527.

8. Miles v Clark, 44 Cal App 539. See Chapter 9, supra, for further discussion of this problem.

9. Tiffany, Real Property (3d Ed.) Sec. 1293; cited supra, footnote #6.

10. Watson v Sutro, 86 Cal 500; Fishback v JC Forkner Fig Gardens, 137 Cal App 211.

Chapter 11: EFFECT OF FAILURE TO RECORD
(By University of Southern California)

## I. INTRODUCTION

The common law rule governing priority was that the party whose instrument was executed first in time was given priority over any instruments executed subsequently. This rule applied as between two instruments transferring or creating legal interests in real property and also as between two instruments transferring or creating equitable interests in real property. If, however, the first instrument transferred merely an equitable interest, a subsequent purchaser of the legal title was given priority, provided he purchased in good faith, for value and without notice of the prior equitable interest.

The California statute follows the common law rule of first in time but adds an additional requirement. The first purchaser will have priority provided he records his instrument before a subsequent purchaser records his instrument. If he fails to record he may lose his priority. The California doctrine, therefore, gives priority to the first in time, provided he meets the statutory requirements of purchase in good faith, for value, and without notice of prior instruments and records first.

If the purchasers have both acquired legal or equitable interests the basis for priority is that the first in time has common law priority and by recording has protected it. If the first instrument involves an equitable interest and the second a legal interest the first purchaser, provided he records first, is protected on the theory that by recording he has given notice to the purchaser of the legal title. The purchaser of the legal title will not be able to claim priority as he would have at common law. It is necessary to base the decision on this theory since the first purchaser in that situation has no common law priority to be protected by recording.

If the purchaser who is first in time fails to record first he may lose his priority. Civil Code Section 1214 provides as follows:

> "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

If the subsequent purchaser records first and meets the requirements of Civil Code Section 1214 he will be given priority over the prior unrecorded conveyance. The subsequent purchaser must prove he purchased in good faith, for value, and without notice of the prior unrecorded conveyance. Here is the second situation in which constructive notice is important. The subsequent purchaser must prove he had no actual notice and no constructive notice in order to be given priority over the first purchaser who failed to record. The problems connected with

notice will be discussed below.

The purpose of this chapter is to determine what persons may assert the invalidity of a prior conveyance when such conveyance is unrecorded. These persons must be subsequent purchasers or mortgagees, who claim under an "instrument" authorized by the general recording statute, and who purchase in good faith, for value, and without notice of the prior unrecorded conveyance, and who record first. There is a special provision for certain judgment creditors. See Section VIII infra. The various elements which a party claiming protection under Civil Code Section 1214 must prove will be discussed below.

## II. CLAIMANT MUST BE A SUBSEQUENT PURCHASER OR MORTGAGEE

Civil Code Section 1214 limits protection to subsequent purchasers or mortgagees. Prior purchasers who record are protected either because they have maintained their common law priority or because recording of their instruments has given notice to subsequent purchasers under Civil Code Section 1213. Therefore, Civil Code Section 1214 is designed for the benefit of subsequent purchasers who claim priority over prior unrecorded instruments. In addition, it protects these subsequent purchasers against other subsequent purchasers who record after they do.

For example, O, owner of Blackacre, conveys to A, who fails to record. O then conveys to B who records meeting all requirements of Civil Code Section 1214. O then conveys the same property to C, who records properly without notice of the prior conveyances. A is a prior purchaser who has failed to record. B is a subsequent purchaser who is protected against A by virtue of Civil Code Section 1214, since he is the first subsequent purchaser to record. By the same token he is protected against C, another subsequent purchaser. This code section gives priority to the subsequent purchaser who first records properly provided he meets the requirements of purchase in good faith, for value, and without notice. That would be B in this case. Therefore, B is protected against a prior unrecorded conveyance and against a subsequent purchaser who recorded after B recorded.

It is important to note that protection is expressly given to subsequent purchasers and mortgagees. It has been held that the grantee of a quit claim deed is considered a purchaser.(1) Therefore, the grantee under such a deed will be given priority over a prior unrecorded grant deed.

Subsequent creditors are not given protection under Civil Code Section 1214. The result is that the grantee under a prior unrecorded conveyance is given priority over a subsequent attachment or judgment creditor. Such creditor may not assert the invalidity of a prior unrecorded conveyance.(2)

However, a judgment creditor purchasing at his own sale is a purchaser and can invoke the protection of Civil Code Section 1214 if he meets the other requirements of that code section.(3)

The subsequent purchaser may be the purchaser of an equitable title as well as the purchaser of a legal title in order to obtain protection under Civil Code

Section 1214.(4) For example, O, owner of Blackacre gives A a trust deed on the property. This is not recorded. O then contracts with B to sell Blackacre to him. This contract of sale is properly recorded. B has acquired an equitable title under this contract of sale and will have priority over A, provided he meets the other requirements of the above code section.

In addition to subsequent purchasers the statute is expressly for the benefit of subsequent mortgagees. This means that a subsequent bona fide mortgagee who records first will be protected against a prior unrecorded conveyance.(5)

## III. CLAIMANT MUST BASE HIS CLAIM ON AN "INSTRUMENT" AUTHORIZED BY THE GENERAL RECORDING STATUTE

What may qualify as an "instrument" under the general recording statute was discussed in Chapter 2. It will not be necessary to discuss that problem at this point. It is important to note that a person who claims priority under Civil Code Section 1214 must claim under such an "instrument". This means he must be a grantee under a deed, a lessee, a mortgagee, et cetera.

An attachment is not an "instrument" and, therefore, a subsequent party claiming rights against the property under an attachment will not receive priority over a prior unrecorded instrument.(6) This question could be dealt with merely by holding that a party claiming under an attachment is not a purchaser but merely a creditor and is, therefore, excluded from the terms of Civil Code Section 1214.

A judgment is not an "instrument" authorized by the general recording statute and, therefore, a subsequent party claiming under a judgment will be refused priority over a prior unrecorded instrument.(7) This question also could be dismissed by holding that such a party is a creditor and a creditor is not protected by the terms of Civil Code Section 1214. There is a special provision regarding a judgment involving the real property in question. This will be discussed below. The present discussion is limited to other judgments.

However, a judgment creditor who purchases at his own sale has been held to be a bona fide purchaser and entitled to protection.(8)

A sheriff's certificate of sale has been held to be an "instrument" entitled to recordation under the general recording statute. Therefore, a purchaser who receives such a certificate is protected under Civil Code Section 1214 against prior unrecorded instruments.(9)

## IV. THE CLAIMANT MUST PURCHASE IN GOOD FAITH

The element of purchase in good faith requires that the purchaser have no notice of facts which would put a reasonable man on inquiry. For example, if the property is purchased at a price which is grossly inadequate this would be a circumstance that would cause a reasonable man to suspect a defect in the title to the property. Failure to make a reasonable investigation under such

circumstances would mean that the purchaser had not purchased in good faith. He should investigate to determine whether there had been a prior conveyance that had not been recorded. If no investigation is made the purchaser is considered to have notice of any matters he would have discovered by a reasonable investigation and may lose his standing as a bona fide purchaser.

The element of good faith is inseparably connected with the problem of constructive notice from facts and circumstances and will therefore, be discussed further in the section below on NOTICE.

V. THE CLAIMANT MUST PURCHASE FOR VALUE

The requirement of value is closely connected with that of good faith. The consideration for the sale of the property may be in money or its equivalent. For example, it may be the forbearance, suspension or surrender of a legal right to process for the enforcement of the collection of the debt.(10) The process of attachment is an example. It has been held many times that the cancellation of a pre-existing debt will be sufficient consideration.(11)

The court does not generally look into the adequacy of the consideration given. A small consideration may support the transfer of valuable interests in property.(12) However, as stated above, if the consideration is grossly inadequate this will be a circumstance bearing on the question of the good faith of the purchaser. For example, in Rabbit v Atkinson,(13) property worth $35,000 was given in satisfaction of a judgment for $184.74. The court stated in this case:

> "While mere inadequacy of consideration may not be sufficient to deprive one of his position as a purchaser for value, an offer by a vendor to sell for a grossly inadequate price is a circumstance which should place the purchaser on his guard and may be such as to require that he make a reasonable inquiry as to the title of the vendor not disclosed by the records."

A mere nominal consideration has been held to be insufficient. The court in Beach v Faust(14) states:

> "The recording laws were not enacted to protect those whose ignorance of the title is deliberate and intentional, nor does a mere nominal consideration satisfy the requirement that a valuable consideration must be paid. Their purpose is to protect those who honestly believe they are acquiring a good title, and who invest some substantial sum in reliance on that belief."

If the purchaser fails to prove he has paid value for the conveyance he will not be given priority over a prior purchaser who failed to record properly.(15) It should be emphasized at this point that a subsequent purchaser has the burden of proving his purchase in good faith, for value, and without notice.(16) If he fails to sustain this burden he will not be given protection under Civil Code Section 1214.

VI. THE CLAIMANT MUST PURCHASE WITHOUT NOTICE, EITHER ACTUAL OR CONSTRUCTIVE

There are two types of notice generally referred to in the California decisions. These are actual notice and constructive notice.(17)

A. ACTUAL NOTICE:

Actual notice means that a purchaser has actually seen the particular unrecorded instrument involved in the case. For example, O leases Blackacre to A for five years by a lease which is unrecorded. O then conveys Blackacre to B by recorded deed. O tells B that he has given a lease to A and shows the lease to B. B then has actual notice of the lease to A and takes subject to its terms.(18)

If the lease were not actually shown to B but he was aware that such a lease was in existence he would be put on inquiry as to the terms of the lease. (19) He would be required to make a reasonable investigation to discover the terms and conditions of such lease. If he fails to make such investigation he will be held to have constructive notice of what he would have discovered by a reasonable investigation.

If the agent of the purchaser has actual knowledge of the terms of the prior unrecorded lease, this knowledge is imputed to the purchaser, who is charged with notice of the terms and is subject to them.(20)

If the unrecorded instrument which the purchaser has actual notice of refers to other instruments the purchaser is put on inquiry as to the contents of the instruments referred to.(21) For example, O, owner of Blackacre, grants to A by an instrument in writing an easement to have a road over Blackacre. O subsequently conveys the property to B with an express recital in the deed making the conveyance subject to A's easement. Neither of these instruments are recorded. O then purports to give C the easement which he had formerly given to A. C has actual notice of the deed from O to B but no actual notice of the instrument from O to A granting this easement. C is, however, put on inquiry from the recital in B's deed and is required to investigate and discover the extent of A's interest. If he fails to make a reasonable investigation he will be charged with notice of the terms of the instrument referred to in B's deed if it could have been found by a reasonable investigation.

The court in the case of Basch v Tidewater Etc. Co.(22) has extended this doctrine to its limit. In this case the purchaser had actual notice of an unrecorded lease. The court held this put the purchaser on inquiry as to the existence of any supplemental agreement modifying the terms of the lease even though such agreement was unrecorded, was not referred to in the lease and of which the purchaser had no actual notice. This puts a purchaser under a duty to investigate to discover instruments which might possibly affect an instrument of which he has notice. This seems to be an extreme interpretation and will probably not be followed by the courts in the future.(23) The decision could be justified if there were certain circumstances present which would give the purchaser reason to suspect the existence of such an instrument. Otherwise, it is an undue burden put on a purchaser and seems to violate the spirit of the recording act.

When an instrument is not a proper instrument to record because defectively acknowledged, unacknowledged, or unauthorized, a subsequent purchaser is not bound by its terms even if it is accepted for record. The instrument is considered the same as if unrecorded. A subsequent bona fide purchaser would be protected against it by Civil Code Section 1214 unless he had actual notice of this instrument. If he had actual notice he would be subject to provisions in the instrument.(24)

In all cases involving notice the subsequent purchaser has the burden of proving that he had no notice, either actual or constructive at the time he made his purchase.(25) This involves proof that a reasonable investigation was made to discover documents and data relevant to the state of the title the purchaser is receiving, when such investigation is necessary.(26)

B. CONSTRUCTIVE NOTICE

The second type of notice is constructive notice. The effect of constructive notice is to charge a purchaser with notice of certain matters when he does not have actual notice of those matters. Constructive notice may be the result of recording, it may be the result of possession or it may be the result of facts and circumstances which put a reasonable man on inquiry. If a subsequent purchaser has constructive notice from any of these factors he cannot be considered a bona fide purchaser and will not be given priority over prior unrecorded instruments.

If the first instrument is recorded and conveys a legal estate the problem of notice is not present. If the first conveyance involves an equitable interest and the subsequent purchaser receives the legal title and records the problem of notice is present. Of course, when a prior instrument is not recorded the problem of notice is of paramount importance.

The situations in which a subsequent purchaser is charged with notice will be discussed below.

1. CONSTRUCTIVE NOTICE FROM THE RECORD

When an instrument is properly recorded the record operates as constructive notice to subsequent purchasers in that chain of title. This is considered a conclusive presumption of notice which cannot be rebutted.(27)

The problem of what matters a subsequent purchaser has notice of from the record has been discussed in Chapter 10. It will not be necessary to go into that problem at this time.

It should be noted, however, that a subsequent purchaser may be charged with notice of an unrecorded instrument because it is referred to in a recorded instrument.

2. CONSTRUCTIVE NOTICE FROM POSSESSION

A subsequent purchaser is required to make a reasonable investigation to determine what interests a party in possession of the property he is purchasing

claims. Failure to make such an investigation puts the subsequent purchaser on notice of any facts he would have acquired by such investigation.(28) This can be illustrated as follows: O, owner of Blackacre, conveys this property to X, who fails to record his deed. X, however, takes possession and remains in actual, exclusive possession and makes improvements on the property. While X is in possession O purports to convey Blackacre to P who records his deed. P, however, fails to make any inquiry concerning the interest which X might have in the property. Failure to make such inquiry puts him on constructive notice of the instrument from O to X which he could have discovered by questioning X, the party in possession.(29)

If the party is in possession under an unrecorded lease a subsequent purchaser must investigate to discover the interest of this person. For example, A leases Blackacre to B for five years but the lease is unrecorded. A later conveys the property to P who fails to investigate and discover anyone in possession. A will be put on notice of B's interest under the lease since a reasonable amount of questioning would have resulted in the discovery of the existence of the lease. P, therefore, takes subject to B's interest under the lease.(30)

Possession of a tenant will also put a subsequent purchaser on inquiry as to the interest of the landlord. For example, O, owner of Blackacre, conveys it to A, who fails to record the deed. A then gives X a lease for years which is also not recorded. O later purports to convey the property to P, who is not aware of A and X's claims. He is put on inquiry, however, by X's possession and must investigate to discover what interests both A and X have. If he fails to investigate he will be charged with notice of the fact that X is a lessee and that A is the owner under an unrecorded instrument. He will take subject to these instruments.(1)

If a reasonable investigation had been made and the subsequent purchaser were unable to discover the interest of the landlord in this case the subsequent purchaser would not be subjected to any interest the landlord might have under the unrecorded instrument.(2) The California cases have not determined what a reasonable investigation would be under these circumstances.

The party in possession may have an equitable interest in the property as well as a legal interest. If the legal title is subsequently purchased the purchaser will be required to investigate the interest of the party in possession. If he fails to do so he will be charged with notice of the prior equitable interest of the party in possession. For example, O, owner of Blackacre contracts to sell the property to A who fails to record the contract but takes possession of the premises. O then conveys legal title to B who is unaware of the former contract with A. B is put on inquiry as to A's interest by A's possession, and B will take subject to this contract of sale if it would have been discovered by a reasonable investigation.(3)

When the grantor remains in possession after he has conveyed the property a subsequent purchaser is put on inquiry to discover the interest the grantor may have retained. For example, O, owner of Blackacre conveys by recorded deed

to B. A remains in possession. B then reconveys the property to C by an unrecorded instrument while A is still in possession. A subsequent purchaser from B is put on notice of the possibility of a deed back from the fact of A's continued possession.(4)

This situation is likely to arise when the grantor has been defrauded or when there is no consideration paid for the conveyance. This can be illustrated as follows: A, owner of Blackacre is persuaded to give B a deed to the property. This was accomplished by fraud on B's part. The deed is properly recorded and B conveys to C, a bona fide purchaser. A subsequently attempts to quiet his title against C. A has in effect a prior equity which consists of a right to rescind the contract he made with B and recover his property. C, a subsequent purchaser of the legal title receives a title which is clear of this prior equity unless he had notice of the equity in A. The courts hold that the continued possession of A puts C on inquiry and he must investigate the right which A has. Failure to investigate charges C with notice of the prior equity. Therefore, C will not take free of A's right of rescission since he cannot claim as a bona fide purchaser.(5)

There should, of course, be evidence that the possession of the grantor continued over a period of time.(6) If the conveyance were made and the grantor merely remained in possession for a few days it would not seem reasonable to charge a subsequent purchaser of the property with notice from that possession. It would seem reasonable for the purchaser in such a situation to conclude that the grantor was merely staying long enough to settle his affairs preparatory to moving.

There are two further matters of importance in connection with this subject. They are the nature of the possession and the extent of the inquiry that must be made.

The possession must be open, notorious, exclusive, and visible. It must not be consistent with the record and must be of such a character that would put a prudent man on inquiry. It must indicate that someone other than the person who appears by the record to be the owner has rights in the property.(7)

There is some discussion in the cases as to the nature of the actual occupancy that is necessary. For example, erection of improvements by one not the record owner will be an indication to a subsequent purchaser that an adverse possessor is in possession.(8) If the area is used for grazing purposes, pasturage, et cetera, that is sufficient to put a subsequent purchaser on inquiry. Some authorities have required the area to be fenced in by the adverse possessor, but the modern approach seems to be away from that requirement.(9)

There must be something to indicate to the subsequent purchaser that one not the record owner is in possession. For example, if a large tract is partly cultivated and later an adverse possessor enters and cultivates the rest in the

same manner there would not be a possession that would put a subsequent purchaser on inquiry. A reasonable man would conclude that the true owner had merely continued to cultivate the rest of his tract. The possession must indicate that it is by one not the record owner.(10)

This leads to a discussion of the requirement that the possession must not be consistent with the record. If it is consistent a subsequent purchaser is not put on notice of any claims adverse to that of the record owner.(11) To illustrate, let us take the following situation:

A and B are tenants in common of lot A according to the record. A conveys his interest to B by an unrecorded deed which gives the entire title to A. A then remains in exclusive possession of the entire lot. Subsequently, B purports to convey his undivided share to C. C is not put on notice of B's conveyance to A because of A's sole possession. The reason for this is that a tenant in common has a right to exclusive possession, and it would be consistent with an interest as a tenant in common.(12)

In addition, the possession of the adverse claimant must be exclusive of the record owner. If the purchaser acquires title from the record owner who is in possession he is not put on inquiry by the fact that one not the record owner is also in possession. The purchaser need not investigate to find out whether the person sharing the possession has an interest under an unrecorded instrument.(13) This rule has not been discussed to any great extent in the California cases but will undoubtedly be subjected to some exceptions.

The final question to be discussed is that of the extent of the inquiry which the purchaser must make. The courts generally require a reasonable investigation to be made and due diligence must be used to discover the true state of the title.(14) If the subsequent purchaser questions the person in possession but receives a false reply he is excused from making further inquiry unless the answer would lead a reasonable man to suspect its veracity.(15)

There is no excuse for failure to investigate merely because it is difficult for the subsequent purchaser to visit and examine the land. He must hire another to examine it for him under those conditions.(16)

If the person in possession is away on vacation the subsequent purchaser is still required to make an investigation to discover whether the property is occupied and by whom.(17)

It should be noted before leaving this chapter that possession puts a subsequent purchaser on inquiry to discover unrecorded instruments and also puts him on notice of claims based solely on adverse possession without a claim under an instrument.(18)

### 3. CONSTRUCTIVE NOTICE FROM FACTS AND CIRCUMSTANCES OTHER THAN POSSESSION

Civil Code Section 19 provides that "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

This means that if the subsequent purchaser hears or reads a statement concerning the title to the property he is purchasing which would put a reasonable man on guard he must investigate to determine the actual interests of persons other than the record owner in the property. The statement must be more than mere rumor or gossip but may be made by the record owner or a stranger to the title who has reason to know the facts. (19)

A circumstance putting a purchaser on inquiry is the fact that a vendor is willing to sell the property at a figure greatly disproportionate to its true value.(20)

When a reasonable investigation is made and no adverse claims have been discovered, the purchaser is not charged with notice of claims not on the record which may actually be in existence.

A problem is presented when the subsequent purchaser has no notice at the time he purchases the property and pays part of the consideration, but receives notice before he pays the balance of the consideration. In such a situation the court holds the purchaser is a bona fide purchaser to the extent of the payments made before he receives notice. He will be protected against the prior unrecorded interest to that extent only. (21)

If the purchaser has no notice at the time of the purchase and payment of the entire consideration he should be protected against the prior unrecorded conveyance even if he acquires notice before he records. In other words, in California a purchaser must be a bona fide purchaser at the time of purchase, but not necessarily at the time of recording.(22)

## VII. THE CLAIMANT MUST RECORD HIS INSTRUMENT PROPERLY

The final requirement of Civil Code Section 1214 is that of recording. The subsequent purchaser who claims protection against a prior unrecorded instrument must prove that he recorded his instrument before any other subsequent purchasers. This requires proper recordation with the proper acknowledgment and without error in the recording process.(23)

The subsequent purchaser who claims protection against an instrument executed prior to his but recorded subsequently must prove that he recorded his instrument first in point of time and in a proper manner. He will then be given priority over the instrument executed prior but recorded subsequent to the recording of his instrument. He must of course prove purchase in good faith, for value, and without notice.(24)

If the subsequent bona fide purchaser has no notice of a prior unrecorded instrument his transferee will prevail even if he has notice of that instrument. The basis for this is that a bona fide purchaser may clothe his transferee with a good title regardless of whether the transferee had notice. If the transferee records properly before the grantee under the unrecorded instrument he will be given priority.

## VIII. RIGHT OF JUDGMENT CREDITOR TO ASSERT INVALIDITY OF PRIOR UNRECORDED CONVEYANCE WHEN JUDGMENT AFFECTS TITLE TO THE PROPERTY

Civil Code Section 1214 states "Every conveyance of real property, other than a lease for a term not exceeding one year, is void...as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action." This can be illustrated as follows:

A conveys property owned by him to B. C, claiming title to the property by reason of a prior equity, brings an action to quiet title in himself. If C files a lis pendens before B records his deed, C will be protected against this conveyance to B if C is awarded the judgment quieting his title. If, however, B records his deed before C files the lis pendens B will prevail. His conveyance will not be declared void. This provision and the exception thereto were discussed in detail in Chapter 2. The most important limitation occurs when the judgment creditor has actual notice of the prior unrecorded conveyance at the time he files his lis pendens. In that situation he is not protected against the grantee under the prior unrecorded conveyance.(25) The subsequent purchaser must make this grantee a party to the action when he knows of the conveyance at the time of filing the lis pendens.(26)

## IX. CONCLUSION

This chapter has stressed the effect of failure to record an instrument. It has developed the qualifications of the parties who may assert the invalidity of an unrecorded instrument under Civil Code Section 1214. This concludes the analysis of the statutes and court decisions relating to the California recording statute. Chapter 2 of Part IV will summarize the defects that exist in the recording system that prevent it from achieving the purpose of notifying prospective purchasers of outstanding interests in the property they are considering purchasing.

FOOTNOTES to CHAPTER 11: EFFECT OF FAILURE TO REDEEM

1. Beach v Faust, 2 Cal (2) 290; Dunn v Carroll, 101 Cal App 209; Allison v Thomas, 72 Cal 562.

2. Hunter v Watson, 12 Cal 363, construing 1850 statute on Conveyances.

3. Foorman v Wallace, 72 Cal 553; Hunter v Watson, 12 Cal 363, cited supra, footnote #2.

4. Keese v Beardsley, 190 Cal 465.

5. Filipini v Trobock, 134 Cal 441; Frey v Clifford, 44 Cal 335.

6. Iknoian v Winter, 94 Cal App 223.

7. Bank of Ukiah v Petaluma, 100 Cal 590; Pixley v Higgins, 15 Cal 127.

8. Hunter v Watson, 12 Cal 363, cited supra, footnote #2.

9. Foorman v Wallace, 75 Cal 553, cited supra, footnote #3. See Chapter 2 for discussion of sheriff's certificate of sale.

10. Frey v Clifford, 44 Cal 335, cited supra, footnote #5.

11. Ibid. See also Foorman v Wallace, 75 Cal 553, cited supra, footnote #3.

12. Frey v Clifford, 44 Cal 335, cited supra, footnote #5.

13. 44 Cal App (2) 752.

14. 2 Cal (2) 290.

15. Long v Dollarhide, 24 Cal 218.

16. Davis v Ward, 109 Cal 186; Eversdon v Mayhew, 65 Cal 163; Black Eagle Oil Co. v Belcher, 22 Cal App 258.

17. Fair v Stevenot, 29 Cal 488. See also Civil Code Section 18.

18. Eversdon v Mayhew, 65 Cal 163, cited supra, footnote #16, De Leon v Higuera, 15 Cal 483.

19. Fresno Canal Co. v Rowell, 80 Cal 114.

20. Watson v Sutro, 86 Cal 500; Stanley v Green, 12 Cal 148.

21. Tiffany, Real Property, (3d Ed.) Sec. 1293.

22. 49 Cal App (2) Supp. 783.

23. Compare Barber v Gianella, for extent to which purchaser is put on notice of other documents because of notice of a particular unrecorded instrument. Citation: 98 Cal 527.

24. Parkside Realty Co. v MacDonald, 166 Cal 426. See Chapter 7 for further discussion of this subject.

25. Wilhoit v Lyons, 98 Cal 409, Bell v Pleasant, 145 Cal 410.

26. March v Pantaleo, 4 Cal (2) 242 for example of a sufficient investigation.

27. Fair v Stevenot, 29 Cal 488, cited supra, footnote #17.

28. Possession of the proper types puts subsequent purchasers on inquiry as to the interests of the party in possession. This possession is not notice of his interest per se, but puts the purchaser on inquiry. If after reasonable investigation the purchaser is unable to discover what interest this person had he would not be charged with notice of that interest. See Thompson v Pioche, 44 Cal 508.

In the cases based on the 1850 statute it was decided that possession was evidence tending to prove notice and required the purchaser to make a reasonable investigation. It did not, however, put him on notice per se. See Introductory Chapter for a discussion of the early debates concerning notice from possession. See also early cases:

Lestrade v Barth, 19 Cal 660; Fair v Stevenot, 29 Cal 488, cited supra, footnote #17; Hunter v Watson, 12 Cal 363, cited supra, footnote #2; Landers v Bolton, 26 Cal 393; Kelley v Wilson, 33 Cal 690; Stafford v Lick, 7 Cal 479; Pell v McElroy, 36 Cal 268.

29. Dement v Pierce, 122 Cal App 254; Hunter v Watson, 12 Cal 363, cited supra, footnote #2. The case of Dement v Pierce involves a subsequent encumbrancer.

30. Beverly Hills Natl. Bk. v Seres, 76 Cal App (2) 255; Fowler v Lane Mtg. Co., 58 Cal App 66; Standard Oil Co. v Slye, 164 Cal 435; Security Loan & Trust Co. v Willamette Steam Mills, 99 Cal 636.

1. Fowler v Lane Mtg. Co., 58 Cal App 66, cited supra, footnote #30; Dutton v Warschauer, 21 Cal 609; Peasley v McFadden, 68 Cal 611.

2. Thompson v Pioche, 44 Cal 508, cited supra, footnote #28.

3. Moss v Atkinson, 44 Cal 1; Cohen v Hellman Comm. T & S Bk., 133 Cal App 758; Morrison v Wilson, 13 Cal 494; Jones v Marks, 47 Cal 242; Stonesifer v Kilburn, 122 Cal 664; Woodson v McCune, 17 Cal 304; Bryan v Ramirez, 8 Cal 467.

4. Pico v Gallardo, 52 Cal 206; O'Rourke v O'Connor, 39 Cal 442; Daubenspeck v Platt, 22 Cal 331; Pell v McElroy, cited supra, footnote #28; Austin v Pulschen, 112 Cal 528.

5. Taber v Beske, 182 Cal 214; Garrett v States, 3 Cal (2) 379.

6. Austin v Pulschen, 112 Cal 528.

7. Randall v Allen, 180 Cal 298; Mountain Club v Pinney, 67 Cal App 225.

8. Kinsell v Thomas, 18 Cal App 683.

9. Havens v Dale, 18 Cal 359; Dissent in Gibbons v Yosemite Lumber Co., 190 Cal 168.

10. Gibbons v Yosemite Lumber Co., ibid. Randall v Allen, 180 Cal 298, cited supra, footnote #7.

11. Ibid, Randall v Allen.

12. Smith v Yule, 31 Cal 180.

13. Schumacker v Truman, 134 Cal 430; Aden v Vallejo, 139 Cal 165; Emeric v Alvarado, 90 Cal 444; McNeil v Polk, 57 Cal 323; Partridge v McKinney, 10 Cal 182; Porter v Johnson, 172 Cal 456; Sanguinetti v Rossen, 12 Cal App 623; Compare: Campbell v Brennan, 13 Cal App 681.

14. Smith v Yule, 31 Cal 180, cited supra, footnote #12.

15. Davis v Haugh, 59 Cal 568; Thompson v Pioche, 44 Cal 508, cited supra, footnote #23.

16. Thompson v Pioche, ibid; Shurtleff v Kehrer, 163 Cal 24; Harlanee v Brown, 21 Cal (2) 568; Whitmore v Ainsworth, 4 Cal Unrep. 872; Compare: Laughton v McDonald, 61 Cal App 673.

17. Taylor v Ballard, 41 Cal App 232.

18. Scheerer v Cuddy, 85 Cal 270; Keese v Beardsley, 190 Cal 465, cited supra, footnote #4.

19. See Chapter 2 of Part IV for further discussion of adverse possession.

20. Lawton v Gordon, 37 Cal 202; Beverly Hills Natl. Bk. v Seres, 76 Cal App (2) 255, cited supra, footnote #30.

21. Rabbit v Atkinson, 44 Cal App (2) 752, cited supra, footnote #13.

22. Davis v Ward, 109 Cal 186, cited supra, footnote #16; Combination Land Co. v Corran, 95 Cal 552.

23. March v Pantaleo, 4 Cal (2) 242, cited supra footnote #26; Chapman v Osterparo, 73 Cal App 537, seems contra; see 14 California Law Review 440, for a discussion of the problem.

24. See Chapter 8 on effect of errors.

25. March v Pantaleo, 4 Cal (2) 242, cited supra footnote #26.

26. Moore v Schneider, 196 Cal 380.

Chapter 12: TITLE INSURANCE

(All of this chapter is taken from an article prepared by Mr. Lawrence L. Otis of the Title Insurance and Trust Company of Los Angeles, California. It is so complete and gives such a lucid description of the history of title insurance and of its characteristics and the procedures involved that to have condensed the article would have destroyed its value.)

A. DEVELOPMENT OF TITLE ASSURANCE METHODS

In a small and close-knit community, where land holdings are personal and not precisely delineated, actual possession by the family, passed on from generation to generation, constitutes the highest proof of ownership, and will seldom be disputed. As the community grows, holdings are divided and contracted; strangers, with no background of long and continuous occupancy, become owners; exact boundaries become important; and values rise. The only sure support for the owner becomes a paper title through which he can trace his right to the property in an unbroken chain of conveyances from the government, the original source of all titles.

The danger, as time goes on, that important papers--vital "links" in this "chain" of paper title--will be lost, destroyed or simulated, coupled with the bulk of the accumulation if all must be preserved over a long period, impel the establishment of a public repository for them, where they--or authentic copies--may be preserved and examined.

The solution adopted in the early days of the United States was the installation in each community--now, commonly, in each county--of a recorder's office, where such documents could be deposited, either permanently or long enough for the recorder to index and make copies of them. Preservation of originals, after copies were made, thereafter become of minor importance.

For a time this repository constituted a sufficient supplement to the known fact of occupancy. A person dealing with one recognized by his fellows as the owner, and having a good record chain of title, usually could safely rely upon such title. And, as time went on, less and less reliance came to be placed upon the fact of known possession and more and more upon the record title. True, the rights of anyone in actual possession must be recognized—that is always necessary—but the growth of dealings in land as in a sense a commodity, an investment, the repeated subdivision and resubdivision into progressively smaller holdings, the rapidity with which holdings change hands, and the more intensive improvement of such holdings, creating new and higher values, all contribute in time to the necessity of relying primarily upon a good record title.

At the same time, the multiplication of the number of documents affecting a particular parcel and their distribution among various offices made it increasingly difficult for people themselves to search the records

for the pertinent information and so they enlisted the help of men who began to specialize in such searching. From helping to find the records relating to the property, these men soon developed the business of furnishing summaries or "abstracts" of the pertinent documents, of bringing the essential information to the customer rather than simply of pointing out where it could be found.

In course of time, still further developments took place. First, it was observed that, up to a certain date, the chain of title to numerous parcels in the same area might be identical: only since the last resubdivision thereof would the instruments affecting the particular parcel differ from its neighbors. It was, therefore, both important and valuable to a searcher of titles, now known as an "abstracter", that he preserve all his previous "abstracts", since from them he could, in many cases, fix a date behind which he need not retrace his search: needing only to copy his previous work down to the point where common ownership of both parcels (the parcel previously abstracted and the nearby parcel under search) terminated, and then complete his search of the latter parcel from that date.

Second, it was logical that this saving of time and energy would be augmented if the abstracter had access to the abstracts of his compeers in the business; but each guarded his own abstracts as his principal stock in trade, and could only permit their use by others at a price. One solution was, of course, for abstracters with comparable stocks of completed abstracts to pool these resources and form an abstract company.

Third, it ultimately became apparent that the manner in which title papers were recorded--being copied into books from day to day, under various titles--deeds, mortgages, homesteads, etc.--was a costly factor, both in time and money, to their business. It was necessary to search every index from start to finish ("from beginning to date" is the trade term) in order to obtain the references to the necessary instruments, and then hunt out the various books from which to make their abstracts. In short, these instruments were not indexed according to the property affected so that a search of a "lot book" would give the required information. The really brilliant idea--the very foundation of modern examination of titles—was the development of lot books in the offices of the abstract companies wherein references to all recorded documents were rearranged according to the property affected for ready reference to all instruments relating specifically to a given parcel of property; at the same time reclassifying matters affecting the persons of the owners rather than a particular parcel of property in another set of books, alphabetically arranged, so that the examination of the lot books could be supplemented by a search for such matters as judgments, bankruptcies, probates, powers of attorney, property settlements, etc., having a bearing upon the title although not expressly relating to it. The latter set of books became known as the General Index--the "G.I." to the initiated.

Fourth, with the growth in population and the creation of additional offices for the preservation of essential data, e.g., tax offices, offices

of clerks of the various federal, state, and local courts, etc., the time consumed in traveling to and from all these offices, examining the pertinent records and abstracting (summarizing) their contents made the maintenance of an integrated title plant a practical necessity. Such a plant comprised--in addition to the collection of all past work in the form of abstracts--lot books and the general index kept up to date, maps both official and unofficial, and a collection of short summaries (sometimes called daily slips) of the instruments of record, so that the instruments not only could be identified but their general nature ascertained without resort to the records themselves. The excellence of any such title plant, over and above its accuracy and completeness in reflecting the records, is the extent to which these daily slips cover the information which otherwise must be gleaned from an inspection of the original instruments or the recorded copies.

All this, however, still related only to the compilation of the "chain of title", it did not involve the construction, interpretation, or legal significance of the various items or instruments comprising such chain. That was the work of the lawyer. Only a lawyer versed in the intricacies of land law and of the laws governing related subjects--corporation law, probate law, bankruptcy law, divorce law; in short, a host of laws, civil and criminal, having a bearing upon the capacity of the parties to the transactions forming the basis of the title—could authoritatively construe the instruments in the chain and reach a conclusion or "opinion" as to the current condition of the title. Not every lawyer was qualified by temperament, training or experience to examine abstracts and formulate a reliable opinion of the title. Besides, it was often a tedious business which did not have a universal appeal. It was natural that a few lawyers in each community should become expert at this business and achieve a reputation for reliable work, thus creating a demand for their opinions.

The concentration of this work in the offices of a comparatively few expert title lawyers in each community created, in times of increased business activity, cloying delays in the completion of land transactions. Moreover, in the field of legal construction of instruments affecting land, there is room for great divergence of opinion; and what one title lawyer would consider sufficient another lawyer would seriously question, engendering uncertainty as to the title which often required costly and time-consuming litigation to allay. Again, the costs of preparing a complete abstract of title to property which had passed through many owners and had been subjected to many dealings, plus the added costs of study and opinion by competent lawyers, were all too often far in excess of those warranted by the value of the property.

This system of abstract of title and attorney's opinion or certificate, developed as it has been to a high point of perfection over the past one hundred years, nevertheless has afforded and still affords a reasonably satisfactory method of establishing a merchantable title and is widely used in the United States to this day. It is the traditional method of establishing a "marketable" title--one that is apparent from the public records

without dependence upon proof of matters not disclosed thereby.

Before the turn of the century, however, experience showed that the abstract-opinion system of establishing title failed, in many instances, to meet the ever-increasing demand for a ready and reliable evidence of title. For one thing it proved to be too slow in a time of rapid movement of real estate; it cost too much when the instruments in the chain of title were numerous and the abstract consequently over-extensive. Moreover, the liability of the abstracter and of the attorney were limited to omissions and mistakes of judgment which a qualified person should not have made, limited also to the actual loss occasioned by the error and then only to the person for whom the work was done. Then, too, as a practical matter, recourse was limited by the financial responsibility of the abstracter or attorney and there were few legal requirements other than a bond. Bond and capital could, in too many cases, be wiped out by one substantial loss.

Two developments then took place which greatly expedited issuance of, and ultimately materially increased the protection afforded by, evidences of title. The first was the elimination of the abstract by the issuance of a "certificate of title". This was made possible by the development to a high degree of perfection of the "title plant" coupled with the great competence acquired by "examiners" in the employ of the company in the pursuit of their work of abstracting titles. These examiners had come to be quite as expert in construing titles as the title attorneys were; and abstract companies perforce also employed skilled attorneys to assist the examiners in their work. As a matter of fact, many such examiners were themselves law trained. Instead of preparing a formal abstract of title, supported by the opinion of a title lawyer, the abstract company would compile, from its records, a search of title, informal in character but sufficient for the purposes of its examiners and, having reached a decision as to the current condition of title, would furnish the customer a "certificate of title", in which the company simply certified that from its examination it found the title to be then well vested in the present owner subject only to certain encumbrances noted therein. This could be done much more quickly and cheaply and with equal satisfaction to the average customer.

There remained, however, the question of protection, which was essentially no different under the certificate of title than upon an abstract and opinion. The second development, accordingly, was the decision of the abstract company to guarantee the title rather than merely certify the correctness of its examination thereof. For such guarantee to mean much, it was obviously necessary for the issuing company also to show its ability to respond to losses if such should occur; accordingly, the company increased its capitalization and set aside reserves so that its customers might feel (and be) protected in relying upon such guarantees. And, recognizing that this innovation was in effect a contract of indemnity, i.e., insurance, the laws governing insurance companies were in many states extended to such "title companies" and they became subject to supervision, limitations upon investments and the issuance of securities, requirements of minimum capital and reserves, and so forth.

At this point, and as a preliminary to the consideration of the latest and most momentous step in the development of the science of assuring title to land—the policy of land title insurance--it may be well to contrast, briefly, the coverage and protection afforded by the certificate and by the guarantee of title. By its certificate of title the company states that it has examined the pertinent public records and certifies that the title to the property, describing it, is vested in a certain person, naming him, subject to certain exceptions, which are then enumerated, such as taxes, easements, restrictions, mortgages and other matters which it finds to be outstanding and unsatisfied. Also excepted are all the matters which are not disclosed by the public records examined, such as rights of parties in possession, capacity of parties to contract, undisclosed liens, matters of survey and location, and the like. Essentially, this is the substantial equivalent of the attorney's opinion reached upon his examination of an abstract of title, and it affords no greater protection—the responsibility of the company is contractual, that it has made a careful search and has exercised the requisite skill in reaching its conclusions. The measure of its care and skill in this respect is that commonly exercised by other competent members of the same profession. Except in instances of gross negligence this is, at best, an indefinite yardstick; and the uncertain outcome of a lawsuit against the company is not very satisfactory protection. The burden of proof is upon the injured party to show that the error indicates negligence amounting to a lack of requisite knowledge and skill.

Moreover, a perfect title is an unknown phenomenon. There are many flaws in title which ordinarily would have no standing in court but, until passed upon, must occasion confusion and dispute. It is a faculty of some nicety to be able to say in advance which of the innumerable technical defects encountered in searching title will or will not ultimately occasion litigation or loss. Every title company constantly is called upon to decide which of these defects to show and which to eliminate. A too generous elimination of defects multiplies the risk of losses; a too strict attitude invites the dissatisfaction of the customer. As a result, the company usually recognizes a moral responsibility to respond to losses occasioned by its failure to show matters which subsequently are asserted to the detriment of the title it has reported. Nevertheless, the liability upon certificates of title is limited, qualified and uncertain.

By the issuance of a guarantee of title, on the other hand, the company guarantees that the title is vested as shown therein and, as above stated, it becomes a contract of indemnity (Title Insurance and Trust Company v. City of Los Angeles, 61 C.A. 232). It is more than a guarantee of careful search and skillful analysis, it is a guarantee of the title of the owner. While it will show the title subject to the same exceptions as would a certificate, it is an undertaking to pay any loss the customer should sustain should the record title prove to be otherwise than as shown therein. It places an absolute guaranty behind the work of the title company. It means that the opinion of the company as to the validity of the title guaranteed is fortified by its agreement to make that opinion good in case it is mistaken and loss should ensue in consequence to the customer.

Thus the great advance of the guarantee over the certificate was--and is--that it substitutes a certain for an uncertain yardstick of liability. And, while the liability under either would be substantially the same should it omit any reference to, say, delinquent taxes against the property which the customer ultimately was required to pay, the liability would be entirely different were the error one of judgment in ignoring a defect which ultimately occasions a loss. Under the certificate, it would first be necessary to establish that the omission was negligent--one that an experienced examiner should have questioned; while, under the guarantee, the fact of omission, plus proof of loss occasioned thereby, would establish the liability of the company regardless of any lack of skill in failing to show it.

All of the arrangements so far considered have one thing in common--such protection as they afford is limited to those matters which are disclosed by an examination of the public records; and these records, particularly those in the recorder's office, are merely transcribed copies of original instruments themselves no longer available for inspection. Every person familiar with these records knows that there may be hidden defects which cannot be determined by examination or study of such records: defects arising from fraud, forgery, identity, competency, status, limitation of power, lack of delivery, failure to comply with law. Neither the abstract, the opinion, the certificate nor the guarantee of title affords any protection against such matters. They are "off-record" risks and, as such, not within the contemplation of such evidences of title. Yet these off-record risks may be determinative of the title.

It remained for the policy of title insurance to extend protection against such off-record risks and the scope of this coverage is continually expanding. Although the use of such a policy began nearly seventy-five years ago its rapid pre-emption of the field has occurred during the past thirty years, accelerated by the increasing demand for the greater coverage it affords as its advantages become more widely known and appreciated.

The demand for wider coverage than that afforded by abstracts, certificates and guarantees was first felt in the larger centers of population where the growth of corporate ownership of land, the intensive improvement of land and the use of land and improvements as security for the safe investment of trust funds and insurance company reserves necessitated greater concern for and protection of the underlying title. The more intensive use of land in urban areas likewise created greater complexity in titles--such things as complicated trusts, ground leases, encroachments, party wall agreements, new and novel easements above and below the surface, complete utilization of the surface necessitating close attention to boundaries, building restrictions, zoning laws and police and fire regulations. In short, substantial investors in large number required additional protection at a time when the examination of titles was becoming increasingly complex. This called for title companies with substantial means and adequate plants to give such increased protection, thus centering the work in established and progressive organizations.

Customer demands coupled with a growing realization of the inadequacies of existing methods led rapidly to the employment of title insurance in lieu of the older assurances of title. Companies issuing such policies in substantial numbers and large amounts, and upon the strength of which vast sums of money change hands with confidence, must necessarily be subjected to the same supervision and compliance with regulatory laws as other insurance companies.

P. TITLE INSURANCE PROCESSES

A title insurance policy represents the final result of three successive processes: investigation of title, determination of the amount of insurance required, and the protection of the insured, by the insurer, against possible title losses. The risk or chance elements in title emanate, of course, from three principal sources: errors in searching the records, errors in interpreting the legal effect of instruments found in the chain of title, and facts external to the record. An insurer meets the first two in much the same way as the abstract company. It will have at its disposal a title plant—the fact finding mechanism heretofore mentioned. It will have, also, a corps of carefully trained and experienced searchers and examiners. It will have competent legal assistance. The added element of hazard, the examination of the risks which lie outside the public records, which is the distinctive coverage of the policy of title insurance, requires additional precautions which will be considered in detail.

Before considering such outside or off-record risks, however, some further attention may be given to the scope of coverage of the public records, wherein the policy affords the same protection as the guarantee of title. The public records include those of every government office of which the public is required to take constructive notice. The records in the recorder's office are only a part. With reference to lands belonging to the federal government there are the land office records both local and in Washington, D.C. There are the numerous records of the State of California in the capital. There are the tax records of every taxing agency whose levies constitute a lien on real property--cities, counties, state, as well as numerous districts such as irrigation, reclamation and drainage districts; also special assessment districts the records of which are found in city and county treasurers' offices. There are the county and city clerks' records where governmental action relating to land is recorded, of which zoning, police and fire regulations are examples. There are the offices of county clerks where, among other things, records pertaining to corporations are kept; and the offices of the clerks of the various courts, state and federal, in which are maintained the files of cases affecting titles—litigation involving real property, or its owners, foreclosure of liens, partition suits, probate, guardianship and divorce cases, bankruptcy, and many others. In fact these offices are so numerous and so scattered that the usual examination of title cannot possibly cover them all. It is well known that upon the bankruptcy of a person all his property, wherever situated, passes by operation of law to the trustee in bankruptcy; yet it is impossible to search every bankruptcy court in the country, to make sure the owner has not been

adjudicated bankrupt since acquiring title. Accordingly, Standard policies, as do guarantees, except from coverage certain matters not disclosed by the records of the district court of the federal district, of the county, or of the city in which the land is situated.

The mere examination, summarization and classification of all this data--every instrument, entry, action and decree, from the government patent to the filings, entries and actions made and taken just the day before--and the posting of all this information to the (plant) records of the insurance company with accuracy, care and fidelity is an undertaking of great magnitude especially in populous counties--when, in Los Angeles County for instance, recordings alone now approach a million instruments a year.

This is not alone a major physical undertaking, extensive as it is, but an extremely delicate one from the standpoint of liability. Since the main purpose of all this effort is to reclassify all of the data according to the property affected, so far as possible, it is readily apparent that absolute accuracy is essential to the proper performance of the function of collecting (abstracting) the pertinent data and reclassifying (posting) it to the land records (lot books) of the insurer. From there on, the insurer will place primary reliance upon its own records (plant), so that if an instrument is posted to the wrong property, that instrument will almost certainly be overlooked in the later process of searching, examining, reporting and insuring the title to the property. A not inconsiderable percentage of losses on policies is directly attributable to mistakes in the performance of this vital function.

The second function of great importance in the examination of titles is the interpretation of the instruments in the chain of title. If accuracy is the prime requirement of the posting process, knowledge and experience are the indispensable prerequisites in construing the validity and effect of the instruments in the chain of title. It must first be ascertained that the necessary persons have joined in its execution--not just have signed their names but have been correctly designated as parties thereto and have properly acknowledged execution thereof. The instrument must appear to be legally sufficient to accomplish its intended purpose, to identify the property correctly and be consistent with the prior title. If it be a lease or trust it must have a valid term and purpose; if it be a deed creating or reserving immediate or future interests, such interests must conform to the laws governing their nature and extent.

It is not always the long or complicated instrument which causes the most difficulty. A deed from A to B for life, remainder to the heirs of A can be expressed in two lines and yet require close study of court decisions in many jurisdictions over a period of more than two hundred years (there being no exact precedent in California--but see Bixby v. California Trust Company, decided in March, 1945, 68 A.C.A. 297) before the conclusion can safely be reached whether, after delivery of such deed, A and B together can convey a good title to the exclusion of the ultimate heirs of A.

In recent years increasing use has been made of the trust form of management and disposition of real property and distribution of the income and avails among beneficiaries. Such trusts provide in detail the powers which the trustees may exercise. It is express law that acts of trustees in contravention of such trust are void. (C.C. 859) In any transaction involving dealings with or dispositions of property by such trustees, care must be exercised to determine that the transaction is consistent with and not in excess of the powers conferred on them.

The third function of importance in examining titles is the inspection and analysis of all judicial proceedings affecting titles. These occur periodically in every chain of title: probate proceedings, in case of the death, minority or incompetency of someone connected with the title; bankruptcy of a party, foreclosure of a mortgage or mechanic's lien; divorce, affecting homesteads, community and often the apparently separate estate of married persons; condemnation and partition suits; disputes over boundaries, encroachments, building restrictions, community driveways and other matters not otherwise disclosed by the records; specific performance actions disclosing off-record contracts of sale; and among any number of other types of litigation directly or indirectly affecting title, quiet title suits of all kinds and such purely personal actions as suits for money resulting in judgments which are afterwards enforced by execution sales of land.

All such proceedings must be examined whenever land is involved therein or affected thereby and their existence is disclosed of record by lis pendens, attachment, mechanic's lien or other record evidence; in fact, all such proceedings are examined and posted by title insurers because of their off-record coverage to be mentioned later. The examination of such proceedings must take into consideration the nature of the action, the necessary parties thereto, the jurisdiction of the court both as to parties and subject matter and as to any limitations upon the power of the court to render specific relief. For instance, it must appear that the court has acquired jurisdiction by due service of process. Thus an execution sale and deed could not be given effect if based upon a money judgment against a nonresident after publication of summons in a simple suit for money. Yet if, in such suit, publication of summons had followed the attachment of specific property of the defendant and the court in due course had ordered such property sold to satisfy the liability of the defendant the sale would be legal. The decree of a probate court determining the validity of an assertion of title adverse to the estate cannot be accepted (unless the adverse claimant be the representative of the estate) for the probate court does not otherwise have jurisdiction to determine such adverse claims.

The examination of such proceedings must also include a determination of the exact nature of the relief awarded and its effect upon the title; whether the judgment is final or still subject to direct attack. It is often unsafe to rely upon a judgment that is not final; it could very possibly be reversed on appeal and a retrial result in an entirely different judgment. On the other hand, in many cases it is unnecessary to await expiration of the period of direct attack (i.e., the time within which to ap-

peal, to move to vacate for inadvertence, mistake, etc., or to set aside default judgments--C.C.P. 473, 473a) because of the unlikelihood of any such attack, as, for instance, in an ordinary uncontested probate sale or simple decree of distribution. Considerable discretion has to be exercised, however, in making such decisions.

A fourth important function in the examination of titles is the consideration of all data pertaining to unpaid taxes and assessments. Tax records are scattered in many offices; tax descriptions often vary materially from record descriptions; tax deeds are not always issued, not always recorded. Protest and invalidity suits, bond foreclosures and treasurer's sales may be outstanding. There may be overlapping assessments or assessments and bonds issued under more than one of the many improvement and bond acts. Taxes and assessments do not ordinarily outlaw by lapse of time and so cannot be ignored even though enforcement may be barred. There are exceptions to this statement (see chapter on Taxation); it is enough here to state that the examination of taxes and assessments requires great care for the special reason that their enforcement, if valid, results in the creation of a new title and the extinguishment of practically all prior private interests so that, if overlooked in insuring title, the insured might easily suffer the complete loss of his property and the insurer be required to pay the full amount of its policy.

C. PROTECTION AGAINST OFF-RECORD RISKS

The outside or off-record risks which can be insured against by the policy of title insurance alone among the recognized means of assuring title are legion--consequently it has been necessary to discriminate among them and to develop several types of policy varying in their coverage of such risks. In a majority of cases, however, concern is centered upon certain more or less common or usual off-record risks and a standard form of policy used which affords protection against them, while at the same time excluding risks which the insured himself ordinarily can safely take. Other forms of policy have been developed to protect the customer against the latter, but the assumption thereof entails additional investigation on the part of the insurer for which extra premiums must be charged. Consideration, accordingly, first will be given to the coverage of the Standard policy; followed by discussion of the extra-coverage, extra-premium policies.

The principal off-record risks which the customer himself has to assume in relying upon abstract-opinions and certificates of title inhere in most transactions. These relate to the identity, competency and powers of the parties to the transactions reflected in the chain of title and to the bona fides of each such transaction. Thus, the hazards which the policy of title insurance primarily was developed to cover relate to the identity and capacity of the parties. Every such policy protects a bona fide purchaser or encumbrancer against forgery, false personation or dealings in title to land by a name differing from that in which title is vested of record, and like protection against loss due to lack of capacity on the part of any party to any transaction involving the title to the property.

Everyone knows that a forged deed, or one not executed by the real owner, even though it be signed by a person of the same name, is ineffective to pass the title--indeed, has no legal effect whatever. Yet such a deed will have the "appearance", on the records, of being just as effective as one properly made by the true owner. The hazard of forgery or false personation somewhere in the chain of title is, of course, a serious off-record risk, and insurance against such risk a substantial contribution to the protection of the customer. It is not a risk lightly to be undertaken by the insurer; and title insurers take constant precautions to guard against loss due thereto. As an illustration, reference may be made to the requirement of many insurers that, in every transaction, the parties personally sign statements of identity, containing essential personal information about themselves, which is preserved in the files for future reference. Such statements have proved to be of great value in establishing the bona fides of subsequent transactions, as well as in eliminating many apparent defects of title involving persons of similar name, besides affording a ready reference for comparison of signatures, ascertainment of marital status, alienage and the like.

The competency of parties to transactions in land is often a matter of vital import of which the public records afford no clue. Competency involves questions of minority, insanity, death or presumed death. Dealings with or dispositions of land by a person under the age of 18 are void; by one over 18 and under 21 (unless a married woman) at least voidable. Such a transaction by a person adjudged incompetent are likewise void; by a person incompetent in fact, often voidable, if not void.

Guardianship proceedings may be pending in another county or another state; no evidence thereof will, in many cases, appear in the records of the county where the property is situated. An interested party may have been missing for over seven years; there is a presumption that he is dead, yet that presumption will not support the probate of his estate, will not bind him if he reappear.

The status of each person involved in the chain is of great importance in passing on titles. This is readily appreciated with reference to marital status--the obvious necessity of the joinder of the wife in the disposition of community property, for instance; but it also arises in cases of bankruptcy, for example the rule that property inherited by a bankrupt within six months after bankruptcy forms a part of the estate in bankruptcy--an exception to the rule that one need not examine the records antedating acquisition of title to ascertain if, perchance, a person has undertaken to deal with it before he acquired title; in cases of alienage, as where a person ineligible to citizenship acquires title, thus subjecting it to escheat under the alien land law; or where a "blocked national" attempts to effect a transaction contrary to wartime Treasury controls; or where an unincorporated association, such as a common-law trust or religious society, or an individual doing business under a trade name, takes title in the fictitious name employed to designate it or him, contrary to the principle that legal title cannot vest in a fictitious entity incapable of acquiring title, even

though the individual or association, by paying the consideration, becomes the equitable owner.

Close attention must also be given to the powers conferred upon agents and fiduciaries under powers of attorney, trusts, and the like and, by law, upon governmental agencies, corporations, partnerships and other associations. An example that recurs with great frequency is the question of the power of an agent, trustee or public body, having the power to lease land, to lease for the development of oil or gas or, under trusts, to lease (for any purpose) for a term extending beyond the duration of the trust, unless the declaration of trust specifically so provides. The powers of a domestic or foreign corporation may be incapable of exercise through expiration, suspension or forfeiture of its charter although this will nowhere appear in the public records of the county where its property is situated. A married woman may confer broad powers upon her attorney-in-fact in the disposition of her property, yet such power will not be sufficient to enable him to join on her behalf in the disposition by her husband of community property unless it specifically so provides.

Delivery is an essential element of the validity of any instrument affecting the title to real property--delivery with intent to pass (or charge) the title, yet this vital act cannot be established by the public records; recordation of an instrument being only presumptive of delivery and this presumption rebuttable. A deed executed in blank can only be completed by another under written authority in that regard, which will seldom appear of record. Cross-deeds, their operation conditioned upon the happening of some future event, are ineffective, as are deeds placed in escrow and delivered in disregard of the conditions thereof. 1 So. Cal. Law Rev. 32).

Then there are the laws of the land, federal, state and local, having a direct and intimate impact upon the title to property and requiring constant study and attention in order to protect persons dealing with land, who deal, it is true, with presumed knowledge thereof--for everyone is presumed to know the law--but in all too many cases without a clear appreciation of their bearing upon the title. Again it is hardly necessary to mention the often completely "off-record" interest of a wife in property standing of record in the husband. Consider, however, the many technical rules relating to joint tenancies, to homesteads, to partnerships, just to mention a few. A difficult situation is created by the possible lien of federal estate taxes, which arises at the instant of death, requires no notice to anyone and is only released by payment or through such arrangements with the commissioner of internal revenue as are sanctioned by the revenue laws. The title of even a good faith purchaser, under probate proceedings or otherwise, is nevertheless subject to such a lien.

The list of laws which must be considered in passing on titles could be extended indefinitely; as could the decisions of appellate courts, having the force of law, which must also be studied and noted--for example, the rule that the enforcement of a deed of trust by trustee's sale on default will not eliminate an admittedly subordinate lien for federal income taxes. (Met. Life Ins. Co. v. U.S., 107 Fed. (2d) 311)

Not the least important of the risks against which a policy of title insurance affords protection are the costs, expenses and attorneys' fees incurred in defending the title insured by the policy against the hazards of litigation. This protection is in addition to the stated liability for loss of title and it covers the defense of unsuccessful attacks upon the title as well as those having merit. A well known example is the recurrent efforts of those who persist in laying claim to land covered by the Spanish and Mexican grants, notwithstanding the innumerable occasions upon which their validity has been reiterated. A spirited attack of this kind can be very expensive to defend, necessitating the recompilation of all the data supporting the grants and the exposition of the history, laws and prior proceedings going to establish the integrity of the titles predicated thereon. Again, differences over the interpretation of instruments in a given chain of title often result in litigation unforeseen or unanticipated at the time the policy was issued. Title insurers promptly and willingly defend such litigation whenever title insured by them is called into question. They also initiate litigation designed to eliminate claims and clouds on title arising out of matters insured against by their policies.

D. RISKS NOT INSURED AGAINST IN STANDARD FORM POLICIES

The protection afforded by the Standard policy may also be determined, however, by the off-record matters against which it does not insure. The Standard form of policy of land title insurance in general use in California (the C.L.T.A.--California Land Title Association--form) does not insure against:

1. Loss arising from defects or other matters concerning the title known to the insured to exist at the date of the policy and not theretofore communicated in writing to the insurer. No one could undertake to protect a person against facts of which he is cognizant and does not disclose. Insurers are not mind readers. Should a man knowingly buy land from a sixteen-year-old, a fact not known to the insurer and not disclosed in its examination of the title, the buyer could hardly expect the insurance company to indemnify him against his own folly, should his purchase be nullified. There are, however, many instances of a less obvious character, where the failure of the insured to communicate to the insurer essential facts pertaining to the transaction relieves the insurer of liability for loss attributable thereto. This would be true where the transaction was induced by the fraud, duress, undue influence or mistake of the insured. It would be true where the insured dealt with a person knowing him to be married, where he nevertheless held title of record and purported to deal with it as a single man; where the insured knew that the person he dealt with was under some disability unknown and undisclosed to the insurer. Indeed, awareness of this limitation upon the liability of the insurer has led careful persons to make a full disclosure of all circumstances pertaining to transactions on which they seek the protection of title insurance.

2. The Standard policy excepts from coverage easements and liens which are not shown by the public records. This exception stems from two factors--first, a good faith purchaser is entitled to rely on the public records, and title acquired in good faith and for value without knowledge of off-record interests and liens will be superior thereto; and, second, easements apparent on the ground and liens, such as mechanics' liens which can be anticipated by observation of construction in progress upon inspection of the premises, fall within the further exception from coverage of facts which such inspection will reveal ((3) and (4) below). Thus, if a private way is apparent from an inspection of the land, or a power line actually crosses the property, or a building is in course of construction, suggesting the possibility of unpaid materialmen's or laborers' claims, these things will be readily apparent to a person about to deal with the property and with which he accordingly is charged with notice as fully as though such rights appeared on the public records. The insurer would have to make an inspection of the land to be able to insure against such off-record easements and liens, and the Standard policy is issued without any such inspection. As will be shown, such matters are covered by the extra-coverage, extra-premium policies discussed below.

3. The Standard policy does not cover the rights or claims of persons in possession of the land which are not shown by those public records which impart constructive notice. Here again, such rights can only be ascertained by inquiry of the parties in possession. Rights of persons in possession are, from the fact of possession alone, just as effective against persons dealing with the land as are rights evidenced by the public records. Possession is constructive notice of all the rights which the person in possession actually has just as fully as is constructive notice by the records. It is incumbent upon anyone seeking to acquire an interest in land to make inquiry of all persons in possession thereof, and he is deemed to have constructive notice of all facts which such inquiry would disclose. Such possessory rights might exist under an unrecorded lease or license, might include rights under a modification agreement pertaining to such a lease, might include an option to purchase the land or might depend entirely upon adverse possession against the interests of the true owner. If there is a billboard on the land, inquiry of the owner of the billboard may disclose that he is paying rent to a stranger to the record title; and inquiry of such stranger might disclose that he holds an unrecorded deed to the property from the record owner. As, under the Standard policy the insurer does not make an inspection of the property, the rights of parties in possession are not covered and this risk must be assumed by the insured. Since in most cases the insured will have inspected the property as a normal incident of the transaction and will thereby have become conversant with the character of any possessory interests, he will ordinarily be willing to assume the risks incident thereto and will not need extra protection, otherwise he will procure the extra coverage necessary

to protect him in that regard.

4. The Standard policy does not cover the facts, rights, interests or claims which are not shown by those public records which impart constructive notice, but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof, or by a correct survey. It will be observed that these exceptions are, again, relative to rights which are apparent on the ground, and which will be observed by the insured as a normal incident of the transaction in which he is interested. He has become interested in that particular parcel of property as a prospective home, or investment, or as security for the loan of money. It is the land with which he is really concerned; it is but an incident thereof that he seeks the protection of title insurance, primarily assurance that the title thereto is marketable. The physical characteristics are elements that appeal to him and as to which he is normally the best judge. If it is a lot in a subdivision or a parcel in a built-up neighborhood, he is not too much concerned with hidden defects in boundaries, in surveys, in encroachments, and such matters. He can buy or build with reasonable assurance, as a practical matter, that he will not be disturbed. If, however, he contemplates such use or enjoyment of the property that he will require substantially the entire parcel for his purposes, as where he expects to erect improvements which will occupy the whole area, say an apartment house or office building, built exactly to the boundaries, he requires further assurances as to the exact location of those boundaries and needs to be sure that buildings on adjoining property do not encroach on his. This necessitates a careful survey, requiring the services of competent surveyors or civil engineers. Title companies do not ordinarily render such services in any case; but, in special instances, will insure against such matters if furnished a correct survey.

5. The Standard policy does not cover mining claims; reservations in patents; water rights, claims or title to water, whether or not of record. One does not encounter mining claims or reservations in patents to property originally embraced in the Mexican grants, nor would such claims or reservations be of any importance in connection with the title to urban property. In cases where they would be or become important their existence should be ascertained--as to mining claims by a careful inspection of the land itself, particularly in areas where mining has at one time or another been pursued; as to reservations in patents, by a re-examination of the patent, or the record thereof, and of the particular laws under which it was issued since, if the law required the patent to contain certain reservations, such reservations may have become effective by operation of law even though actually omitted from the patent in question. Water rights depend upon too many elusive factors to make it possible to cover them in the Standard policy, and even a good record title to a certain amount of water gives no assurance that the supply is adequate or available.

6. The Standard policy does not cover acts or regulations of any governmental agency regulating the occupancy or use of the land or any building or structure thereon, such as zoning ordinances. While important in relation to the use of property in many cases, and therefore having a bearing upon the title and binding an owner the same as other laws, it has not been found practical to attempt to extend the coverage of title insurance to the inclusion of such regulations, principally because the regulations are constantly being changed, so that a policy written one day correctly reflecting the regulations then in effect would be good for that day only and could give the customer no assurance whatever that they would not be changed the next day.

The off-record risks which are thus not covered by the Standard policy of title insurance can, however, be insured against by a title insurer, either by the insertion in the Standard policy of a special endorsement undertaking such extended coverage or by the employment of special forms of policy.

B. SPECIAL ENDORSEMENTS

These are furnished, in proper cases for such situations as: protection to lenders, not afforded by the Standard policy because of the exception of liens which are not shown by the public records, against the assertion of priority by a mechanic's lien claimant--limited however, to insurance that the lender's mortgage or deed of trust has been recorded prior to the inception of the work of improvement and of which such claim of lien emanates; protection of the insured against forced removal of encroachments upon adjoining land--of particular importance to lenders who do not want a part of the security destroyed after the loan has been made, as for instance where the wall of an apartment house is built, say, six inches over the side line of the lot, but the insurer is willing to afford the lender such added protection because of lapse of time, waivers, or other considerations (usually off-record, as is the encroachment itself) indicating that no action to enforce removal is likely to be made or sustained; insurance against loss by reason of an existing violation of private building restrictions, based upon an inspection of the property and the neighborhood, and relying upon laches, waiver, abandonment, invalidity, changed conditions or other persuasive factors. These are examples of situations giving rise to special endorsements which can, however, be adapted to any situation where the insured desires special insurance against a particular risk, whether on or off-record, which the insurer is willing to undertake. Such an endorsement is specially appropriate where certain defects in title appear of record, and are known to the parties, so that omission of all mention thereof in the policy would be improper, but where the insurer is reasonably satisfied the defect will never occasion any loss. The defect, accordingly, is noted in the policy but an endorsement is added protecting the insured from any loss occasioned thereby. Illustrations of such defects on or off record, might be: unlimited restrictions upon the use of land which for various reasons are known or believed to be unenforceable; easements of record but long in disuse and un-

likely ever to be claimed; etc.

F. A.T.A. AND FULL COVERAGE POLICIES

In section D it was explained that the protection afforded by the Standard policy is subject to certain standard exceptions of matters not covered or insured against; and it was stated that these risks are, in the main, matters which the customer himself can assume as a result of his own inspection of and familiarity with the property. There are occasions, however, where the customer cannot or will not assume such risks and special extra-coverage, extra-premium policies have been devised to assume most of those risks. Perhaps the first customers to request such added protection were institutional lenders such as the large eastern life insurance companies who were not in a position to make or rely upon personal inspection of the property, and for whom the American Title Association form of lender's policy (A.T.A. policy) was devised which, in addition to the usual coverage of the Standard policy "ruled out" or eliminated the standard exceptions referred to in paragraphs (2), (3), (4) and (5) of section D, supra, viz. off-record easements and liens, rights of parties in possession, rights and claims which an inspection of the land or a correct survey thereof would show, and mining claims, reservations in patents and water rights. This extended coverage was made possible by the acceptance by the insurer of the responsibility of inspecting the property in each case, as well as a competent survey (not prepared by the insurer) and of determining whether any such rights or claims existed and, if so, its nature and extent.

Interesting problems have been encountered in providing such added protection. In one instance the existence of a heavy underground telephone cable was not disclosed by either survey or careful inspection; it was only discovered when, after issuance of the policy, excavation with a steam shovel brought it to light, neatly severed, disrupting the telephone service and necessitating costly repairs. Perhaps only an experienced lineman could have divined its existence by the existence of special manhole covers in the vicinity. Certainly the average person relying upon his own examination of the property would hardly have suspected it ran underneath that particular parcel. There is a legal principle that certain buried water lines and sewer pipes are "visible", though completely hidden from the surface, simply because their use is reasonably necessary and continuous. Such lines may connect improvements located on adjoining property on one side with a main in the street on the other side, thus running directly across the land under consideration. Again, only excavating will reveal them, yet an off-record or implied easement may exist, preventing removal, to the amazement of the innocent owner of the land.

Inspection or survey often discloses a variety of encroachments such as overhanging buildings even, on occasion, one which is within the lines at ground level but departing from the perpendicular so as to encroach upon adjoining property several stories up; architectural details, cornices, flag poles, fire escapes, hydrants, signs; party walls, boundary fences or trees; community driveways; faulty surveys; and even streets, improperly centered,

so that they do not conform with record easements, shortages or excesses on the ground, so that physical improvements occupy parcels differing from those appearing of record.

The Full Coverage policy provides the same protection to owners that the A.T.A. form affords lenders; in each instance the policy fee is approximately twice that of the Standard form of policy. Both the A.T.A. and Full Coverage policies lend themselves more readily to urban and subdivided land although they can, of course, be written on rural property; and, while unimproved property may be covered, they are more in demand where improvements have been made.

It must not be inferred, however, that by the simple expedient of procuring such extra-coverage, extra-premium title insurance, a broader protection against known or disclosed defects can be obtained. The coverage of matters shown by examination of the public records, matters affecting the competency or status of parties to the title, and particularly matters revealed by the inspection and survey, will be shown in any such policy. If a lessee is in possession, though no lease appears of record, his rights will be shown, not insured against, as also will be shown off-record easements, encroachments and whatever else appears to affect the title. The inspection and survey simply enable the title insurer to substitute its training and experience in ascertaining, weighing and reflecting off-record matters which constitute constructive notice to the customer against which he himself must otherwise take independent precautions.

As in the Standard policy, so in these extra-coverage policies, there are certain matters against which the title company does not insure, principally (a) defects or other matters known to the insured to exist at the date of the policy and not theretofore communicated in writing to the insurer and (b) regulations of governmental agencies respecting the occupancy or use of the land; the reasons for these exceptions being the same in either case; see D, (1) and (6), supra. While it is possible, in exceptional cases, to cover zoning ordinances, it is seldom of substantial benefit to the insured, owing to the constantly changing nature of such regulations. And the exception of matters known to the insured, not communicated to the insurer, obviously is one which is, and of right ought to be, inherent in any policy of title insurance.

G. THE INSURER

The final protection of every policy of title insurance abides in the ability, integrity, responsibility and good management of the company by which it is issued. It takes many years, many people of learning and experience and the outlay of substantial sums to build and maintain an organization which can promptly, faithfully and continuously provide the protection which the public demands and has come to expect and rely upon.

The law (see the Insurance Code of California, sections 12340, et seq.) imposes certain requirements and restrictions upon every title insurer. It

must have at least $100,000 paid-in capital; the deposit with the state treasurer of an additional $100,000 in cash or sound securities, the "guarantee fund"; a "title insurance surplus fund" equal to 10% of its annual premiums until the fund reaches 25% of its paid-in capital, and all impairments of such fund must be restored in the same way; it must have and maintain adequate "plant" facilities; it may not make loans to its officers, directors or employees; its funds must be invested in specified securities; and the declaring of dividends is restricted. It is under the supervision of the insurance commissioner and must have his yearly certificate of authority to do business, his permit to issue securities, his periodic examination of its business and affairs. These are the legal minima which all title insurers must observe.

Responsible insurers will have much more: a larger capitalization, perhaps, much larger guarantee and surplus funds, title plants of proved adequacy; personnel of ability and experience; practices of recognized soundness and reliability; management of known capacity and repute.

1. The title plant

While it is possible for an insurer to issue policies of title insurance without having a plant of its own, the work of examining and reporting the title to land cannot be done effectively, economically and quickly without an up to date and "down to date" title plant. If the insurer does not have one of its own it must rely upon another company which has such a plant for the actual work of examination and report, predicating its policies upon the work of such a company. The latter need not be a title insurance company; it may be, and often is, an "abstract" or "title" company capable of turning out its own abstracts or certificates of title. In practice, almost all of the title insurers in California are corporations maintaining plants of their own in one or more counties of the state but, in many instances, also issuing its policies covering land in other counties based upon the title work of a local abstract or title company; so that the basis of every policy is the same.

Each title plant begins with the establishment of four principal sets of books, the books of abstracts of recorded instruments, the lot books, the general indices, and the map books. These are augmented, in course of time, with books of "press copies" or "starters", representing the accumulation of office copies of every evidence of title theretofore written by the company; books of miscellaneous data sometimes called "office information", containing copies of documents or information of a special nature, such as complicated decrees, declarations of trust, property settlement agreements and other matters to which reference must be made from time to time to supplement the data found elsewhere in the plant; and books of "opinions" covering the essential facts concerning court proceedings of all kinds which, once examined, are thus made

available for subsequent occasions where the same proceedings may have a bearing, for instance: the review, after distribution, of a proceeding probating the estate of a decedent who died owning many parcels of land, the opinion showing completion of the necessary steps leading to the distribution of the estate among the heirs or devisees, and establishing the regularity of those proceedings. In the absence of such an opinion the proceedings would have to be re-examined every time another parcel of land was involved which had been included in the estate. Since it is true that every parcel of land passes through probate proceedings of some sort once in every generation, it will be seen that opinions on such proceedings alone will, in time, constitute quite a volume. A plant often will include, moreover, a complete set of tax records, gathered from all the far-flung taxing offices and agencies in the county and, because of the fact that tax descriptions ofttimes vary from record descriptions, these tax records may be completely separate from the conventional lot books.

The lot books constitute the heart of the plant. They must reflect every instrument ever recorded in the county in which the land lies which affects the particular parcel described therein. As heretofore mentioned, such instruments are, when recorded, indexed by the recorder by the names of the parties not by description of the land. These instruments are then copied into permanent books, one after another, so that the only way in which the instruments ever can be located in these books is by first ascertaining the names of the parties and scanning the indices of names. Lot books must, therefore, be prepared in which every parcel of property in separate ownership is given a separate space or column and each instrument on the records affecting that particular parcel entered in its space or column so that the title thereto can be traced from the earliest through to the latest instrument by examining that column alone.

In the compilation, as well as in the maintenance of these lot books, an abstract first is made of each recorded instrument, showing the date, and date and place of recording, the nature thereof, the parties thereto and the property affected thereby. A notation of the date and nature of each instrument is then "posted" to the respective parcels in the lot books, starting with the earliest, until each instrument in the chain of title of every parcel has been entered therein. The abstracts or "daily slips" are then bound into books labeled by date and chronologically arranged for ready reference. The abstracts of each day's recordings are posted as promptly as possible, often on the same day, and then bound up, so that the plant is always strictly up to date. When it is realized that the county recorders are themselves sometimes months behind in copying instruments into the records, the value of having the title plant always completely up to the minute may be readily appreciated.

The general index. Many of the recorded instruments, however, do not relate to or indicate any particular parcel of land. They may be powers of attorney, declarations of trust, blanket deeds (i.e., of all property of the grantor in the state or county), court decrees, affecting status, such as adjudications of bankruptcy, of divorce or incompetency, of change of name, and judgments creating liens on all property of the judgment debtor. Abstracts or daily slips of such matters obviously cannot be posted to any particular parcel of land on the lot books and so they must be noted in another set of books, alphabetically arranged, according to the names of the persons affected, known as the general index, the "G.I." as it is invariably referred to.

The map books. Every parcel of land must be identified by a "description"--a delineation thereof by established calls from which it can be identified and located on the ground. Initially, surveys were made by the government, identifying land by a legal method of subdivision; private grants were identified by name, supplemented by calls for monuments crudely or obscurely identified. In patents, in proceedings to establish private grants, and in civil actions for partition, etc., these descriptions were supplemented by maps and surveys, often crudely drawn. From these beginnings, resurveys, subdivisions, and public and private maps have been made, retraced, revised and recorded, until the accumulated data comprises, especially in the more populous counties, an imposing collection.

A title company must necessarily maintain a complete collection of official maps, but its files will not stop there. It should have available for ready reference as many of the private maps and surveys as possible, to facilitate the interpretation of the instruments in the chain of title which refer thereto. It will keep on file, also so far as necessary, copies of small maps and plats for insertion in its policies as an aid to the insured in his use thereof.

An incident of this essential part of the plant is the compilation of "arbitrary" maps by the company's engineering staff to facilitate the posting of recorded data to portions of larger holdings not identified by a separate lot number or designation. Title to a sizable plot may be vested in a person who then proceeds to deed out smaller parcels by metes and bounds descriptions. Unless each smaller parcel can be quickly identified, it would be necessary to examine every instrument affecting any part of the larger plot each time title to one of the smaller parcels is being examined. By preparing a map of the plot, sketching in each parcel as it is carved out and giving it an "arbitrary" designation (by letter or number, for instance) and then alloting each such parcel a separate column in the lot book, instruments affecting a particular parcel can be posted thereto, rather than to the plot as a whole, thus simplifying

the work of searching the title thereto.

2. The examination of title

When an order for a policy of title insurance is received it is given a number, assigned to an examiner, and delivered to a searcher. All orders for title services are numbered successively, as received, and entered in an index with a notation of the name of the examiner assigned, so that it can be located during the period of preparation. The number assigned is always important for by its number and in no other way can the "search notes" ever be located. Prompt acknowledgment of the order is sent the customer, bearing the number so assigned; and the search is immediately undertaken.

The searcher first examines the lot book, to find the space or column devoted to the particular property under search, and there notes informally the number of the order he is working on. He also checks back to ascertain the last examination and report or insurance of the title. He then notes the reference thereto and the references to every entry on the lot book relating to the parcel he is searching. From these entries he makes up the search by attaching a copy of the last report or policy written and a copy of the abstract or daily slip of each subsequent entry. From these he ascertains the names of all parties interested in the several transactions so shown and "runs" their names on the "G.I." noting each entry affecting such persons during their stay in the title, and collecting and inserting the abstracts of the instruments so shown. If these abstracts indicate the existence of court proceedings, he orders an opinion thereon and he attaches to the search the map or drawing of the parcel, if available, or orders one made. Meanwhile a tax report has been ordered from the tax division, designed to reflect the essential tax data affecting the property.

The search then goes to the examiner assigned, who, when he has the complete search, with opinions, tax data, map or plat and abstracts and starter, all arranged in proper order, proceeds to analyze the title, noting what matters shown in the starter still remain unchanged, and adding the new matter appearing of record since the date of the starter and not since disposed of; compiling his conclusions in the form of a written preliminary report which is sent to the customer.

In his analysis of the search, the examiner seldom retraces the work leading up to the writing of the starter, that is, he does not "go behind" the previous work of the company. He does, however, carefully check the parties to each instrument in the chain, the legal description of the property, the essentials of due execution and the tenor and legal sufficiency of each successive transaction. Of course, he often encounters defects somewhere along the line. Many of these he is able, by training and experience, to eliminate

or "pass" without mention. Others may be regarded as of sufficient importance to refer to a supervisor, a member of the legal staff or to the management, for disposition. Those that ultimately are considered to be so defective that they require clearing, are so shown in this report.

Many defects are technically serious and the risk that loss may eventuate requires expert evaluation. The ultimate decision is reposed in a title committee, composed of representatives of the management, including one or more lawyers, who weigh the seriousness of the defect against their experience of the likelihood of loss. In a large company many such hazards are considered daily and decisions made whether to require the defect remedied, or shown and insured by endorsement, or passed without further action. It is not the function of the company or any officer or committee to ignore material defects, or to insure the title to be different than it really is. A company which makes a practice of insuring over such defects, no matter how able it may be financially to make good its losses, will not long retain the confidence of its customers. On the other hand, a too conservative disposition in the evaluing of defects will also react adversely. A perfect title is an unknown quantity; every chain of title contains errors, omissions or departures from perfection. From most of them nothing will ever come. Others can readily be perfected. A few are really dangerous and cannot be overlooked. The function of the examiner, the supervisor, the title committee and the management of the company is essentially the same; to separate those which are a danger from those which are not; to recognize, from study and experience, the one from the other; to expedite, by passing the one while safeguarding all concerned from the possibly adverse effects of the other.

When the customer determines from the preliminary report—or after steps have been taken to clear up defects which cannot be passed—that the title is satisfactory to him, he hands the examiner such further instruments as are necessary to place title in the condition desired, with instructions to record them and issue a policy. Some time having elapsed, however, since the date of the report, it is necessary to repeat the searching process to cover the interval. If nothing appears to change the condition of title, as so reported, the instruments delivered to the examiner may then be recorded and the order completed.

Chapter 13: OPERATIONS
(By Division of State Lands)

A. RECORDERS' OFFICES

By way of contrast to the deficits shown to exist in the Registrars' offices, operations in the Recorders' offices indicate a healthy condition generally. A number of counties could not supply the information desired, but of those who did so practically all were able to show an excess of fees received over all costs involved. This excess increased with the volume of business. In some cases it has resulted from the adoption of the photographic system. Statistics for several counties follow.

OPERATIONS IN RECORDERS' OFFICES IN SELECTED COUNTIES

| County | Year | Fees | Total Costs | Number of Documents Recorded | Number of Employees in 1950 |
|---|---|---|---|---|---|
| Alameda | 1945 | $ 161,501.70 | $ 165,548.73 | 87,563 | |
| | 1946 | 188,538.45 | 183,310.05 | 115,272 | |
| | 1947 | 247,171.58 | 241,837.99 | 111,058 | |
| | 1948 | 297,039.55 | 223,175.30 | 98,455 | |
| | 1949 | 267,154.17 | 163,164.79 | 93,715 | 36 |
| Los Angeles | 1945 | 916,747.99 | 686,058.25 | 622,003 | |
| | 1946 | 1,212,209.75 | 901,506.61 | 827,040 | |
| | 1947 | 1,398,106.01 | 1,093,083.07 | 877,409 | |
| | 1948 | 1,828,606.93 | 921,674.25 | 841,839 | |
| | 1949 | 1,644,382.17 | 894,646.31 | 794,306 | 450 |
| San Bernardino | 1945 | 73,368.20 | 59,485.46 | 56,806 | |
| | 1946 | 100,516.25 | 74,000.59 | 80,591 | |
| | 1947 | 124,600.75 | 111,071.17 | 88,467 | |
| | 1948 | 157,312.25 | 131,196.77 | 83,933 | |
| | 1949 | 146,386.20 | 105,705.65 | 76,882 | 27 |
| San Diego | 1945 | 126,409.83 | 111,335.86 | 113,537 | |
| | 1946 | 153,989.47 | 126,077.85 | 137,744 | |
| | 1947 | 184,928.05 | 155,148.18 | 136,130 | |
| | 1948 | 238,981.70 | 154,027.23 | 128,547 | |
| | 1949 | 215,387.53 | 125,851.51 | 123,381 | 25 |
| San Francisco | 1945 | 163,679.60 | 99,285.33 | 127,105 | |
| | 1946 | 179,037.02 | 138,878.22 | 107,814 | |
| | 1947 | 221,890.68 | 151,849.04 | 98,725 | |
| | 1948 | 206,535.85 | 127,928.71 | 87,760 | |
| | 1949 | 224,155.85 | 131,328.17 | 91,539 | 28 |
| Santa Cruz | 1945 | 24,497.95 | 28,614.05 | 17,404 | |
| | 1946 | 32,986.05 | 39,876.92 | 22,197 | |
| | 1947 | 34,978.40 | 41,815.81 | 19,320 | |
| | 1948 | 39,234.10 | 37,342.10 | 17,064 | |
| | 1949 | 38,330.65 | 32,215.58 | 16,134 | 10 |

As a matter of information the fees to be charged and collected by the Recorder are as indicated below:

FEES TO BE CHARGED AND COLLECTED BY THE COUNTY RECORDER (DERRINGS POLITICAL CODE AND GOVERNMENT CODE OF CALIFORNIA 1947 & 1949 SUPPLEMENT, SECTIONS 27360-27382)

ARTICLE 5

Sec. 27360. FEES TO BE CHARGED AND COLLECTED. For services performed by him, the county recorder shall charge and collect the fees fixed in this article. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27361. RECORDATION. The fee for recording every instrument, paper, or notice required by law to be recorded is ten cents ($0.10) a folio. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27362. INDEXING. The fee for indexing every instrument, paper, or notice is ten cents ($0.10) for each name. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27363. FILING. The fee for filing every instrument, paper, or notice for record, and making the necessary entries thereon is one dollar ($1), except that the minimum fee for filing for record, recording, indexing and making the necessary entries on any written instrument, paper or notice, except as otherwise provided by law, is one dollar ($1). (Added by Stats 1947, ch 424, Sec. 1; Amended by later act passed at same session, Stats 1947, ch 844, Sec. 2.)

Sec. 27364. CERTIFICATES UNDER SEAL. The fee for each certificate under seal is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27365. COPIES OF BIRTH, DEATH OR MARRIAGE CERTIFICATES. The fee for any copy of a birth, death, or marriage certificate, when the copy is made by the recorder, is the same as is payable to a state or local registrar of vital statistics. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27366. COPIES OF OTHER RECORDS OF PAPERS. The fee for any copy of any other record or paper on file in the office of the recorder when the copy is made by him, is ten cents ($0.10) a folio. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27367. EXAMINING AND CERTIFYING COPY. The fee for examining and certifying to a copy of any record or paper on file in the recorder's office when the copy is prepared by another is three cents ($0.03) a folio for comparing the copy with the original. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27368. ENTRY OF DISCHARGE, CREDIT OR RELEASE. The fee for every entry of discharge, credit, or release on the margin of record, and index-

ing the entry is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27369. SEARCHING RECORDS FOR BIRTH, DEATH OR MARRIAGE CERTIFICATE. The fee for searching the records of his office for a birth, death, or marriage certificate is the same as is payable to a state or local registrar of vital statistics; in all other case, for each year, fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27370. ABSTRACT OF TITLE. The fee for an abstract of title is twenty-five cents ($0.25) for each conveyance or encumbrance. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27371. MAP OR PLAT COPIED IN BOOK OF RECORD. The fee for recording each map or plat where it is copied in a book of record is ten cents ($0.10) for each course. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27372. RECORDING OR FILING MAP OR PLAT WHERE LAND SUBDIVIDED. The fee for recording or filing each map wherein land is subdivided in lots, tracts, or parcels is five dollars ($5). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27373. FILING BUILDING CONTRACTS, PLANS, AND SPECIFICATIONS. The fee for filing building contracts, plans, and specifications is one dollar ($1). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27374. FIGURES OR LETTERS ON MAPS OR PLATS. The fee for figures or letters on maps or plats is ten cents ($0.10) a folio, except that the fees for recording any map shall not exceed fifty dollars ($50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27375. ACKNOWLEDGMENTS. The fee for taking an acknowledgment of any instrument is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27376. FEE FOR FILING CERTIFICATE OF REGISTRY OF MARRIAGE. The fee for filing a certificate of registry of marriage to be paid by the county clerk is one dollar ($1). (Added by Stats 1947, ch 424, Sec. 1; Amended by later act passed at same session, Stats 1947, ch 1303, Sec. 3.)

Sec. 27377. FILING NOTICE OF ESTRAY STOCK. The fee for filing a notice of estray stock and all services in estray cases is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27378. RECORDING MARKS OR BRANDS. The fee for recording each mark or brand is one dollar ($1). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27379. ADMINISTERING AND CERTIFYING OATHS AND AFFIRMATIONS. The fee for administering and certifying each oath or affirmation is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27380. FILING, INDEXING, AND KEEPING PAPERS NOT REQUIRED TO BE

RECORDED. The fee for filing, indexing, and keeping each paper not required by law to be recorded is one dollar ($1). (Amended by Stats 1949, ch 62, Sec. 1.)

Sec. 27380.5. MARGINAL REFERENCE. The fee for making a marginal reference to a document previously recorded is ten cents ($0.10) on each and every instrument requiring this service. (Added by Stats 1947, ch 844, Sec. 3.)

Sec. 27381. MILITARY DISCHARGES, ETC. No charge or fee shall be made for recording, indexing, or issuing certified copies of any discharge, certificate of service, certificate of satisfactory service, report of separation, or notice of separation of any officer, commissioned warrant officer, warrant officer, flight officer, cadet, midshipman, noncommissioned officer, petty officer, soldier, sailor, or marine separated, released, or discharged from the Army, Navy, Marine Corps, Coast Guard of the United States, Women's Army Corps, Women's Army Auxiliary Corps, Women's Reserve of Navy, Marine Corps, or Coast Guard, or from the Army and Navy Nurse Corps. (Added by Stats 1947, ch 424, Sec. 1.)

Sec. 27382. FILING, INDEXING NOTICES OF FEDERAL TAX LIENS AND CERTIFICATES OF DISCHARGE. The fee for filing and indexing each notice of lien and each certificate of discharge for internal revenue taxes is fifty cents ($0.50). (Added by Stats 1947, ch 424, Sec. 1.)

B. TITLE INSURANCE

Figures as to the volume of business of title insurance companies, their costs of doing business, and their income are not believed to be pertinent to this study. It is sufficient to say that the business is large and extends throughout the State. Of direct interest, however, is the size of fees charged for insuring titles to properties which are within the range of values of those that have been registered under the Land Title Law. In the table which follows the fees shown are those generally in use throughout the state. Some companies require that escrow service be included so that their fees will be found to be larger.

Partial
SCHEDULE OF FEES FOR POLICIES OF TITLE INSURANCE
Effective in Los Angeles County, July 1, 1950

| Amount of Insurance | Owner's, Joint Protection, or A.T.A. Policy | Loan Policy |
|---|---|---|
| $ 250 or less | $16.00 | $12.80 |
| 251 - 500 | 19.00 | 15.20 |
| 501 - 750 | 22.00 | 17.60 |
| 751 - 1000 | 25.00 | 20.00 |
| 1001 - 1500 | 28.00 | 22.40 |
| 1501 - 2000 | 31.00 | 24.80 |
| 2001 - 3000 | 34.00 | 27.20 |
| 3001 - 4000 | 37.00 | 29.60 |
| 4001 - 5000 | 40.00 | 32.00 |
| 5001 - 6000 | 43.00 | 34.40 |
| 6001 - 7000 | 46.00 | 36.80 |
| 7001 - 8000 | 49.00 | 39.20 |
| 8001 - 9000 | 52.00 | 41.60 |
| 9001 - 10000 | 55.00 | 44.00 |
| 10001 - 11000 | 58.00 | 46.40 |
| 11001 - 12000 | 61.00 | 48.80 |
| 12001 - 13000 | 64.00 | 51.20 |
| 13001 - 14000 | 67.00 | 53.60 |
| 14001 - 15000 | 70.00 | 56.00 |
| 15001 - 16000 | 73.00 | 58.40 |
| 16001 - 17000 | 76.00 | 60.80 |
| 17001 - 18000 | 79.00 | 63.20 |
| 18001 - 19000 | 82.00 | 65.60 |
| 19001 - 20000 | 85.00 | 68.00 |

As used in this schedule, the word "Owner's ", "Loan", or "Joint Protection" Policy refer to the California Land Title Association Standard Coverage Policy form. As used in this schedule, the word "A.T.A." Policy refers to the American Title Association Loan Policy form.

# PART IV

# CONCLUSIONS

Chapter 1: DEFECTS IN THE TORRENS SYSTEM IN CALIFORNIA
(By University of Southern California)

The purpose of this Chapter will be to summarize briefly the numerous defects in the California Recording System. No attempt will be made at this point to offer any constructive method of improvement. Any statements of that nature would appear logically in the second report. (See Chapter 4.)

The defects may be classified in terms of Internal and External defects and will be treated under those headings.

I. INTERNAL DEFECTS

These defects result from the nature of the Torrens System and the work involved in carrying out the provisions of the Land Title Law. They can be summarized as follows:

A. The Torrens System requires a considerable amount of work in connection with the conveyance of a piece of real property.

First: Additional documents must be filed by the parties involved in a transaction. For example: affidavits, court orders, et cetera. This makes more work for the parties to the transaction. Also, additional notations must be made on all documents, such as deeds, filed with the Registrar.

Second: Elaborate records must be kept by the Registrar's Office. A separate certificate for each transfer of a piece of property must be issued, requiring a considerable amount of copying from former certificates. This, of course, creates a possible source of error in copying, which in turn may result in loss to one of the parties to the transaction. The staff in the Registrar's Office must be of an extremely high calibre in order to avoid errors as much as possible.

Third: In order to register the property it is necessary to have a sufficient title search made, surveys and examinations conducted, all of which require time and money.

These various items mean more work for all persons concerned and result in a cumbersome system.(1)

B. The Certificate of Title which is on file in the Registrar's Office merely shows a summary of the outstanding encumbrances against a particular piece of property. This may not give a prospective purchaser sufficient information and it will be necessary to refer to the actual documents filed with the Registrar.(2) This again results in additional work. It should be remembered also, that such a system does not eliminate the necessity for the services of an attorney to interpret the effectiveness of these encumbrances against the property. The Registrar cannot give any opinion in this regard.

C. The system works a hardship on persons dealing with Torrens property. For example: a mechanic who has done work on Torrens property must determine at his peril that such property is registered property, and must, therefore, file his claim of lien with both the recorder and the registrar. If he fails to do so, he risks the disallowance of his claim.(3) This is a burden on a mechanic unfamiliar with such a system.

D. The Torrens System does not allow any registered property to be acquired by adverse possession.(4) This has been the subject of some criticism.(5) From time immemorial people have used property that has been abandoned or unused for a long period. This was looked on with favor by the various governments since idle land is unproductive. Since this was favored, the law developed a theory that an occupant of land which had been left uncared for, could acquire title to such land after a certain length of time and after complying with certain specific requirements. This policy of encouraging the use and benefit of idle land has been completely done away with by the Torrens System. This is the basis for the criticism of the provision that no land can be acquired by adverse possession under the Torrens System.

E. Withdrawal of property from the Torrens System was until recently not permitted. The severe criticism of this finally led to a change in the law which now permits withdrawal. This move was however, opposed by some who claim that this breaks down the entire system.

By allowing people to withdraw their property it was felt that the System would soon become non-existent by reason of the withdrawal of the majority of property registered under the Torrens System. However, since the California System has proved unsatisfactory it would seem fair to allow persons who desire to withdraw their property the opportunity of so doing.

## II. EXTERNAL DEFECTS

These defects result mainly from court interpretations of the Torrens Statute and from the failure of the System to operate in practice as it would in theory.

A. The most important defect in the Torrens System is the fact that a Certificate of Title is not a conclusive determination of title. This means that a purchaser of registered property may be subject to interests which do not appear on the Certificate through fraud and defects in the original registration proceedings.(6) This causes a lack of security to a purchaser interested in buying Torrens property. This defect is mainly the result of court decisions and interpretations of the California Land Title Law which have sapped the effectiveness of the Torrens System. Situations in which the purchaser is subject to unregistered interests are set forth in detail in various portions of this paper and it is sufficient at this time merely to call attention to the existence of this serious defect.

B. In addition to loss from unregistered interests as discussed above,

the owner of registered property may suffer loss through a forgery of his certificate of title. His recourse to the Assurance Fund as has been discussed previously, has been wiped out since the fund is depleted. This leaves him with little or no remedy for his loss.(7) The owner of registered property must, therefore, guard his certificate because it represents the property he owns. If, even without any negligence on his part, he loses it, he runs the risk of forgery by one who finds it and the ultimate loss of his property. This is, indeed, a defect that should be given due consideration.

## III. CONCLUSION

These defects account, to a great extent, for the lack of effectiveness of the Torrens System in California. In theory, the system appears to be ideal. In actual practice, it has been an unsuccessful venture. Part of the trouble may be attributed to lack of knowledge on the part of the general public, inertia, and lack of interest by the people in a different type of property conveyancing than the one they have been accustomed to. However, a Torrens system similar to the California system has been used elsewhere and proven satisfactory.

This concludes the Survey of the Statutory and Case Law in California involving the California Registration System. The later report will consider the essential elements for improvement in the California system.

FOOTNOTES to CHAPTER 1: DEFECTS IN THE TORRENS SYSTEM IN CALIFORNIA

1. 7 California Law Review, p. 75.

2. Crouch, Winston W., Analysis of Measures on the Ballot, Nov. 7, 1950 prepared under a grant from the Haynes Foundation.

3. Hammond Lumber Co. v Moore, 104 Cal App 523.

4. Land Title Law, Section 35.

5. 14 California Law Review, p. 237. Thompson, Real Property (Perm. Ed.), Vol. 5, Section 4438.

6. See Chapter 4 of Part II for sufficient references to statutory and case law illustrating this topic. See particularly Powell, Richard R., Registration of the Title to Land in the State of New York (1938), p. 54.

7. See Report on the Statistical Aspects of the California Registration System prepared by J. W. Dougherty, Research & Editorial Assistant, State Lands Commission pointing out the fact that the payments into the fund are very small, contributing to its inadequateness.

Chapter 2: DEFECTS IN THE CALIFORNIA RECORDING SYSTEM
(By University of Southern California)

The purpose of this chapter will be to summarize briefly the numerous defects in the California Recording System. No attempt will be made at this point to offer any constructive method of improvement. Any statements of that nature would appear logically in the second report. (See Chapter 4.)

As was stated in the Introductory Chapter to this paper, the defects may be classified in terms of Internal and External defects and will be treated under those headings.

I. INTERNAL DEFECTS

These are familiar to all persons who have ever searched a title in California. They consist of the following items:

A. Cumbersome, voluminous records in the County Recorder's office.

B. Poor search methods. There is no tract index, which makes it necessary for a purchaser to search through the alphabetical indexes for the various grantors and grantees in the chain of title.

C. Since no legal description is contained in the indexes it is necessary to examine each document given by anyone in the chain of title to determine whether it affects the property in question.

D. In certain instances a subsequent purchaser must search for instruments executed after a grantor in the chain of title had already parted with title. This puts an extremely great burden on the subsequent purchaser. See Chapter 9 of Part III for a thorough discussion and analysis of this problem.

E. Records are not in a central place such as the County Recorder's office. Some records are in the Tax Collector's office, County Clerk's office, et cetera. This requires a further search.

F. Assuming a sufficient search could be made, a legal interpretation of the documents would then be required. Just finding the instruments in the chain of title does not complete the job. Their legal effect must then be determined.

G. The index of grantors and grantees is defective since it fails to show interests created by a grantor in favor of the grantee in the land retained by the grantor. This can best be illustrated by the following example:

A, owner of lots #1 and #2 conveys lot #1 to B by deed containing mutually enforceable restrictive covenants which are applicable to both lot #1 and lot #2. Later, A sells lot #2 to C, who has no actual notice of the restrictions imposed on lot #2 by the former deed to B. It has been

decided in California that C would be subject to the restrictions against lot #2 in favor of B, the owner of lot #1. The difficulty of such a decision lies in the fact that the index of grantors and grantees will merely show A as the grantor of lot #1 and B as the grantee. It will not show that lot #2 is affected in any way by the conveyance or that B has been given any rights in lot #1. This will, of course, show in the deed from A to B. The result is that C is required to search all deeds in the record executed by A conveying neighboring lands to find such restrictive covenants. Such a situation could be remedied by use of a tract system whereby all restrictions against lot #1 would be shown together. Another possibility would be to require such an interest to be indexed in A's name thus warning a subsequent purchaser of such an outstanding interest. (See Chapter 9 of Part III for a thorough discussion of this problem.)

## II. EXTERNAL DEFECTS

These defects consist of matters which affect the title of a certain parcel of land, but which do not appear upon the record. In some instances a bona fide purchaser is protected so that the defect is not as serious as would seem at first glance. The general problem encountered in all these matters is that an intending purchaser desires to know what outstanding encumbrances the property is subject to. The recording system is defective in every instance in which the purchaser must ascertain any information of this nature from matters which do not appear of record. The most important matters of this type are as follows:

### A. Interests arising out of possession (unrecorded).

A purchaser is required to take subject to any interests he would have discovered by a reasonable inspection of the premises. Some instances of such situations are as follows:

#### 1. Adverse possession:

In California the elements of adverse possession consist of possession which is open, notorious, adverse, exclusive, and continuous for a five-year period. In addition, the California statute requires the adverse possessor to pay all taxes assessed against the property for these five years.(1) When an adverse possessor meets these requirements he becomes the owner under an original title and his title will not appear of record. A person who subsequently purchases this property in good faith from the party who appears on the record to be the owner will not prevail as against the party who acquired title by adverse possession. He is said to have notice of the adverse possessor's rights from the fact of his possession.

2. Easements acquired by prescription (similar to adverse possession).

3. Possession may also put a subsequent purchaser on notice of interests of persons in the property which arise out of unrecorded instruments. These interests, of course, arise out of the instrument, not out of the possession itself and, therefore, properly should be considered in connection with the next paragraph.

B. Interests which are not of record, but of which the intending purchaser has actual notice or notice from facts and circumstances that would put a reasonable man on inquiry. (Possession is one of the facts and circumstances which put a party on notice of interests arising from unrecorded instruments.) The purpose of this is, of course, to avoid frauds, but could be carried too far in charging a person with notice where he had no actual notice but merely notice of suspicious circumstances.

C. Errors: When an error appears in the record it has been decided that a bona fide purchaser of the property may rely on the condition of the record. This protects the purchaser but puts a burden on the grantor to check the record after a deed is recorded to determine whether it has been correctly entered.

D. Mechanics' and Materialmen's Liens: Since these liens relate back to the date on which the materials were furnished, there is a short period of time in which even a bona fide purchaser would be subject to such liens although not on the record. Of course, this is again a matter arising out of possession and the purchaser could discover the presence of such materials on the real property in question and inquire whether any such liens would be involved.

E. Non-Delivery of Deed: This can be best shown by the following illustration:

O, owner of Blackacre, executes a deed to A but does not give it to him. A takes the deed, without permission, from O's possession, without negligence on the part of O, and transfers the property to P, a bona fide purchaser, giving him a deed to the property. In an action between O and P the California law permits O to recover the property since there was no passage of title to A, who had stolen the deed. Even though the subsequent purchaser, P, was in good faith, he cannot prevail since he did not receive title to the property from A.(2)

This is one of the unfortunate situations in which a subsequent bona fide purchaser may lose the property due to an off-the-record matter.

F. Lack of Authority: There are many situations in which an agent may exceed his authority in dealing with the sale of land. In some of these instances a subsequent bona fide purchaser of the property may be protected depending on circumstances and in other situations he will not be protected. The following example illustrates a situation in which the subsequent purchaser is not protected:

O, the owner of Blackacre, executes a deed to A and delivers it to X to act as an escrow agent. X fails to follow the instructions given to him by O and delivers the deed to A before the conditions of the escrow have been complied with. A later sells the property to P, a bona fide purchaser, and gives him a deed. In an action brought by O against P to recover the property, the California court has held that O should recover.(3) The basis for this is that no title passed when X, the escrow agent, violated his instructions

and gave the deed to A. Since A had no title he could not pass any title to P. This is, therefore, an instance in which a subsequent purchaser is subject to the off the record defense of lack of authority of an agent. There are, however, other situations in which the subsequent purchaser would not be protected as discussed in Chapter 2 of Part III.

G. ILLEGALITY: If property is sold by a corporation in violation of a statute (e.g. usury laws), the transaction is void. A subsequent purchaser in such a situation would be given no protection. When a transaction is void no title passes to a subsequent purchaser.(4)

H. FORGERY: A forged instrument is void and ineffectual for any purpose. Even though it is recorded it does not create any rights in parties claiming through or under it.(5) For example:

O is the owner of Blackacre under a recorded deed. X purports to convey O's property to A and forges O's name to the deed. This instrument is recorded. A subsequently conveys Blackacre by deed to P, a bona fide purchaser. P relying on the record title of A purchases the property and is then sued by O, the original owner. In such a situation P will not be protected since he has never acquired title to the property. Forgery is, therefore, another one of the off-the-record matters to which a bona fide purchaser may be subjected.

The certificate of a notary is intended to guard against forgeries, but due to the summary way in which an instrument is notarized it is in fact not much of a guaranty against forgeries.

I. FRAUD: There are two types of fraud which the law recognizes and which have different results.

1. Fraud in the Inception of a Contract: This is the type of fraud which vitiates a transaction and makes it void, thus giving no protection to innocent purchasers.(6) For example:

O is the owner of lots 1 and 2. He agrees to sell lot 1 to X and signs a deed transferring lot 1 to X. This deed contains the description of lot #1 when O signs it. X fraudulently adds (after O has signed the deed) the description of lot #2 and records the instrument. X then purports to convey lots 1 and 2 to P, a bona fide purchaser. In an action by O to recover possession of lot #2, O would recover. P would not be protected since this is the type of fraud which makes a transaction void and no title passes. This fraud is practically tantamount to a forgery.

2. Fraud in the Inducement: This type of fraud can only be used as a basis of rescission of a contract when the parties to the fraud are involved in the action or a subsequent purchaser who does not meet the requirements of a bona fide purchaser. When the interests of a bona fide purchaser are involved the bona fide purchaser is protected.(7) For example:

O, owner of Blackacre was induced to sell his property to X for a sum far below its market value on X's misrepresentation that a freeway would be

cut through that property. This was in fact untrue, but O relied on it. The deed was recorded. X then conveyed the property to P, an innocent third party who paid value in good faith. P in this situation would be protected since he acquired legal title which cuts off the prior equity which O had to rescind the contract for fraud. O would have a right to damages against X provided the necessary elements of fraudulent misrepresentation were proved.

This is, therefore, an illustration of a situation in which a subsequent bona fide purchaser would be protected against an off the record matter. However, the subsequent purchaser would be required to appear and defend his rights and prove that he is a bona fide purchaser. This alone is a burden placed on the purchaser. If he fails to sustain such burden he will lose the property.

J. LEGAL DISABILITIES: There are various types of disabilities: infancy, insanity, deprivation of civil rights due to certain types of imprisonment. When the grantor is subject to certain disabilities his contract is void and a subsequent bona fide purchaser is not protected. In other situations the contract is merely voidable and the subsequent purchaser is protected. For example, the contract to sell real property executed by an infant under 18 years of age is void, while such contract executed by an infant between 18 and 21 years of age is merely voidable.(8) The inference from this would be that a subsequent bona fide purchaser in the first case would not be protected, but a subsequent bona fide purchaser in the second case would be protected.

K. VOID DECREES ON WHICH JUDICIAL SALES ARE BASED:

Judicial sales may be set aside if they are based on an invalid decree. If the court has no jurisdiction over the parties or subject of the action, the decree will be void and any sale of real property held in pursuance thereof will also be void. An innocent purchaser who later acquires such property will not be protected.(9) For example: probate proceedings are held and property sold and distributed on the basis of the decree rendered in the probate proceedings. It is later discovered that the "decedent" was not dead, making the entire probate proceedings, decrees and sales invalid. Innocent purchasers who acquired property sold in connection with these proceedings will not be protected.

This is, therefore, still another instance in which a subsequent purchaser is subject to matters which are not on the record when he purchases the property.

Closely connected with this problem are cases in which judicial procedure on which a decree and sale is based is irregular. In some instances where there have been irregularities a subsequent purchaser is not protected. To the extent that this is true, a subsequent purchaser is put on inquiry as to all procedural steps connected with any decrees and judicial sales of the property that have occurred in his chain of title.

L. DESCENT AND HEIRSHIP: The problems of this nature were discussed thoroughly in Chapter 2 of Part III and a short reference to them is all that is necessary at this point. If the heir of a decedent who has died intestate takes real property by succession and transfers that property to a bona fide purchaser the purchaser's title remains inconclusive for a period of four years according to a California statute. If during that four years a will of the decedent is found which devises this property to someone other than the heir who acquired it by succession and such will is duly proved or a notice thereof is recorded, the bona fide purchaser will lose his right to the property in favor of the devisee under the will. If, however, four years elapse without such will being discovered the purchaser's title becomes conclusive as against any will executed by the decedent which may later be found.(10)

If the decedent died leaving a will devising real property to a specific devisee and later a second will is discovered leaving the property to another, a bona fide purchaser from the first devisee is fully protected.(11) For example:

D, decedent, died leaving a will which gave Blackacre (which he owned at his death) to A. A decree of distribution awarded this property to A who sold it to P, a bona fide purchaser. Subsequently, a later will was discovered willing this same property to X. In a suit brought by X against P, the bona fide purchaser, P would be allowed to retain the property. The theory on which such a conclusion is based is that acquisition of legal title by a subsequent bona fide purchaser cuts off all prior equities such as that of X.

The danger from the discovery of a will when the decedent died intestate or the discovery of a second will when he died testate is not a very serious off-the-record matter as can be seen from this series of examples, since a bona fide purchaser is generally protected. Of course, he is put to the task of proving his bona fide purchase, et cetera.

M. MARITAL INTERESTS: Marriage automatically creates interests in the husband or wife in certain property. Often these marital interests do not appear on the record in the County Recorder's office and thus a subsequent purchaser of the property is not made aware of such interests. The records in the County Marriage Bureau are likewise insufficient.

In some instances a subsequent bona fide purchaser is protected against a spouse whose interest does not appear of record, while in other instances he would not be so protected. This can best be illustrated in the following manner:

H and W (husband and wife) own Blackacre and hold title to it as community property. The record, however, shows H as the owner of the property by reason of a recorded deed to the property to him as grantee. Nothing in the deed indicates that he is married and W's interest does not appear of record. According to California statute, the wife must join with the husband in executing a deed selling this property.(12) If H conveys this property to P, a

bona fide purchaser without notice of the wife's interest, but fails to have W join in the conveyance, W has the right to set aside the conveyance as to her one-half interest, providing she did not consent to the transfer by H. The wife is given, by statute, a period of one year from the date of filing of the deed to the bona fide purchaser, to set aside this deed and assert her one-half interest. If W in the above example failed to act within that one year period, she would lose all such rights and P, the bona fide purchaser, would prevail.(13)

This illustrates a situation in which an innocent subsequent purchaser, relying on the state of the record title, may lose the property he has purchased to a person whose interest does not show on the record. His title, in effect, is inconclusive for one year. This illustrates another defect in the Recording System as it exists in California.

This concludes the Survey of the Statutory and Case Law in California involving the California Recording System. The later report will consider the essential elements of a good Recording System with some suggestions for improvement in the California System.

FOOTNOTES to CHAPTER 12: DEFECTS IN THE CALIFORNIA RECORDING SYSTEM

1. See Civil Code Section 1007 and Code of Civil Procedure Sections 323, 324, 325 for statutes relating to adverse possession. See 2 Southern California Law Review 139 for a discussion of adverse possession.

2. Gould v Wise, 97 Cal 537.

3. Promis v Duke, 208 Cal 420.

4. Haymond, T. W., Title Insurance Risks of Which the Public Records Give No Notice, 1 Southern California Law Review 422.

5. Haight v Vallet, 89 Cal 245; Trout v Taylor, 220 Cal 652, Jones v Coulter, 75 Cal App 540; Wunderlin v Codagan, 50 Cal 613.

6. Haymond, Title Insurance Risks, cited supra, footnote #4; Gage, D. D., Land Title Assuring Agencies (1937).

7. Ibid.

8. Civil Code Sections 33 and 34.

9. Parsons v Weiss, 144 Cal 410. Haymond, Title Insurance Risks, cited supra, footnote #4.

10. Probate Code Section 322.

11. See Chapter 2 of Part III for citations to cases involving this situation.

12. Civil Code Section 172a.

13. Ibid. Trimble v Trimble, 219 Cal 340; Mark v Title Guaranty & Trust Co., 122 Cal App 301; see also 21 California Law Review 170 and 7 Southern California Law Review 106. For authority indicating that property may be community property regardless of the record title see the case of Horsman v Madden, 48 Cal App (2) 635.

## Chapter 3: FEATURES OF GOOD LAND TITLE SYSTEMS
(By Mr. Nathaniel B. Bidwell)

From the entire context of the report and the first installment of the data submitted by the University of Southern California and from the comparative data in the counties beginning with Los Angeles County through to the others, submitted in detail, I cannot see that the system adopted, an instituted service in California, can be reconciled with a maximum of accuracy or exactness in the examination of title. It seems unfortunate that, for example, the question of the validity of judicial procedure under foreclosure suits could possibly arise under a properly statutory form of foreclosure. Again, there never should be an absence of statutory law that would allow a question on the passage of title as within the parties or as to third persons to arise under "nondelivery of deeds".

As to special liens, which are material men's liens or mechanics' liens, California laws should require immediate recording in the regular Registry of Deeds of the county where the land lies, as does the statute in Massachusetts.

Future judgments and decrees all are taken care of in the original and appellate jurisdiction of the courts and finally are recorded as against the world as an action in rem.

The authority of an agent or corporate officer should be questioned and disposed of at transfer and, except in the case of fraud, should be binding against all parties.

I note by the report on Los Angeles County, dated February 19, 1950, that it is required in the Land Court system that the applicant must prove ownership by furnishing an abstract or a policy of title insurance. If the data before me is a sufficient criterion by which one may judge, no comprehensive abstract could be presented under the system of recordation that seems to obtain in your State. Under the Land Court system in Massachusetts, the title examiner for the Court is appointed by the Court and he is able to obtain a complete examination of a title from the simple system which has been thoroughly outlined in this report. Again, no policy of title insurance can be sound that is based upon inaccurate records or inadequate records of recordation.

Once the system of recordation is simplified so that all so-called encumbrances which affect the title to real estate are correlated under a simple accurate system, land can be registered as outlined in the Massachusetts Statute, Chapter 185, attached to the first portion of my report, and the said Assurance Fund only guarantees against error on transfers or re-registrations after the original registration.

The historic record is the basis for effectual conclusions of the workability of a system. The simple recordation system and the regular outline of registration in fifty-two years in the Commonwealth has resulted in $3000 worth of loss to the Assurance Fund.

I understand again from the report of February, 1950, from the Los Angeles data "the State Assurance Fund must assume sole responsibility for clear title." To me this is a serious undertaking, wholly unnecessary, and a responsibility not based upon the probability of accurate data presented upon the original registration.

Attached to this report is a list of the various counties of the Commonwealth and of their population, all of which are small as compared with California, but the difference in quantity is not an insurmountable barrier to establishing a system of title recording regardless of land registration. In the economic world this title recording is of the highest importance and a simple, accurate system is a condition precedent to successful title examination, investment marketability and security. Insofar as my commission allows me, and even beyond, I recommend a very drastic revision of the recordation system of your State.

This is important, as I observed that the State Assurance Fund assures future increased values of property for the original payment of one-tenth of one per cent of the assessed value at the time of the original registration except in the interim between the decree of original registration and the end-of-the-year limitation period. Under the Land Court of Massachusetts, there is no such guarantee of the Assurance Fund as to the original value and therefore no guarantee of the Assurance Fund for increased value because of any act in regard to the original registration. As I have said before, the Assurance Fund is a guarantee against errors following original registration, and therefore there exists the potentiality of guaranteeing increased values similar to the example given in the attached comments to the Los Angeles County report for the original fee. You will recall that, regardless of the original value of the land, the maximum that can be collected is $1000 under our statute. Therefore, under these two considerations, the recordation system as a basis for title examination is of the utmost importance in its sequence and continuity and comprehensiveness of record. It would appear to me, if I understand the comparative data given, that it would be well nigh impossible to be certain of a certification of title under the California system presently obtaining. Again, such an improved recordation system is essential because of the tremendous value indicated in the transactions daily in the Los Angeles County recording office. If it can be secured, a recording system similar to that outlined by General Laws, Chapter 183, of Massachusetts, is an integral system recommended and promulgated as a result of examination of the recording systems in the various states and territories as outlined in other parts of my report. Without a recent examination of amendments in other jurisdictions, which examination is not comprehended in my commission, I therefore finally recommend that such a system be adopted at the earliest date obtainable.

It has been the history that such simplified recordation systems have opposition from title companies, and from abstractors and conveyancers. The test, however, is the value to the public rather than to the profession. In addition to accuracy and the minimum of errors, it eliminates the requirement of free service to be performed by County Registers' or County Recorders'

offices. I recommend a system of fees that will approximate the cost of services, which services should be limited directly to the recording and preparation of indexes and records for agencies separate and apart from the Recorder's office, inclusive of lay individuals. I note the recommendation of 1943-44 of a photographic method of recording. That has been adopted long since in our County and districts of the County, and has resulted in a great saving in hastening the return of the recorded deed to the grantee, etc. in the point of time.

Again, it seems to me that the duplication in examination of title, either within the confines of the Torrens system or without, could be eliminated by the adoption of a simple system of recording titles. To have the potential encumbrances spread out over varied points of record, and to have so many possible encumbrances not a matter of centralized record, makes a title examination expensive if at all feasible.

In addition to the repetitious comments I have made throughout this part of my report, I would like to call specific attention to certain provisions of law which would be of value in a recording system:

1. A deed executed and delivered would be sufficient without any other act to convey land as between the grantor or lessor and persons having actual notice, except this conveyance of a fee, or of a lease for more than seven years or for life, cannot be valid against any person other than the grantor or lessor unless it is recorded in the Registry of Deeds in which the land lies. The purpose of this provision is to take the place of a livery of seisin, and is to protect subsequent purchasers against prior or unrecorded conveyances and to give legal sanction to the antiquated rules adopted by judicial decisions by giving constructive notices to purchasers and creditors. You will note that this provision is substantially identical with the words of the Federal Statutes, 41 U.S., p. 1000.

2. It should be provided further that the record of a deed and a lease or a Power of Attorney, duly acknowledged, becomes conclusive evidence of the delivery in favor of purchasers of value without notice.

3. A statement, sworn to before an officer, and showing a person's married or unmarried status, kinship, and birthday, should be recorded and become admissible in evidence in support of a title in any court of a state.

4. A grantee's name and residence and address should be contained or endorsed on a deed.

5. There can be provision for a short form of Warranty or Quitclaim Deeds.

6. The word "grant" can be used as a complete and sufficient word of conveyance as against the old "give, bargain, sell and convey".

7. It can be provided that the words "heirs and assigns" are not necessary to give an estate in fee and that the law construes a conveyance as such unless the deed specifically provides otherwise.

8. When a conveyance by deed or will is made the word "use" shall be implied or the words "in trust" should also be used.

9. It can be provided that easements, rights, privileges, and appurtenances are by implication all part of the transfer, unless the deed or conveyance specifically excludes them.

10. A mortgage entitled "Mortgage Deed" is a deed to heirs and assigns and contains full warranty covenants and various statutory conditions in regard to payment or redemption or foreclosure.

11. Various mortgages given to banks (national, cooperative, savings) may all be provided for simply by statute and a general provision that a holder of a mortgage may upon foreclosure purchase at such a sale.

It may be noted here that it has recently been provided under our Commonwealth that foreclosures must be by way of equitable action, which further simplifies the record of titles.

12. A mortgage may be assigned from one mortgagee to another by a simple paper recorded and witnessed.

All these instruments, by provision of law, must be acknowledged.

13. In order to have a substantial, successful Torrens Land Registration System, there must exist a recording system that possesses maximum accuracy, that possesses minimum cost of examination of title, and that provides for examiners who are competent.

14. As in Massachusetts, so can it be in any state. There should be in the Land Court judges whose jurisdiction is confined solely to land titles and not inclusive of the jurisdiction of torts, divorce, criminal law, etc., as I understand obtains in Cook County, Illinois. In Massachusetts these judges are primarily located in the Capitol in Boston, but may at their discretion hold sittings of Court in any part of the Commonwealth. This might require various locations in the State of California because of its size and inaccessibility to Sacramento from the south and the north, just as certain other of your offices are divided between San Francisco, Los Angeles, Sacramento, etc. This is not an insurmountable difficulty.

15. The recorders, assistant recorders, and engineers in the main office or offices should be of most competent education and experience.

16. The examiners should be chosen by the Court and not by the applicant.

17. As in the Massachusetts Statutes, Chapter 185, all available data should be required to be given in the application, and there should be authority for added examination and surveys.

18. The system of notice, whether by personal posting or by publication, should be at a maximum, with allowance of sufficient time to permit all parties interested therein to be heard and to assert their rights. Under this system there should be a decree in rem conclusive against the world, including the State of California. There should be a limitation of time after the decree in which all questions except fraud are forever barred.

19. The various Registries of Deeds for the simple recordation system or for the division of the Registry that handles the Torrens system should be personneled by specialists in that line and should be free from politics.

20. An assurance or indemnity fund, because of the suggested procedure as required here of no defaults but complete hearings on each title, with limitations after decree, should be confined in its guarantee to errors after original registration. An observation on this feature, where your applicant furnishes his own abstract on a faulty recordation system, is that your Assurance Fund is always in danger.

21. An assurance fund depletion should not be dependent upon a title insurance company's guarantee or vice versa.

It is beyond my commission and it would be impossible, with the data that I have or my lack of knowledge of your conditions in California, to suggest or to outline a schedule of individual costs and fees as well as of salaries of employees and of the Court. This is dependent upon a state's condition, size, fixed financial programs and attitudes, all differing from another state or locale as one person inherently differs from another.

It is recognized that no one feature or features can make a successful recording or registry system workable, but there are certain salient elements, in my opinion, which are essential to its advancement and efficiency, such as a minimum of political attitudes, and the employment of specialists for the Court's engineers, examiners and personnel. Lastly, but certainly not the least by any manner of means, is the attitude of the conveyancers and the bar of a state toward a possible destruction of present sources of income of independent examinations for title guarantees. I am informed that in every state in the Union, there has been criticism and objection to a change, based partly upon such a destruction of a recognized and somewhat lucrative business. This is only human, but I do believe that growing cooperation of conveyancers and lawyers with property owners and financial interests will be absolutely necessary to fix the marketability of titles and their use as collateral at a minimum of cost. The accumulative tax problem that faces the people of any state from the state level, from the municipal level, from the county level, and moreover from the national level, means an economy to be projected along the lines of titles.

Otherwise real estate will become less and less a basis expedient to industry and free enterprise and, worst of all, the hopes of the small-income class of people, in regard to their homes, and small businesses, and farms, will be defeated.

Water rights for irrigation and for power are a source of complicated title dependency. All these are larger problems obtaining in the State of California than in the Eastern or Middle West States, at least east of the Mississippi River. Coastal States, inclusive of the thirteen original colonies, have had to meet the inaccurate descriptions and rights towards or within the inland waters and the marginal seas, and overlapping and undecided questions. It has been experienced that the Land Court has been the most effective instrument in searching and determining these overlapping rights.

One element which must be taken into account on water rights arises under the granting of licenses by the Federal Government to construct piers or other structures in navigable areas, and the resulting conflict that arises between riparian owners bordering on these navigable waters.

In the conflict that has arisen involving riparian owners on inland waters and marginal seas as to the ownership of and recovery of resources such as fish, gravel, sponges, etc., etc., the Land Court has been an effective institution for the determination of these rights, because all parties in interest are notified and heard, and the constitutional provisions are necessarily strictly observed.

Finally, this report and these observations, criticisms, and recommendations are not given or presumed to be those of perfection or those that could be adopted by a particular jurisdiction without substantial disruption. The determination of their value must necessarily rest beyond my authority, and is subject to the protection, consensus, and reflection of competent minds studying the changing times and problems with the years.

Chapter 4: METHODS FOR IMPROVEMENT IN THE CALIFORNIA LAND TITLE RECORDING AND REGISTRATION SYSTEMS
(By University of Southern California)

INTRODUCTION:

At the beginning the limited scope of this report should be emphasized. It does not purport to pass upon the very broad question whether, in view of the availability of title insurance, any attempt whatever should be made to improve title recording or registration in California. On this broad issue we make no pronouncement at all. The authors of this report are required by their contract with the State Lands Commission to report "on the methods to be followed in applying good land title recordation and registration systems in the State of California." In writing this report we have assumed that it is desired to provide the people of California with systems of registration and recording operated by the government which will be at least equal in efficiency to those operated by the governments of other states of the United States. The facilities made available to the public by privately owned and operated title insurance companies have been left entirely out of consideration.

From the point of view here stated the following recommendations are respectfully submitted. They are based upon a consideration of systems in use in other states and the suggestions of experts in this field.

PART I: METHODS FOR IMPROVEMENT IN THE CALIFORNIA LAND TITLE REGISTRATION SYSTEM

The Torrens System (registration system) has not been used to any great extent in the United States. It has been tried in various parts of the country, but has met with disappointing results. There are a few areas in which it is being used to a very limited extent, i.e. Boston, Massachusetts and Cook County, Illinois. These areas have found the system to be satisfactory, but they are decidedly in the minority.

The reasons for the failure of the Torrens System to succeed in the United States can be traced mainly to the apathy of the people in regard to it. The people are accustomed to the Recording System, cumbersome though it may be, and do not desire to change over to a system which is quite different from that to which they are accustomed.(1) Much of this attitude on the part of the people is due to the fact that the initial proceeding for putting property under the Torrens System is an expensive proceeding. It requires a judicial hearing, title reports, surveyor's reports, the services of an attorney and other incidental matters. These are expenses that are faced when a property owner decides to register his land and they add up to a fairly large sum. There is a saving to future owners of the property since subsequent conveyances are less expensive than they would be under the recording system, but a present owner is not concerned with the savings to such future owners. He is naturally concerned with the expense to him. Therefore, after considering such

expense, a property owner generally decides he will remain under the Recording System where he needs only to pay a small amount for recordin his deed and other documents affecting his property.

The only solution to this attitude on the part of the general public is to make the system compulsory, requiring everyone to register his property. This, of course, has obvious political difficulties, and would not be considered.(2)

If we assume, however, that a Torrens System could be made to operate satisfactorily on a small scale, as it is in Boston or parts of Illinois, the problem that confronts us is why has California's experiment with the Torrens System failed so drastically? There are several defects in the California System which have led to this failure. They will be discussed in detail below, with suggestions for remedying the defects.

The California Registration Law provides for an Assurance Fund for the purpose of protecting registered owners who lose their property due to operation of provisions of this law.(3) For example, A owns registered property. His Certificate of Title to that property is stolen by X, who forges A's name and conveys the property, by transfer of the certificate, to B, who is a bona fide purchaser. According to the provisions of the Registration Law in California, B would be protected, since the certificate is to that extent "conclusive" evidence of title.(4) A's only remedy would be against X who has probably left the State. The purpose of the Assurance Fund is to give A a recovery of money for the value of the land which he has lost through this forgery and theft. The Land Title Law gives him a right of recovery, provided he meets the requirements set up by the law, against the Assurance Fund. Theoretically, this is an ideal solution. It provides for a "certificate that is conclusive", which is necessary for the perfect operation of a Torrens System, and it also provides for protection of the rightful owner, permitting him a money recovery.

The Fund has, however, not worked in the manner in which it was expected to. The reason for this is that the fund is much too small to meet the demands of property owners who have lost their property through conditions which would give them a right to recovery from the fund. The amounts put in the fund consist of a small percentage of the amount collected as fees by the Registrar for his services in connection with Registered (Torrens) Property. These fees are admittedly very low and insufficient to cover the costs of maintaining a Registration System. The amount which goes into the fund is entirely too small to create a fund sufficiently large enough to meet the needs of owners of Registered property.(5) In addition, at the present time, due to the judgment in the Gill case discussed in the first report, the fund has become bankrupt. This leaves the Registered owners with absolutely no protection at all from any Assurance Fund. With a situation like this, a Torrens System could not possibly be successful.

There must be a soundly financed Assurance Fund, large enough to

meet the normal needs of owners of Registered property. In order for it to give adequate security to these owners, it must be supported by the State of California.(6) Any other type of insurance, unsupported by the State, will be inadequate. Without an adequate, workable fund, California can never have a successful Torrens System.

The major problems encountered in connection with California's Registration System stem from the interpretation of the Courts as to the "conclusiveness" of a Torrens Certificate. Section 36 of the Land Title Law provides that the certificate should be "conclusive" evidence of title. This means, in effect, that protection is given to those persons whose names appear on the certificate as having an interest in the property. Anyone who claims an interest in the property, but whose name does not appear on the Certificate is precluded from any interest in the property. His remedy is then limited to damages or a possible action against the Assurance Fund discussed above.

Exceptions are made in the Statute in Section 38, which states that the registered owner holds his property subject to such estates, mortgages, liens, charges and interests which are noted in the last certificate of title EXCEPT:

1. An existing lease for a period of not exceeding one year;
2. public highways; 3. certain taxes; etc.

The California Courts have refused to hold the certificate "conclusive" evidence of title in a series of important decisions.(7) These have been discussed in the first report, but should be referred to briefly at this point. In most of these cases the California Court found that the Court in the original proceedings to register the property had no jurisdiction to make the determinations as to interests in the property. This may have been because of a lack of proper service on parties who had interests in the property, or it may have been due to the Court's failure to have jurisdiction over the property itself, which was the subject of the Registration proceedings. Lacking jurisdiction, it was held, the Court could not effectively preclude the interests of persons to the property attempted to be registered and the entire proceedings were declared invalid. Such decisions naturally shook the confidence of the general public in the Torrens System and the result has been that property owners do not feel that Torrens property is a safe investment.

The following case affords an illustration of this situation:

O, owner of blackacre, brought an action to have his property registered under the Torrens System. He failed to name X, (who was occupying a small section of Blackacre) in the petition and X was not given personal service of the petition and summons. The Land Title Law requires personal service to be given to all occupants of the property sought to be registered. X, having no knowledge of the registration proceedings failed to appear and consequently the property was decreed to be registered in the name of O, with no mention of X's interest which was based on a

boundary agreement previously made with O. Several years later the property was sold to a bona fide purchaser, P, who had no actual notice of X's interest. X brought an action to quiet title and set aside the decree of registration so that he could assert his interest in Blackacre against P. The court in Swartzbaugh v. Sargent(8) under facts similar to those outlined above, held that X was entitled to set aside the decree of registration and assert his interest in the property. The court held that failure to give the notice required by statute (personal service in this case) in this instance meant that no due process had been given to X. It is, of course, necessary to give the type of notice required by the statute in order to give the defendant "procedural due process". It is not necessary, however, that the statute require personal service. It has been held by a series of Supreme Court cases that when an action is in rem (such as the type of action involved in a quiet title action) notice by publication is sufficient--personal service is not necessary unless the statute specifically requires it.(9) When the Court has physical jurisdiction over the real property involved (i.e. the land is within the State in which the court is situated) the court has the right to settle the title to such property.(10) This may be based on publication service as held in these Supreme Court decisions, whether the parties with interest in such property are within the state or not. This means that the California Land Title Law could be amended to require merely service by publication as the method for giving notice in the original proceedings for registration, rather than personal service. The decree granted would then be "in rem" (i.e. conclusive against all the world) and lack of personal service could not be claimed as a basis for lack of jurisdiction and grounds for vacating the judgment in the original proceedings.

In order for the Torrens System to operate successfully, the certificate must be conclusive evidence of title as against all the world.(11) It is proper, however, to allow a short period (as is provided in the Land Title Law) for vacating the decree because of fraud, mistake, or inadvertence. Such action should not be allowed as against a bona fide purchaser of the property, however. After this period of time elapses, the decree in the original proceedings should not be subject to attack.

The Torrens Statute itself has provided for a conclusive certificate of title. Failure on the part of the Courts to recognize the proceeding as one in rem in which rights were established and all other rights cut off, has been largely responsible for the breakdown in the operation of the Torrens System in California.

It should be emphasized that in order to have a satisfactory Registration System there must be a satisfactory Recording System as a basis.(12) This is necessary in order to determine in the original Torrens proceeding which parties have interests in the property which is being registered, so that they can be given proper notice of the Torrens proceeding. If it is difficult to find this information from the Official Records, persons with legitimate interests in the property would not be properly notified and consequently trouble would very likely arise in the

future. The Boston report states this as follows:

> "In order to have a substantial, successful Torrens' Land Registration System there must exist a recording system that possesses maximum accuracy, that possesses minimizing cost of examination of title; and an examiner who is competent."

Improvements in the California Recording System would not only be beneficial in connection with the operation of that system, but also in connection with the operation of the Torrens System, as can be seen from the above quotation.

There are some practical human problems which enter into the picture and must be dealt with. For instance, in some of the Registrars' offices in various counties throughout California, poor records are kept and there is a lack of proper supervision.(13) It is necessary to have a competent, well-trained staff to carry out the provisions of the Registration System. This can only be achieved by emphasis on adequate personnel in the various Registrars' offices.(14) If the Torrens System is ever to function properly, a thorough investigation of how records are kept should be made and a revision accomplished where necessary. This is especially applicable to the smaller counties since the large counties, such as Los Angeles, are well-staffed and operate in an efficient manner.

These then are the principal defects in the California Registration System and are the matters which must be remedied in order to have a workable Torrens System in California. It is feasible for a Torrens System to be successful, as has been the experience of certain small communities. It must, however, have the support of the people. This is perhaps the greatest problem of all, since the people of the State of California have heretofore failed to have sufficient interest in the operation of the Torrens System to support it wholeheartedly. As long as the apathy of the general public continues, it is doubtful whether a Torrens System which would operate successfuly could ever be devised. It is, therefore, up to the people of the State of California, in the last analysis, to determine whether they want a Torrens System or not.

## PART II: METHODS FOR IMPROVEMENT IN THE CALIFORNIA LAND TITLE RECORDING SYSTEM

Many of the defects in the California Recording System arise out of the mechanical difficulties of obtaining information from the public records. One of the main purposes of a recording system is to provide a method in which a purchaser may obtain information as to the status of title to a particular piece of property. This he should be able to find with a minimum of time and effort. Instead, due to the bulk of material and the poor indexing system in use in California, it is extremely difficult to obtain a clear picture of the record title to a particular piece of property from the official records. Under the California system as it prevails today, a purchaser must first trace through a series of Grantor-Grantee Indexes and must ultimately read every document executed

by a grantor in the chain of title to determine whether it involves the property he is interested in purchasing. This is due to the fact that the Indexes do not contain any legal description of the property conveyed. By looking at the index all a purchaser can discover is that X conveyed by deed to Y. He cannot determine from that index whether it was lot 1, lot 2, etc. which was conveyed. It is no wonder that the Boston report registers disbelief at such a deplorable condition.

The first recommendation, therefore, is that at least a provision be made requiring the index books to indicate the legal description of the property conveyed, as well as the name of the grantor and grantee and the title of the instrument, by which it was conveyed. This would help the purchaser considerably, since he could then determine, without consulting the instrument itself, whether a specific document or transaction dealt with the property he is interested in purchasing.

This would eliminate a certain amount of wasted effort. However, the bulk of title searching would still involve the tedious method of checking Grantor-Grantee Indexes back to the source of the title.(15) It would be a considerable time saver if tract indexes could be used. All transactions involving a specific parcel of property would be listed on a page containing the legal description of the property in question.(16) A purchaser, interested in a specific piece of property, could then consult the page corresponding to the legal description of the property he is interested in. He would find on this page a notation concerning all transactions connected with that piece of property. With this form of index he could obtain a picture of the chain of title at one glance rather than by having to trace the title laboriously through grantor-grantee books. From the reference contained in the tract index he could then consult the record of the particular documents which are of special interest to him.(17) This system has been used successfully by other states and by the title companies. It is true that such a change is a great undertaking and would, it has been suggested require the preparation by the state of abstract books similar to those in use by the title companies.(18) It would, however, greatly increase the productivity of the recording system and result in a far more workable system than that which is in effect at the present time.

Such a change would eliminate the defect presented in the following type of case:

A, owner of lots #1 and #2 conveys lot #1 to B by deed containing restrictive covenants which are mutually enforceable by A and B and which are applicable both to lot #1 and lot #2. Later, A sells lot #2 to C, who has no actual notice of the restrictions imposed on lot #2 by the former deed to B. The California court has held that C, the subsequent purchaser, is put on notice of the restrictions against lot #2 which he has purchased, from the record of the deed from A to B creating these mutually restrictive covenants.(19) As was pointed out in Chapter 9 of Part III, C would not be able to find the nature of these restrictions from the official records, unless he scrutinized deeds given by A

involving land which was near C's lot. This is a burden on a subsequent purchaser which could be easily eliminated by the use of a tract system. If such a system were used, a notation would be posted on the sheet set up for lot #1, showing the restrictions against lot #2 in favor of lot #1. The subsequent purchaser, C, in searching the tract index would then become completely aware of the existence of these restrictions against the property he is interested in purchasing. He would then be in a position to investigate the effect of these restrictions against him, as a subsequent purchaser of this property. This is clearly a situation in which use of a tract index, rather than a grantor-grantee index would be highly desirable and beneficial.

The fact that records are kept in various offices creates a further defect. It requires a lengthy search through various offices, such as the County Clerk's office, County Tax Collector's office, Bureau of Assessment, Probate Court records, and Bankruptcy records, with the possibility that an interested purchaser might overlook some important source of information. It would be advisable to centralize the records by requiring them to be recorded in the same office. This would perhaps, be an added burden, but would make the process of title searching much simpler. This suggestion is likewise made by the Boston report.

The bulk of the material in the recorder's office presents a mechanical problem. The use of photography has helped to a certain extent to cut down on the bulk. This is noted with approval in the Boston report. This problem of voluminous records could be further solved to a certain extent by the use of the microfilming process. When documents are microfilmed the records would take up very little space. However, the problem of flashing them on a screen everytime someone wishes to see a particular document may make such an innovation an impractical one.

The matters discussed so far in this report have been concerned with defects existing in the recording system itself—internal defects. There are, as has been pointed out in the first report and in the introduction to this second report, many defects which arise outside of the record itself. These have been referred to as external defects.

These defects present themselves whenever a purchaser of real property is held to be subject to interests in that property which do not appear in the record chain of title. For example, a purchaser may be subject to an adverse possessor's rights although the record as such shows no record of such adverse possessor's interests. The same situation arises when a forgery occurs or when certain types of fraud are involved in transactions in the chain of title. As a result of these matters a purchaser may find that he is subject to a title in the true owner and he is left with little or no recovery. These situations present difficult problems and cannot be solved easily. Some suggestions have been given by the Boston report and some further suggestions are discussed below. The changes required to eradicate these defects involve generally a radical change in the prevailing law. Even such changes as are outlined below would leave some hardship on certain parties involved as will be

pointed out in the following discussion.

The first serious off the record defect involves the rights of an adverse possessor against the rights of a bona fide purchaser of a particular piece of property. The law as it stands today holds that a purchaser of real property is put on notice from possession and therefore takes subject to interests of anyone adversely possessing the land he has purchased.(20)

The trouble which arises out of adverse possession is a serious one, since it causes a purchaser to take title subject to interests which do not appear on the record. This rule is applied even if the purchaser uses due diligence in investigating the premises to determine whether another person is in possession.

Various suggestions for remedying this defect have been suggested or attempted. One suggestion has been that an adverse possessor be required to record his claim to the property. This would make public the fact of his adverse possession. A purchaser would then be put on notice from the record.(21) If no claim is filed, the purchaser should be protected if he uses due diligence in investigating the premises. If he finds no one in possession (i.e. if the house is boarded up and there are no signs of life) the purchaser should be protected against the rights of an adverse possessor who is, perhaps, on a vacation. A rule such as this would help to remedy the dangers resulting from the doctrine of adverse possession.

The Torrens System attempted to face this problem and solve it by eliminating the right to obtain property by adverse possession.(22) In order to evaluate the desirability of dispensing with the doctrine of adverse possession entirely it is necessary to consider the basis on which adverse possession is predicated. The main purpose of such a doctrine is to cure old, defective titles. It is a method of clearing land of clouds and interests which have not been asserted for several years.(23) To this extent it is similar to a quiet title action. It is a very ancient and natural method of disposing of problems involving a parcel of real property. If an adverse possessor meets the statutory requirements, such as possession for the statutory period which is open, notorious and adverse plus payment of requisite taxes, such individual acquires an original title. He is not subject to any prior claims to that property. The rights of all persons have been cut off — the slate has been wiped clean. There is a strong public policy in favor of clearing the title to land in this manner. It is a necessary doctrine for this purpose.

Without some such doctrine, titles would not be cleared in this simple manner. Court actions involving time, expense and practical difficulties would be necessary to determine the status of old claims. It is desirable, therefore, to provide some method of clearing titles without the necessity of a court action, if the doctrine of adverse possession is to be dispensed with as it is under the Torrens System. A satisfactory method by which this could be accomplished would be by limiting the extent of title searching

that is required to prove good title - i. e. a statute limiting title searching to a 40 year period. For example, O is record owner of Blackacre. To prove a sufficient title he need only search the record back for 40 years. In searching for this period O finds that A, his vendor, acquired the title from B, by recorded deed 20 years ago; that B in turn acquired the title from C by recorded deed 20 years before the conveyance to A. This would then show clear record title in O, deraigned for 40 years. This would be the only search required. O could then convey a title free and clear from claims by persons who had interests that did not appear on the record during that 40 year period. For example, if X had acquired an interest in Blackacre, such as an easement, which appeared on the record prior to the 40 year period but not during the 40 year period, it could not be asserted by X against O or his vendee. Such a statute would, therefore, have the same effect as the doctrine of adverse possession, i. e., it would clear up old title defects.

Of course, if X were actually using his easement, this would prevent O or his vendee from becoming a bona fide purchaser since he would have actual notice from X's possession. In that case, X could assert his interest in spite of the 40 year statute referred to above.

Other external defects include fraud, forgery, lack of capacity, etc.(24) To protect purchasers against loss due to these various items a radical change in the law would be necessary. The doctrine of bona fide purchaser would have to be extended to protect a purchaser against any defect in the chain of title of which he was not aware. For example, he would have to be protected if a transfer in his chain of title was obtained by means of a forgery, or fraud (either in the factum or by means of inducement). He would have to be protected even if a transfer had been made by a person with a lack of capacity, or even where there had been a non-delivery of a deed. It is true that this would violate the common law rule that no innocent party loses his property due to a forgery. The Torrens system purported to protect the purchaser in situations like this by making the certificate of title a conclusive determination of title. The recording system could be made to operate in such a manner merely by revising the law in the various situations in which a bona fide purchaser is not protected and giving him the needed protection. As discussed in the former report, the doctrine of a bona fide purchaser does protect in several instances, but it would have to be extended considerably to protect the purchaser in all instances. It is apparent that these off the record defects do not present a very serious problem in Boston, judging from the Boston report. Under the Massachusetts law a bona fide purchaser is protected against many of the claims which the California law fails to protect a purchaser against. Even in the cases in which a purchaser is not protected against certain of these claims in Boston, it is indicated by the Boston report that the consequences have not been serious. The chances of loss from the existence of off the record defects have no doubt been exaggerated even in California. Nevertheless, the problem, although small, exists and was part of the undercurrent leading to the adoption of the Torrens System in California.

A possible solution to the loss due to the off the record defenses has been suggested by the maintenance of a state insurance fund.(25) Such fund would compensate innocent purchasers who are forced to part with land which they have purchased, due to some defect not appearing in the record and of which they had no notice. As can be seen from the articles in the footnote, such suggestion has resulted in many controversial opinions. Such a fund would have to have the backing of the State of California.

There are some minor reforms that could be suggested to avoid certain of the off the record risks.

The first is the continued photographing of documents. This helps to avoid forgeries, since the signature on record can be compared. Photography is of assistance in avoiding copying errors, also, as is pointed out by the Boston report.

The second is a more strict regulation of notaries who certify documents which are recorded. Many forgeries could be avoided by a stronger enforcement of the requirement that the notary have knowledge of the party signing the document.

In order to improve the California Recording and Registration Systems it is necessary to have a thorough revision of both systems with attention directed to some of the above matters.

FOOTNOTES to CHAPTER 4:: METHODS FOR IMPROVEMENT IN THE CALIFORNIA LAND TITLE RECORDING AND REGISTRATION SYSTEMS

1. Rood, J. R., Registration of Land Title, 12 Michigan Law Rev. 379.

2. Powell, R. R., Registration of Title to Land in the State of New York (1938) says that a compulsory system is not justified. Bordwell, in his articles in 7 Univ. of Chi. L. R. 470 and 12 Iowa L. R. 63, states that such a system must be compulsory. See also: McDougall, 8 U. of Chi. L. R. 63, Fairchild and Springer, 24 Cornell L. Q. 557, for discussion of this problem.

3. Land Title Law, Section 105.

4. Land Title Law, Sections 37 and 38.

5. See report prepared by J. Dougherty for State Lands Commission of California regarding the various counties of California and particularly the report on San Bernardino County. See also Chaplin, 6 Harvard L. R. 302, where a tax is recommended to build up an insurance fund.

6. Powell, R. R., Registration of Title, cited supra, footnote #2 recommends publicly regulated but privately controlled title insurance. See also Bordwell's article in 7 Univ. of Chi. L. R. 470, cited supra, footnote #2.

7. Follette v. Pacific L. & P. Corp., 189 Cal. 193; Swartzbaugh v. Sargent, 30 Cal. App. (2) 467; Moakley v. L. A. Pacific Ry. Co., 99 Cal. App. 74.

8. 30 Cal. App. (2) 467.

9. Pennoyer v. Neff, 95 U. S. 714; Arndt v. Griggs, 134 U. S. 316; Freeman v. Alderson, 119 U. S. 185; Wilson v. Seligman, 144 U. S. 41; First National Bank v. Eastman, 144 Cal. 487; Loaiza v. Superior Court, 85 Cal 11.

10. Overby v. Gordon, 117 U. S. 214; Lynch v. Murphy, 161 U. S. 247; Reynolds v. Stockton, 140 U. S. 254.

11. See Chaplin, H. W., 6 Harvard L. R. 302, cited supra footnote #5, discussing necessity for a conclusive determination of title to land; Corret, J. R., Land Transfer - A Reply to Criticisms, 7 Harvard L. R. 24, stating that an owner is entitled to exclusive possession of land and the State should see to it he gets it. The Boston report emphasizes that the decree must be conclusive even as against the State of California. See Newcomb v. Newport Beach, 7 Cal. (2) 393.

12. Bordwell, 7 Univ. of Chi. L. R. 470, cited supra footnote #2.

13. See report by J. Dougherty referred to in footnote #5.

14. Powell in his book cited in footnote #2 discusses the difficult personnel problems connected with the Torrens System.

15. See Chapter 1 of Part III for example of search method involved in grantor-grantee system. See Home, W. S., Escrow and Land-Title Procedure (1948).

16. See Home, W. S., Escrow and Land Title Procedure, Ibid, for a description of the tract indexes used by title companies.

17. Bordwell, P., 7 Univ. of Chi. L. R. 470, cited supra, footnote #2. This article emphasizes inadequate indexing of official recording systems. Concludes that an adequate indexing system together with a comprehensive action to quiet title should solve the problem of the difficulties encountered in recording systems in the United States. See also on this subject, McCormick, C. T., Possible Improvements in the Recording Acts, 31 W. Va. L. Q. 79.

18. Bordwell, P., 7 Univ. of Chi. L. R. 470, Ibid.

19. Tiles v. Clark, 44 Cal. App. 539.

20. Civil Code Sec. 1007; West v. Evans, 29 Cal. (2) 414.

21. 14 California Law Review 287.

22. Land Title Law, Sec. 35.

23. See the following articles for discussion of adverse possession and its purpose. McCormick, C. T., 31 W. Va. L. Q. 79, cited supra, footnote #17; Haymond, 2 S.C.L.R. 139; Hood, 12 Mich. L. R. 379.

24. Chaplin, H. W., 6 Harvard L. R. 302, cited supra, footnote #5.

25. Chaplin, H. W., 6 Harvard L. R. 302, Ibid, advocates a tax for such an insurance fund; Powell, R. R., Registration of Title, cited supra footnote #2, advocates state regulation of title insurance companies rather than a state insurance fund; Bordwell, P. 7 Univ. of Chi. L. R. 470, cited supra footnote #2, appears to be in accord with Powell's suggestions; McDougall, 46 Yale L. R. 1125, criticizes this suggestion made by Powell.