MODEL TITLE STANDARDS

BY

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This publication is the second product of a research project sponsored by The University of Michigan Law School and the Section of Real Property, Probate, and Trust Law, of the American Bar Association. The first product, consisting of a treatise entitled "The Improvement of Conveyancing by Legislation," was published in the spring of 1960. A third product, to be entitled "A Handbook for More Efficient Conveyancing," will be published in the near future. For a description of the joint research project involving these three publications, reference is made to the Foreword, by Paul E. Basye, in the treatise on "The Improvement of Conveyancing by Legislation."

The general scheme of these model title standards is as follows. Standards are divided into chapters. Each standard is stated in capitals. Following it are authorities, lists of similar state standards, and comment.

In citing authorities, no attempt is made to cite exhaustively. The following treatises are cited so frequently that an abbreviated form of citation is used as follows: Basye, Clearing Land Titles (1953), cited as Basye; Patton, Titles (2d ed., 1957), cited as Patton; Simes and Taylor, The Improvement of Conveyancing by Legislation (1960), cited as Improvement of Conveyancing by Legislation. State title standards are cited merely by an abbreviation of the name of the state, followed by the number of the title standard.

Since title standards, when adopted and promulgated, must be based upon the law and practices of a particular state, an attempt has been made to indicate in brackets what legislation and what rules of law are assumed to be in force. In a number of instances, title standards are presented on the assumption that one or more model acts, found in the treatise on The Improvement of Conveyancing by Legislation, will be adopted before the particular title standard is promulgated. Wherever a title standard is presented on this assumption, that is expressly stated in brackets.

Bracketed notes are also employed to offer suggestions to the local committee or other body to which is assigned the duty of preparing the model title standards for adoption.
When these title standards are adopted in any particular state, the bracketed materials should not be included in the final draft.

Finally, it must be pointed out that, in preparing these Model Title Standards, the authors examined all existing state title standards, and, indeed, used a number of them as models. Moreover, a tentative draft of this volume in mimeographed form was sent to approximately one hundred land title experts, with a request for comment and criticisms. A number of helpful criticisms were received and have been made the basis of modifications in the manuscript.

The authors wish to thank all those who sent comments and criticisms.

Lewis M. Simes

San Francisco, California
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INTRODUCTION

THE FUNCTION AND SCOPE OF UNIFORM TITLE STANDARDS

A uniform title standard may be described as a statement officially approved by an organization of lawyers, which declares the answer to a question or the solution for a problem involved in the process of title examination. A brief reference to the task of the title examiner will show why such standards are needed.

Perhaps there is no greater delusion current among inexperienced conveyancers than that land titles are either wholly good or wholly bad, and that the determination of the person who has the title is merely a mathematical process of applying unambiguous rules of law to the abstract of the record. Yet the experienced conveyancer knows that the process of determining the marketability of a title is much more like determining whether, under all the facts, a man has a cause of action for negligence, than it is like the calculation of the amount of income tax a person owes on a given date.

No record, or abstract of the record, gives all the facts from which marketability must be determined. Thus, if the grantee in one recorded deed is Joseph Fremont and the grantor in the next is also Joseph Fremont, it is highly probable that

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these are one and the same person. But the record does not enable us to know whether it was delivered, whether it was a forgery, or whether the grantor was of sound mind when he executed it. Yet it is patently impossible for the title examiner to make a factual investigation to determine these things. He must decide, not whether it is absolutely certain that a given person has title, but whether it is reasonable to conclude from the facts which he can be expected to investigate, that this person has title.

As to many fact situations which are constantly recurring, a completely uniform practice of conveyancers is recognized. Thus, all conveyancers presume that the use of an identical name in one deed as grantee and in the next deed as grantor indicates that these names refer to the same person. All conveyancers presume, in the absence of evidence to the contrary, that a recorded deed has been delivered, that it was not a forgery, and that the grantor had the capacity to execute it. These presumptions may be described as a part of that body of recognized procedures known as the practice of conveyancers.

Now while, as to such matters as those already named, the practice of conveyancers is uniform, as to other matters there are notable variations. Thus, such questions as the following may be involved: whether a recorded conveyance should be questioned which does not have a notary's seal, or does not have a statement of the date on which the notary's commission expires; or, if a conveyance is made by a corporation, whether it should be questioned because there is no resolution on record showing the action of the corporation to make the conveyance, or showing whether the people who executed it as officers were in fact such officers at the time. As to these matters some title examiners may reach one conclusion and others the opposite conclusion. Uncertainties may also arise as to pure matters of law. Thus, a new probate procedure act may have been passed, and there may be a difference of opinion among members of the bar as to its constitutionality.

If the practice of conveyancers is not uniform, the tendency always is for the standards of the overmeticulous conveyancer to determine the standards of all conveyancers. Lawyer A feels that a title should be passed even though there are certain defects in the recorded acknowledgment, and he realizes that the majority of experienced, competent conveyancers would agree with him. But he also knows that Lawyer B would refuse to pass the title and would require a quiet title suit. Since Lawyer A is aware that his client may some day wish to sell the land to someone who employs Lawyer B to pass on the title, he will be inclined to impose the same overmeticulous standard as Lawyer B. Like Gresham's law, the result will be that bad title standards drive out good standards.

The remedy for this situation is either uniform title standards or legislation or both. Although Lawyer A may not dare to approve a title solely on his individual judgment, the situation is different if his judgment is backed by the official action of a bar association. If the official standards are supported by the great majority of competent, experienced conveyancers, and the prestige of the bar association is high, overmeticulous conveyancers may well follow these standards. Or even if a few do not, the conveyancer who does follow them can justify his position to his client by pointing out that he has followed officially approved standards.

Thus, uniform title standards have great remedial value because they crystallize the practices of conveyancers; and instead of being merely the recognized practices of individuals in a profession, they become also the recognized conclusions of the organized profession itself.

That it is desirable for state bar associations to adopt title standards, for the reasons already stated, has rarely been questioned in recent years. Already such standards are found in twenty-three states and doubtless other states will be added. But it is important, before adopting such standards, and before presenting a set of model standards, to inquire (1) what kind of subject matter is suitable for bar standards, and (2) what limitations exist as to this subject matter. We should also consider the questions: What form should title standards take, and what support from the bar is necessary in order that they accomplish their purpose.

Doubtless there is no hard and fast line which can be drawn to determine the appropriate subject matter of title standards. Nevertheless, a considerable area of agreement can be found in the published writings of those who have discussed this matter. Professor John C. Payne, writing in 1953, suggests the following as to general standards: "Such agreements may extend to: (1) the duration of search; (2) the effect of lapse of time upon defects on record; (3) the presumptions of fact which will ordinarily be indulged in by the examiner; (4) the law applicable to particular..."
situations; and (5) relations between examiners and between examiners and the public.”

Mr. Jesse E. Marshall, in an introduction to the Iowa Title Standards, makes the following statement: "The common problems about which agreement can and should be reached include: (1) Satisfactory abstracts and abstract certificates; (2) The effect of Statutes of Limitations; (3) Presumptions of fact which should be indulged in ordinary situations; (4) General principles of law; (5) The duration of search in many situations; and others.”

In a recent address before the Ohio Bar Association, Professor Paul E. Basye has made the following suggestion concerning the subject matter of title standards: "Title standards cover at least five areas in which title problems arise most frequently." These involve (1) attitudes and relationships between examiners themselves and between examiners and the public; (2) the duration of search; (3) the effect of lapse of time on record title defects; (4) presumptions of fact which should ordinarily be applied by examiners; and (5) the law applicable to commonly recurring situations.

An actual survey of all the existing state title standards shows that their subject matter can include almost anything of interest to the conveyancer. Thus they have concerned the conduct of the title examiner, the form of his certificate of title, the form and content of abstracts, the effect of wild deeds, name variations, the application of statutes of limitations and of marketable title acts, tax titles, mechanics' liens, titles derived from decedents, the attitude of the title examiner toward the constitutionality of procedural statutes, and many other subjects.

That there are definite limits to the scope and function of uniform title standards is everywhere recognized. They cannot change or abolish a rule of law. They cannot do away with the requirement of delivery or of a writing for a valid conveyance; they cannot change the length of the statute of limitations, or abolish provisions for the extension of the period of limitations by disabilities. They cannot make a statute constitutional by declaring it so. In short, so far as rules of law are concerned, they can only resolve ambiguities pending their resolution by the highest court of the jurisdiction. So far as facts are concerned, they can determine what risks it is reasonable to expect a client to assume when a title is approved. Even that question of reasonableness is doubtless subject to review by a court. But if the practice of conveyancers is followed by all, the question is not likely to reach a court, and, even if it does, the court will generally follow the title standard.

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The further question remains: Conceding that the possible subject matter of title standards covers a very broad area, how much of that area is it practicable to cover? Thus, all three writers who have been cited agree that rules of substantive property law may be included. But what rules of property law? Are the title standards to constitute a complete treatise on the law of conveyancing, a Restatement of Property, an American Law of Property, or a Powell on Real Property? Obviously not. There is no point in duplicating statements of rules of law which are readily available, or in quoting statutes which can easily be found in published codes. Title standards are neither law treatises nor collections of selected statutes. They deal only with particular problems of law which frequently trouble the title examiner. Very often, the problem dealt with is a narrow question of the law of one state or of the effect of a minute variation from a perfect record title. And the answer is not readily obtainable in any published volume. Yet it is a point upon which the title examiner is often compelled to make a decision.

In order to determine what these points are, it is necessary to refer to the experience of expert conveyancers. Thus only can it be determined what are the subjects on which standards are needed. Recognizing this fact, the model standards have been drawn largely from existing state standards, and these in turn have been drawn from the experiences of the organized bars of the various states in which such standards exist.

Should the question involved in a title standard be a controversial one, or should it be a question the answer to which would appear in a court, and, even if it does, the court will generally follow the title standard.

5. Judicial recognition of title standards appears in the following cases: Hughes v. Fairfield Lumber & Supply Co., 143 Conn. 427, 123 A.2d 195 (1956); Siedel v. Snider, 241 Iowa 1227, 44 N.W.2d 687 (1950); In re Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863 (1956); Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1958); B. W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 59 N.W.2d 813 (1953); Hartley v. Williams, 287 S.W.2d 129 (Mo. App., 1956).
be agreed upon by all members of the bar? If on the one hand, the question is extremely controversial, there is danger that the standard will not be followed by those who disagree with it. On the other hand, if there is no possible question about the standard, it may be said that there is no point in declaring it, since conveyancing practice which it expresses will be followed anyway. Thus, there is no particular point in having a standard which declares that a recorded deed is presumed to have been delivered, since every lawyer will apply that presumption anyway.

It would seem that a standard should represent the substantially unanimous opinion of the members of the bar who are experienced conveyancers, but it should involve a question upon which inexperienced conveyancers may be uninformed, or with respect to which overmeticulous conveyancers may take a position opposed to that of practically all competent, experienced conveyancers. In other words, it should not be a question which is controversial among competent, experienced conveyancers, but it should be one upon which the inexperienced may go wrong or the "fly specker" may reach an unreasonable conclusion. To find these problems, it may be suggested that there should be an organized conveyancing section of the state bar, and that a committee of this section should secure opinions on the appropriate matters for title standards from lawyers representing all geographical areas of the state.

What form should title standards take? First, except insofar as they are concerned with Federal statutes, they should deal with state law and with state conveyancing practices. One of the most valuable things which a bar standard can accomplish is to inform the bar generally of some decision or statute, which is well known to experienced conveyancers but which is likely to be overlooked by other members of the bar. It is true, a very considerable number of title standards are about the same in all states because, as to the particular problems involved, the title practices are practically identical throughout the country. What these often seek to do is to crystallize a liberal practice as opposed to a strict and overmeticulous practice. Of course, the only justification for a set of model title standards such as is presented herein, is that either the same standards can be used in all states, or that the same problems arise in all states and the solutions are similar.

How specific or how general should title standards be? In this particular, wide variation is found in existing standards. A number of them state first a problem or question more or less concretely, and follow it with a specific answer, which is sometimes called a standard. Thus, Iowa Standard 4.8 is as follows:

**Problem:**
If A and B, who have acquired title as joint tenants, make a subsequent conveyance or mortgage, is it necessary to include anything in the granting clause relating to the grantors except the names of the parties?

**Standard:**
No. Every outright conveyance of real estate passes all interest of the grantor therein.

See § 557.3 of the Code.

In other jurisdictions, each numbered standard consists merely in the statement of a more or less abstract proposition. Thus Oklahoma Standard 23 is as follows:

The absence of revenue stamps on a deed does not affect the marketability of the title.

The format of the Michigan title standards is first an abstract statement of a standard, followed by one or more concrete problems which are expressly answered, after which comment may be added and local authorities listed. Thus Michigan Standard 2.3 on abbreviations of names is as follows:

**Standard:** All customary and generally accepted abbreviations of first and middle names should be recognized as the equivalent thereof.

**Problem:** Blackacre was conveyed to L. Joseph Emery and Frederick Stephens. Later a conveyance thereof was executed by L. Jos. Emery and Fred'k Stephens as grantors. May identity of the grantees and grantors be presumed notwithstanding the discrepancies in spelling?

**Answer:** Yes.

**Authorities:** People v. Tisdale, 1 Doug. 59 (1843); Standard v. Jewell, 206 Mich. 61, 172 N. W. 407 (1919).

Certainly it is desirable to have the standard stated in concrete and specific form. On the other hand, if the standard consists merely in a hypothetical fact situation, much of its value is lost because situations which may arise will vary slightly from the facts stated in the standard. But if a standard is stated in such abstract and general terms that it must be construed before it can be applied, it is practically useless. The Model Title Standards which follow begin with a statement of a general proposition,
which is as concrete as practicable but is not ordinarily in the form of a hypothetical case. This is then followed by citation of authorities and by comment, which may include one or more hypothetical cases. It is believed that local authorities in the form of cases and statutes should be cited. Ordinarily it should not be necessary to cite also treatises or decisions from other states, although this may occasionally be done to convince members of the bar of the soundness of the standard.

Standards should be stated from the standpoint of the conveyancer who is passing upon the title, and should enable him to answer the question: Shall I pass the title? Or if not, what else must be required? a quiet title suit? an affidavit? a certificate of death or birth?

While it is not necessary for a state to begin with a large number of title standards, enough should be adopted at the outset to make it worthwhile for a lawyer to consult them whenever he examines a title.

Finally, to be effective, title standards must have the support of the conveyancing bar. No more satisfactory way of accomplishing this objective can be suggested than to organize, in the state bar, a conveyancing or real property section, a committee of which prepares the standards. These standards, however, should not be adopted until they have been submitted to all the bar and opportunity has been given for full discussion and criticism.

It may be thought that a more effective way to inaugurate title standards would be to have them enacted as statutes by the legislature. This has been done in only one state, namely, Nebraska. Reports from that state indicate that members of the Nebraska bar are not entirely pleased with that method of putting title standards into effect. Indeed, it is believed that a number of reasons may be advanced to the effect that title standards should not be enacted as statutes. If they prove unsatisfactory or need revision, it is not as easy to accomplish this if they are in the form of statutes as when they are in the form of voluntary resolutions of a bar association. Moreover, it might at times be desirable to have a standard to the effect that a particular statute is constitutional; yet, obviously the legislature could not enact a standard to that effect. It would seem undesirable, also, that the form of a title standard take the form of a statute. It should be more concrete and specific. Finally, a title standard should represent the opinion of the expert conveyancers who are members of the bar. That result is more likely to be secured by a voluntary standard of the bar association than by an act of the legislature.

Of course, some propositions may be either the subject of a title standard or of an act of the legislature. And a statute might well be enacted to supersede a title standard in a particular situation. Suggestions along this line are made from time to time in connection with the model title standards which follow. But, in general, title standards perform their remedial function in a manner differing from statutes, and legislation should not be regarded as an adequate substitute for title standards. Nor should title standards be regarded as a complete substitute for remedial statutes.

In conclusion, in setting up title standards, the members of the bar should never lose sight of their basic function, which is to declare and establish officially the practice of conveyancers. In spite of its limitations, this so-called practice of conveyancers is probably the most potent element in the process of title examination. For essentially it is nothing less than the recognized practices of the conveyancing bar in determining what risks of fact or of law, actual or theoretical, are to be assumed by the title examiner on behalf of his client in approving a title.

6. As to the importance of the "practices of conveyancers," see Hughes v. Fairfield Lbr. and Supply Co., 143 Conn. 427, 123 A.2d 195 (1956); Hartley v. Williams, 287 S.W.2d 129 (Mo. 1956); Johnson, Title Examination in Massachusetts, in Casner & Leach, Cases and Text on Property (1951) 886; Payne "The Future of Uniform Title Standards," supra, note 1. Traditionally, this so-called custom of conveyancers has been a recognized source of the common law. For an interesting decision invoking and discussing the idea, see Finnegan v. Deus, 1956 O.R. 69, 73. This has been so much true that in many conveyancing matters the law is nothing more than recognized practice. See 7 Holdsworth, History of English Law (1922) 384.

7. For a discussion of title standards from the standpoint of assumption of risk by the title examiner, see the Foreword to the Oklahoma Title Examination Standards, 16 Okla. Stat. Ann., at 104.
LIST OF STATE TITLE STANDARDS

(Twenty-three state title standards are listed below in alphabetical order. In addition, the Indiana standards, which are not strictly state standards, are added at the end.)

Colorado Real Estate Standards, 19 Rocky Mt. L. Rev. 65 (1946), also published in separate pamphlet by Record Abstract and Title Insurance Co., Denver.


Florida Uniform Title Standards, published in 33 Fla. Bar J. 218 (March, 1959), 1102 (October, 1959), and 34 Fla. Bar J. 178 (March, 1960); also in Boyer, Florida Real Estate Transactions (1960), 249 to 300.

Idaho Title Standards, 18 Idaho Bar Ass'n J. 157 (1942); 19 Idaho Bar Ass'n J. 63 (1944) (adopted 1946 as appears in 20 Idaho Bar Ass'n J. 126, 132).


Iowa Land Title Examination Standards (1955), now appearing in Iowa Code Ann. c. 558, Appendix.

Kansas Standards of Title Examination (1956), published by Kansas State Bar Ass'n.


Montana Title Standards (adopted 1951).


New Hampshire Title Examination Standards (1954), published by N.H. Bar Ass'n.


New York Standards for Title Examination, adopted and published by Executive Committee of N.Y. State Bar Ass'n (1955).

North Dakota Bar Association Title Examination Standards (1955 revision).

Ohio Standards for Title Examination.


Utah Title Standards, 21 Utah Bar Bull. (Special Number, May 1951).

Washington Standards for Title Opinions, 17 Wash. L. Rev. 236 (1942).


Wyoming Title Examination Standards, 3 Wyo. L. J. 180 (1949).

Indiana, Standards of Marketability (Allen County), 20 Ind. L. J. 307 (1945); Standards of Marketability (Indianapolis), 20 Ind. L. J. 315 (1945).
CHAPTER I

THE ABSTRACT

[In this chapter it is assumed that professional abstracters prepare abstracts which are passed upon by title examiners, and that legislation requires such abstracters to be bonded.]

STANDARD 1.1

ABSTRACT IN LONGHAND

AN ABSTRACT WRITTEN IN LONGHAND IS ACCEPTABLE IF LEGIBLE AND NOT MUTILATED.

Similar Standards: Iowa, 1.1, Kans. 2.3.

STANDARD 1.2

MIMEOGRAPHED OR PHOTOSTATIC COPY

COPIES OF ABSTRACTS MADE BY MIMEOGRAPHING, PHOTOSTATIC PROCESS OR OTHER SIMILAR PROCESS ARE ACCEPTABLE IF PROPERLY CERTIFIED BY SEPARATE CERTIFICATES TO BE CORRECT AND COMPLETE ABSTRACTS.

Similar Standard: Iowa, 1.2.

STANDARD 1.3

RE-CERTIFICATION UNNECESSARY

IT IS UNNECESSARY THAT ATTORNEYS REQUIRE THE ENTIRE ABSTRACT TO BE CERTIFIED EVERY TIME AN EXTENSION IS MADE. FOR THE PURPOSE OF EXAMINATION, AN ABSTRACT SHOULD BE CONSIDERED TO BE SUFFICIENTLY CERTIFIED IF IT IS INDICATED THAT THE ABSTRACTERS WERE BONDED AT THE DATES OF THEIR RESPECTIVE CERTIFICATES. IT

IT IS NOT A DEFECT THAT AT THE DATE OF THE EXAMINATION THE STATUTE OF LIMITATIONS MAY HAVE RUN AGAINST THE BONDS OF SOME OF THE ABSTRACTERS.

Similar Standards: Kan., 2.2; Mont., 22; Neb., 22. N.D., 5.01 and Okla., 26 require re-certification.

STANDARD 1.4

ABSTRACT COMPILED BY TITLE OWNER

WHERE AN ABSTRACTER HAS CERTIFIED AN ABSTRACT OF TITLE TO REAL ESTATE IN WHICH HE HIMSELF IS INTERESTED, IT IS NOT NEGLIGENCE ON THE PART OF AN EXAMINER TO ACCEPT SUCH ABSTRACT.

Similar Standard: Neb., 8.

[Note: A number of other standards might appropriately be added to this chapter on such subjects as the following: the form of the abstracter's certificate; the records which he is required to abstract; and the parts of the records which must be reproduced or summarized in the abstract. These matters will vary in accordance with local practices, and therefore no model standards on these subjects are presented.]
CHAPTER II
THE TITLE EXAMINER

STANDARD 2.1
EXAMINING ATTORNEY'S ATTITUDE

THE PURPOSE OF THE EXAMINATION OF TITLE AND OF OBJECTIONS, IF ANY, SHALL BE TO SECURE FOR THE EXAMINER'S CLIENT A TITLE WHICH IS IN FACT MARKETABLE AND WHICH IS SHOWN BY THE RECORD TO BE MARKETABLE, SUBJECT TO NO OTHER ENCUMBRANCES THAN THOSE EXPRESSLY PROVIDED FOR BY THE CLIENT'S CONTRACT. OBJECTIONS AND REQUIREMENTS SHOULD BE MADE ONLY WHEN THE IRREGULARITIES OR DEFECTS REASONABLY CAN BE EXPECTED TO EXPOSE THE PURCHASER OR LENDER TO THE HAZARD OF ADVERSE CLAIMS OR LITIGATION.

Similar Standards: Fla., 00; Idaho, 14; Ill., 1; Iowa, "General Standard"; Kan., 1.1; Minn., "General Statement"; Mo., 2; Mont., 25; N.M., 1; N.D., "General Standard"; S.D., 1.

Comment: Title Standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misapprehension of the law. The examining attorney, by way of a test, may ask himself after examining the title, what defects and irregularities he has discovered by his examination, and as to each such irregularity or defect, who, if anyone, can take advantage of it as against the purported owner, and to what end.

STANDARD 2.2
PRIOR EXAMINATION

WHEN AN ATTORNEY DISCOVERS A SITUATION WHICH HE BELIEVES RENDERS A TITLE DEFECTIVE AND HE HAS NOTICE THAT THE SAME TITLE HAS BEEN EXAMINED BY ANOTHER ATTORNEY WHO HAS PASSED THE DEFECT, IT IS RECOMMENDED THAT HE COMMUNICATE WITH THE PREVIOUS EXAMINER, EXPLAIN TO HIM THE MATTER OBJECTED TO AND AFFORD OPPORTUNITY FOR DISCUSSION, EXPLANATION AND CORRECTION.

Similar Standards: Colo., 1; Conn., 35; Mont., 1; Ohio, 2.1; Okla., 2; Mo., 1; Wyo., 1.

STANDARD 2.3
REFERENCE TO TITLE STANDARDS IN LAND CONTRACT

AN ATTORNEY DRAWING A REAL ESTATE SALES CONTRACT SHOULD RECOMMEND THAT THE TERMS OF THE CONTRACT PROVIDE THAT MARKETABILITY BE DETERMINED IN ACCORDANCE WITH TITLE STANDARDS THEN IN FORCE AND THAT THE EXISTENCE OF ENCUMBRANCES AND DEFECTS, AND THE EFFECT TO BE GIVEN TO ANY FOUND TO EXIST, BE DETERMINED IN ACCORDANCE WITH SUCH STANDARDS.

Similar Standards: Conn., 67; Mo., 27; Okla., 28.

Comment: An attorney, drawing a real estate sales contract, should recommend the inclusion of the following language or its equivalent in the contract:

It is understood and agreed that the title herein required to be furnished by the seller, or party of the first part herein, shall be marketable and that marketability shall be determined in accordance with the Title Standards of the Bar. It is also agreed that any defect in the title which comes within the scope of any of said Title Standards shall not constitute a valid objection on the part of the buyer provided the seller furnishes the affidavits or other title papers, if any, required in the applicable Standard to cure such defect.
CHAPTER III
USE OF THE RECORD

STANDARD 3.1
PERIOD OF SEARCH

In this standard, it is assumed that record titles in the jurisdiction are so long that it is unreasonably burdensome to trace title back to the government, or if land titles do not originate with the United States or with the state, it is impracticable to trace titles back to their origin. Of course, if the Model Marketable Title Act, or similar legislation, were in force, then the length of search, for most purposes, would be determined by such legislation. This standard is not as satisfactory as a marketable title act, since defects in title prior to the period of search as stated in the title standard constitute a risk which a vendee must assume. Whereas, if a marketable title act is in force, defects in title prior to the period of the act are extinguished.

A RECORD TITLE COVERING A PERIOD OF FIFTY YEARS OR MORE IS MARKETABLE: PROVIDED THAT THE BASIS THEREOF IS A WARRANTY DEED, ONE OR MORE QUICHTCLAIM DEEDS SUPPORTED BY A REASONABLE RECORD PROOF THAT THEY CONVEY THE FULL TITLE, A PATENT FROM THE UNITED STATES, OR A CONVEYANCE FROM THE STATE, A PROBATE PROCEEDING IN WHICH THE PROPERTY IS REASONABLY IDENTIFIABLE, A WARRANTY MORTGAGE DEED IF SUBSEQUENTLY REGULARLY FORECLOSED, OR ANY OTHER INSTRUMENT WHICH SHOWS OF RECORD REASONABLE PROBABILITY OF TITLE AND POSSESSION THEREUNDER; PROVIDED FURTHER THAT THE PERIOD ACTUALLY SEARCHED DOES NOT REFER TO OR INDICATE PRIOR INSTRUMENTS OR DEFECTS IN TITLE, IN WHICH CASE SUCH PRIOR INSTRUMENTS MAY BE USED IN TURN AS A START, AND THAT THE PERIOD ACTUALLY SEARCHED DISCLOSES INSTRUMENTS WHICH CONFIRM AND CARRY FORWARD THE TITLE SO ESTABLISHED.

Similar Standards: Conn., 1 (60-year period); Mo., 23 (45-year period); N.M., 20 (50-year period); Ohio, 2.2 (65-year period); Utah, 41 (50-year period).

COMMENT: In applying this standard, it is necessary to trace the record title back to a "root" or "start," which may be, and generally is, more than fifty years back. Any defects in the record title subsequent to the date of recording of the "root" or "start" must be considered by the examiner. Thus, suppose the record shows a warranty deed from A to B in fee simple, recorded in 1880. The next instrument in the chain of record title is a conveyance of flowage rights from B to X, recorded in 1882. The next instrument is a warranty deed from B to C in fee simple, recorded in 1920, in which the flowage rights are not mentioned. In 1959, D, who has contracted to purchase the land from C, employs an attorney to examine the title. The title examiner will have to go back to the deed of 1880 and will have to report that the record title is subject to flowage rights in X, created by the deed of 1882.

STANDARD 3.2
EXTENT OF SEARCH

IN EXAMINING A TITLE THE EXAMINER IS REQUIRED TO SEARCH ONLY FOR RECORDED INSTRUMENTS IN THE CHAIN OF TITLE. FOR THIS PURPOSE THE FOLLOWING INSTRUMENTS ARE OUTSIDE THE CHAIN OF TITLE: (1) AN INSTRUMENT FROM A PERSON IN THE CHAIN OF TITLE RECORDED AFTER THE DATE OF RECORDING OF ANOTHER INSTRUMENT FROM THE SAME PERSON PURPORTING TO PART WITH THE SAME INTEREST; (2) AN INSTRUMENT RECORDED PRIOR TO THE DATE WHEN THE GRANTOR ACQUIRED THE SAME INTEREST FROM A PERSON IN THE RECORD CHAIN OF TITLE; (3) AN INSTRUMENT PURPORTING TO CONVEY A TRACT OF LAND ADJACENT TO THE TRACT OF LAND IN THE CHAIN OF TITLE, WHICH INSTRUMENT GRANTED AN APPURTENANT EASEMENT OR SERVITUDE CONSTITUTING A BURDEN ON THE TRACT OF LAND IN THE CHAIN OF TITLE.

[It is assumed that the official indices of the records are name indices, that is grantor-grantee indices, mortgagor-mortgagee indices, and the like. It is also assumed that there are no decisions or statutes in the jurisdiction contrary to the rules laid down in this standard.

It should further be pointed out that the courts are not unanimous as to any of the three propositions laid down in the standard. While the substantial weight of authority is in accord with
proposition (2), the authorities are more nearly evenly divided as to propositions (1) and (3). As to the authorities on proposition (1), see American Law of Property (1952), § 17.22. As to the authorities on proposition (2), see American Law of Property (1952), § 17.20 and Patton, § 70. As to the authorities on proposition (3), see the following: American Law of Property (1952), § 17.24; 21 Cornell L. Q. 479 (1936); 20 Mich. L. Rev. 344 (1922); 16 A.L.R. 1013 (1922). The general principle involved in this title standard is supported in Philbrick, "Limits of Record Search and Therefore of Notice," 93 U. Pa. L. Rev. 125 at 171 and 176 (1944) and Patton, § 69.

Of course, it is entirely possible that, in spite of local decisions on the question of constructive notice inconsistent with one or more of the three propositions contained in this title standard, the uniform practice of conveyancers is in accord with the standard, simply because the existing indices preclude anything else. If so, it may still be thought desirable to adopt some such standard as this; but no recommendation is herein made.

Comment: The following fact situations will illustrate the second sentence in this standard.

(1) A, having a good record title, conveys Blackacre to B in fee simple in 1955. In 1956, A conveys Blackacre to C in fee simple, who at once records. C has actual notice of the deed to B. In 1957, B records. In 1958, C conveys Blackacre to D who pays value and has no actual notice of the deed to B. D at once records. D's title is good. The title examiner is under no duty to search for the deed to B.

(2) In 1955 A executes and delivers a warranty deed purporting to convey Blackacre to B in fee simple, and B at once records. At that time A appears by the record to be a stranger to the title, and the last deed in the record chain of title of Blackacre was a conveyance to X. In 1956 X conveys Blackacre to A in fee simple, who at once records. In 1957 A conveys Blackacre to C in fee simple, who paid value and had no notice of the deed to B. C at once records. C's title is good. The title examiner is under no duty to search for the recorded conveyance to B.

(3) In 1955, A, owning tracts X and Y, conveys tract Y to B in fee simple, granting to B also in the same deed the right to overflow tract X in the use of tract Y. B at once records. In 1956, A conveys tract X to C in fee simple, without referring to or excepting the flowage rights which he has granted to B. C, who paid value and had no notice of B's flowage rights, at once records. The title examiner for C is under no duty to search for the deed to B, since it is not in the chain of title of tract X. C takes tract X free from the flowage rights.

STANDARD 3.3

INSTRUMENTS BY STRANGERS TO THE RECORD CHAIN OF TITLE

AN INSTRUMENT EXECUTED BY A PERSON WHO IS A STRANGER TO THE RECORD CHAIN OF TITLE AT THE TIME SUCH INSTRUMENT IS RECORD-ED DOES NOT MAKE THE TITLE UNMARKETABLE.

Similar Standards: The following standards deal with instruments executed by strangers to the record chain of title: Colo., 2; Idaho, 2; Ill., 7; Iowa, 4.5; Minn., 14, 15, 16, 37; Mo., 4; Mont., 2; N.D., 1.05; Ohio, 3.13; Okla., 32; Utah, 9; Wash., 5; Wls., 3; Wyo., 4.

Comment: The preceding standard involves a question of constructive notice. This standard applies whether there is actual notice or not. The following situations will illustrate its application.

(1) The record shows that in 1950, Blackacre was conveyed by X to Y in fee simple. X is connected with a record chain of title running back to a patent from the United States. A deed of Blackacre from A to B, neither of whom appears in the record chain of title, was recorded in 1955. Y has good title to Blackacre. The deed from A to B is not an encumbrance.

(2) The record shows that, in 1950, Blackacre was conveyed by A to B in fee simple. A is connected with a record chain of title running back to a patent from the United States. In 1955, B, M, and N, convey Blackacre to P in fee simple, and the deed is at once recorded. M and N do not appear from the record ever to have had an interest in Blackacre. In 1954 a judgment imposed a lien on all M's property. The title examiner for a purchaser from P may disregard the possibility of a lien, since M is a stranger to the chain of title and P may trace his title entirely from B.

(3) The record shows that, in 1950, Blackacre was conveyed by A to B in fee simple. A is connected with the record chain of title running back to the United States. In 1952, X, a stranger

STANDARD 3.3
to the record title, conveyed Blackacre to B in fee simple, and the deed was at once recorded. The records show that, in 1951, a judgment lien was imposed upon all X's real estate. The title examiner for C, who wishes to purchase Blackacre from B, may disregard the deed from X and also the possibility of a judgment lien. X is a stranger to the chain of title and C may trace title solely from B.

STANDARD 3.4

MODEL ACT CONCERNING INDEFINITE REFERENCES

[It is assumed that the Model Act Concerning Indefinite References is in force. As to the text of that act, see The Improvement of Conveyancing by Legislation, p. 103.]

THE FOLLOWING REFERENCES IN RECORDED INSTRUMENTS MAY BE DISREGARDED BY A PERSON WHO IS NOT A PARTY TO SUCH INSTRUMENT, AND IS NOT OTHERWISE SUBJECT TO, OR ON NOTICE OF, THE INSTRUMENT OR INTEREST REFERRED TO:

(A) ANY REFERENCE TO AN INSTRUMENT WHICH IS NOT RECORD-ED.

(B) ANY REFERENCE TO AN INTEREST NOT CREATED OR TRANS-FERRED BY A RECORDED INSTRUMENT.

(C) ANY REFERENCE TO A RECORDED INSTRUMENT WHICH IS NOT IN THE CHAIN OF TITLE OF SUCH PERSON, IF THE PLACE IN THE PUBLIC RECORDS TO WHICH REFERENCE IS MADE IS NOT SPECIFICALLY IDENTIFIED BY SUCH REFERENCE.

Comment: The following illustrations show how the Model Act operates.

(1) A has conveyed Blackacre in fee simple to B by a deed which recites that it is "subject to a certain mortgage given by me to X on January 1, 1950." The deed is at once recorded. No such mortgage can be found in the records. C, in acquiring title from B, may disregard the mortgage, and is not subject to it.

(2) A conveyed to B a right to remove coal from Blackacre, owned by A. The deed was never recorded. Later A conveyed Blackacre to C in fee simple, "subject to the right of B to remove coal from the land." The deed was at once recorded. D, in acquiring title to Blackacre, may disregard B's right to remove coal, and is not subject to it.

(3) A conveyed Blackacre to B in fee simple and the deed was at once recorded. Thereafter B conveyed the same land to C in fee simple, but the deed was never recorded. Subsequently C executed a mortgage of the land to X, which was at once recorded. B then conveyed to D in fee simple "subject to a certain mortgage to X," and the deed was at once recorded. E, in purchasing Blackacre from D, may disregard the mortgage to X, since it is not in the chain of D's title, and the reference is not sufficiently specific to identify it.

(4) A conveyed Blackacre to B in fee simple, and the deed was at once recorded. Thereafter B mortgaged Blackacre to C in fee simple, and the mortgage was at once recorded. Thereafter B conveyed Blackacre to D in fee simple "subject to all encumbrances." E, in acquiring Blackacre from D, will take subject to the mortgage to C. While the reference does not identify the place in the record where the mortgage is recorded, the mortgage is in the chain of record title. The statute provides that an indefinite reference may be disregarded by a person only if "he is not otherwise subject to it or on notice" of the interest referred to. Therefore, E would have notice of it, even if there were no reference whatever.

(5) A holds the record title in fee simple to Blackacre. B enters into possession, holding adversely to A for the statutory period, and thus acquires a title by adverse possession. Thereafter, A conveys Blackacre to C in fee simple, "subject to all adverse claims, if any," and C at once records. In the meantime B has gone on a long journey, and no one is in possession. D, in acquiring Blackacre from C, takes subject to B's title by adverse possession. It is true, the reference in the deed is not to a recorded instrument, and is indefinite. But, a title by adverse possession is not extinguished by a failure to record. Hence, D's title would "otherwise be subject" to B's title. The result would have been the same even if no reference to B's claim had been made in the deed to C.
STANDARD 3.7

WHEN EXPIRED OPTION NOT A CLOUD ON TITLE

A recorded option to purchase real estate shall not be a cloud on the title of the vendor at the expiration of one year after the time stated in the option contract, within which the option was exercisable, if no conveyance, contract or other instrument has been recorded showing that such option has been exercised; and the title examiner should not object to the vendor's title by reason of the record of such option.

[It is probable that, in some jurisdictions, this standard is so inconsistent with prevailing conveyancing practices that it should not be adopted. See Basye, § 133; Patton, § 598. If that is the case, it is recommended that the Model Act Concerning Option Contracts as Notice be enacted. As to the text of that act, see The Improvement of Conveyancing by Legislation, p. 157. It is believed, however, that even in the absence of statute, an option expires on the date named in it for its expiration, unless it is extended by estoppel, waiver or similar matters, and that the title examiner should not be required to search off the record for evidence of these matters. The mere record of the option should not be notice that it has been extended, and in the absence of evidence to the contrary, the title examiner should assume that the option has expired on the date indicated in its terms. See Stone v. Howell, 168 Iowa 282 (1914). The additional period of one year is added to take care of a case where the option is exercised just before the date of its expiration but the exercise is not recorded until a short time thereafter.]

Similar Standard: Minn., 28.

Comment: When the lease contains an option to renew, and there is no notice of renewal, this standard is applicable; and the date of expiration to which the standard is referable is the date on which the lease, by its terms, would expire if not renewed.

STANDARD 3.6

WHEN RECORDED LAND CONTRACT CEASES TO BE CLOUD ON TITLE

The existence of a recorded contract for the purchase and sale of real estate shall not constitute an encumbrance or cloud on the title of a purchaser from the vendor if (1) the record shows no evidence of performance in favor of the vendee; (2) five years have elapsed after the date provided in the contract or any recorded extension thereof, for the delivery of the deed, or, if no date be designated for the delivery of the deed, then five years after the date when the last and final payment or installment of the purchase price was required to be paid, and (3) no proceeding shall have been begun to enforce such contract in which a notice of lis pendens has been filed.

[It is assumed that the Model Act Limiting Encumbrances Arising from Recorded Land Contracts is in force. For the text of this act, see The Improvement of Conveyancing by Legislation, p. 156.]

Similar Standard: Neb., 46.
CHAPTER IV

MODEL MARKETABLE TITLE ACT

[In this chapter it is assumed that the Model Marketable Title Act is in force. For the text of this Act, see The Improvement of Conveyancing by Legislation, p. 6.]

STANDARD 4.1

REMEDIAL EFFECT

THE MODEL MARKETABLE TITLE ACT IS REMEDIAL IN CHARACTER AND SHOULD BE RELIED UPON AS A CURE OR REMEDY FOR SUCH IMPERFECTIONS OF TITLE AS FALL WITHIN ITS SCOPE.

Authorities: Basye, § 374; Patton, § 563. Sustaining constitutionality of marketable title acts are Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941); Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957).

Similar Standards: Ill., 22; Iowa, 10.1; Mich., 1.1; Minn., 61; Neb., 42; N.D., 1.18; S.D., 34; Wis., 4.

STANDARD 4.2

REQUISITES OF MARKETABLE RECORD TITLE

A MARKETABLE RECORD TITLE UNDER THE MODEL MARKETABLE TITLE ACT EXISTS ONLY WHERE (1) A PERSON HAS AN UNBROKEN CHAIN OF TITLE OF RECORD EXTENDING BACK AT LEAST FORTY YEARS; (2) NOTHING APPEARS OF RECORD PURPORTING TO DIVEST SUCH PERSON OF TITLE.

Note: These two requirements are elaborated in the next two standards.

Similar Standard: Mich., 1.2.

MODEL MARKETABLE TITLE ACT

STANDARD 4.3

UNBROKEN CHAIN OF TITLE OF RECORD

"AN UNBROKEN CHAIN OF TITLE OF RECORD," WITHIN THE MEANING OF THE MODEL MARKETABLE TITLE ACT MAY CONSIST OF (1) A SINGLE CONVEYANCE OR OTHER TITLE TRANSACTION WHICH PURPORTS TO CREATE AN INTEREST AND WHICH HAS BEEN A MATTER OF PUBLIC RECORD FOR AT LEAST FORTY YEARS; OR (2) A CONNECTED SERIES OF CONVEYANCES OR OTHER TITLE TRANSACTIONS OF PUBLIC RECORD IN WHICH THE ROOT OF TITLE HAS BEEN A MATTER OF PUBLIC RECORD FOR AT LEAST FORTY YEARS.

Comment: Suppose A is the grantee in a deed of a tract of land, which was recorded in 1915. Assume, also, that nothing affecting this land has been recorded since then. In 1955 A has an "unbroken chain of title of record." Or instead of this recorded instrument being a deed of conveyance, it may be a decree of a probate court or court of general jurisdiction, which was recorded in the public records in 1915. Likewise, in 1955, A has an "unbroken chain of title of record."

Instead of having only a single link, A's chain of title may contain two or more links. Thus, suppose X is the grantee in a deed of a tract of land which was recorded in 1915; and X conveyed the same tract to Y, by deed which was recorded in 1925; Y conveyed the same tract to A by deed which was recorded in 1940. In 1955 A has an "unbroken chain of title of record." Any or all of these links may consist of recorded decrees of a probate court or court of general jurisdiction instead of deeds of conveyance.

The significant time from which the forty-year record title begins is not the delivery of the instrument but the date of its recording. Suppose A is the grantee in a deed, executed and delivered in 1915, but recorded in 1925. A does not have an "unbroken chain of title of record," since forty years have not elapsed subsequent to the recording of his deed in 1925. He will not have the "unbroken chain" required by the statute until 1965.

For a definition of "root of title," see Model Marketable Title Act, § 8(e).
MATTERS "PURPORTING TO DIVEST" WITHIN THE MEANING OF THE MODEL MARKETABLE TITLE ACT ARE THOSE MATTERS APPEARING OF RECORD WHICH, IF TAKEN AT FACE VALUE, WARRANT THE INFERENCE THAT THE INTEREST HAS BEEN DIVESTED.

[Assumption: there is a statute or rule of law which permits the recording of affidavits showing the facts of adverse possession, and gives evidentiary value to such affidavits.]


Comment: Of course, the obvious case in which a recorded instrument purports to divest the forty-year chain of title is that of a conveyance to another person. A is the grantee of a tract of land in a deed of conveyance recorded in 1915. The record shows a conveyance of the same tract by A to B, recorded in 1925. There is also a deed of conveyance of the same tract from B to X, recorded in 1937. Although B, in 1955, had a forty-year record chain of title, the deed to X purports to divest it, and B, of course, does not have a title.

A recorded instrument may also purport to divest even though there is not a complete chain of record title connecting the grantee in the divesting instrument with the forty-year chain. Suppose A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A deed of the same land was recorded in 1925, from X to Y, which recites that A died intestate in 1921 and that X is his only heir. There is nothing else on record indicating that X is A's heir. The deed recorded in 1925 is one "purporting to divest" within the terms of the Act. This is the conclusion to be reached whether the recital of heirship is true or not.

Or suppose, again, that A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A deed of the same land from X to Y was recorded in 1925, which contains the following recital: "being the same land heretofore conveyed to me by A." There is no instrument on record from A to X. This instrument is nevertheless one "purporting to divest," within the terms of the Act.

[Note: If the Model Act Concerning Indefinite References (see the Improvement of Conveyancing by Legislation, p. 103, for text of the Act), is in force, the instruments described in the last two illustrations would not "purport to divest" within the terms of the Act, because the recitals, even if true, would have no legal effect.]

Suppose that in 1915, A was the last grantee in a recorded chain of title, the deed to him being recorded in that year. A deed of the same land was recorded in 1925, signed: "A by B, attorney-in-fact." Even though there is no power of attorney on record, and even though the recital is untrue, the instrument is one "purporting to divest" within the terms of the Act.

Suppose that A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. In 1955 there was recorded an affidavit by X, a stranger to the title, which recited that X and his predecessors have been "in continuous, open, notorious and adverse possession of said land as against all the world for the preceding thirty years." This is an instrument "purporting to divest" A of his interest, within the terms of the Act.

On the other hand, an inconsistent deed on record, is not one "purporting to divest" within the terms of the Act, if nothing on the record purports to connect it with the forty-year chain of title. The following fact situations illustrate this.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A warranty deed of the same land from X to Y was recorded in 1925. The latter deed is not one "purporting to divest" within the terms of the Act.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A mortgage from X to Y of the same land, containing covenants of warranty, is recorded in 1925. The mortgage is not an instrument "purporting to divest" within the terms of the Act.

It should be observed that, although the recorded instruments in the last two illustrations are not instruments "purporting to divest" the forty-year title, they are not necessarily nullities. Under § 2(d) of the Model Act, the marketable record title can be subject to interests arising from such instruments.
MODEL TITLE STANDARDS

STANDARD 4.5

COMMERCIAL MARKETABLE TITLE

If the interest, concerning which the forty-year unbroken chain of record title exists, is inherently a marketable interest such as a fee simple absolute or a term of years absolute, and if none of the five types of interests named in § 2 of the Act, to which the marketable title can be subject, are found to exist, the title is commercially marketable. Otherwise it may not be commercially marketable. (See Model Marketable Title Act, § 8(a)).

Authorities: Basye, c. 22.

Comment: Since, by its terms, the Model Marketable Title Act validates a forty-year record title to "any interest in land," the title can not be commercially marketable to any greater extent than the extent to which such interest is marketable. Thus suppose in 1915 a deed was recorded conveying a certain tract of land "to A for life, remainder to B and his heirs." In 1916 a mortgage was recorded from B to X in which B mortgaged his remainder "subject to A's life estate." In 1918 a deed was recorded in which B conveyed his remainder to C in fee simple, there being no reference to the mortgage to X. In 1958, A, the life tenant, being still alive, has a marketable record title, to the remainder, under the terms of the Act, and X's mortgage is extinguished. But being a remainder subject to a life estate, no one but the life tenant is likely to desire to buy it, and it cannot not be said to be commercially marketable.

Since by the terms of § 2 of the Act, one may have a "marketable record title," as defined in the Act, though subject to certain interests, the existence of some of these interests may prevent the title from being commercially marketable. The next five standards deal with five of the interests to which the marketable record title may be subject.

STANDARD 4.6

DEFECTS IN THE FORTY-YEAR CHAIN

If the recorded instrument which constitutes the root of title, or any subsequent instrument in the chain of record title, is commercially marketable, then the marketable record title is subject to such interests and defects which exist in the forty-year chain of title. (See Model Marketable Title Act, § 8(a)).


Comment: This standard is explainable by the following illustrations.

(1) In 1915 a deed was recorded conveying a certain tract of land from A, the owner in fee simple absolute, to "B and his heirs so long as the land is used for residence purposes," thus creating a determinable fee in B and reserving a possibility of reverter in A. In 1925 a deed was recorded from B to C and his heirs "so long as the land is used for residence purposes, this conveyance being subject to a possibility of reverter in A." In 1955, C has a marketable record title to a determinable fee, which is subject to A's possibility of reverter.

(2) Suppose, however, that in 1915 a deed was recorded conveying a certain tract of land from A, the owner in fee simple absolute, to "B and his heirs so long as the land is used for residence purposes;" and suppose, also, that in 1918 a deed was recorded by B to C and his heirs, conveying the same tract of land in fee simple absolute, in which no mention was made of A's possibility of reverter. There being no other instruments of record in 1958, C has a marketable record title in fee simple absolute. His root of title is the deed from B to C and not the deed from A to B; and there are no interests in third parties or defects created by "the muniments of which such chain of record title is formed."

STANDARD 4.7

FILING OF NOTICE

A MARKETABLE RECORD TITLE IS SUBJECT TO ANY INTEREST PRESERVED BY FILING A NOTICE IN ACCORDANCE WITH THE TERMS OF § 4 OF THE MODEL MARKETABLE TITLE ACT.

Comment: Suppose A was the grantee in a chain of record title of a tract of land, a deed to which was recorded in 1900. In 1902 a mortgage of the same land from A to X was recorded.
In 1906 a mortgage of the same land from A to Y was recorded. In 1918 a deed of the same land from A to B in fee simple absolute was recorded, which made no mention of the mortgages. In 1957 Y recorded a notice of his mortgage, as provided in § 4 of the Act. X did not record any notice. In 1958 B has a marketable record title, which is subject to Y's mortgage but not to X's mortgage. B's root of title is the 1918 deed. Therefore X and Y had until 1958 to record a notice for the purpose of preserving their interests. If X had filed a notice after 1958, it would have been a nullity, since his interest was already extinguished.

It should be pointed out that the filing of a notice may be a nullity, not only because it comes too late, but also because it concerns a subject matter not within the scope of the statute. Thus, recorded notices of real estate commissions claimed or other charges which do not constitute liens on the property have no effect upon the title. Of course, they should never have been recorded in the first place. But even if they are recorded, they should be disregarded by the title examiner.

STANDARD 4.8

FORTY-YEAR POSSESSION IN LIEU OF FILING NOTICE

IF AN OWNER OF A POSSESSORY INTEREST IN LAND UNDER A RECORDED INSTRUMENT (1) HAS BEEN IN POSSESSION OF SUCH LAND FOR A PERIOD OF FORTY YEARS OR MORE AFTER THE RECORDING OF SUCH INSTRUMENT, AND (2) SUCH OWNER IS STILL IN POSSESSION OF THE LAND, ANY MARKETABLE RECORD TITLE, BASED UPON AN INDEPENDENT CHAIN OF TITLE, IS SUBJECT TO THE TITLE OF SUCH POSSESSORY OWNER, EVEN THOUGH SUCH POSSESSORY OWNER HAS FAILED TO RECORD ANY NOTICE OF HIS CLAIM.

Comment: The kind of situation which gives rise to this standard is suggested by the following illustration. A was the last grantee in a chain of record title to a tract of land, by a deed recorded in 1915. There are no subsequent instruments of record in this chain of title. A has been in possession of the land since 1915 and continues in possession, but has never filed any notice as provided in § 4 of the Model Act. A deed of the same land, unconnected with A's chain of title, from X to Y, was recorded in 1916 according to the Model Act; no other instruments with respect to this land appearing of record, Y has a marketable record title in 1956. But by the terms of § 4(b), it is subject to A's interest. On the other hand, A had a marketable record title in 1955, but, according to § 2(d), it is subject to Y's interest. Thus, the relative rights of A and of Y are worked out independent of the statute, since the interest of each is subject to the other's deed. A's interest being prior in time, and Y's deed being merely a "wild deed," under common law principles A has the better title.

STANDARD 4.9

EFFECT OF ADVERSE POSSESSION

A MARKETABLE RECORD TITLE IS SUBJECT TO ANY TITLE BY ADVERSE POSSESSION WHICH ACCRUES AT ANY TIME SUBSEQUENT TO THE EFFECTIVE DATE OF THE ROOT OF TITLE, BUT NOT TO ANY TITLE BY ADVERSE POSSESSION WHICH ACCRUED PRIOR TO THE EFFECTIVE DATE OF THE ROOT OF TITLE. (See § 2(c) and § 3 of the Model Marketable Title Act.)

Comment: [Assume that the period for title by adverse possession is 20 years.]

(1) A is the grantee of a tract of land in a deed which was recorded in 1895. In the same year, X entered into possession, claiming adversely to all the world, and continued such adverse possession until 1916. In 1917, a deed conveying the same land from A to B was recorded. No other instruments concerning the land appearing of record, B has a marketable record title in 1957, which extinguished X's title by adverse possession acquired in 1915.

(2) Suppose A is the grantee of a tract of land in a deed which was recorded in 1915. In 1936 X entered into possession, claiming adversely to all the world, and continued such adverse possession until the present time. No other instruments concerning the land appearing of record, in 1955 A had a marketable record title, but it was subject to X's adverse possession, and when his period for title by adverse possession was completed in 1956, A's title was subject to X's title by adverse possession.
STANDARD 4.11
QUITCLAIM DEED OR TESTAMENTARY RESIDUARY CLAUSE IN FORTY-YEAR CHAIN

A RECORDED QUITCLAIM DEED OR RESIDUARY CLAUSE IN A RECORDED WILL CAN BE A ROOT OF TITLE OR A LINK IN A CHAIN OF TITLE, FOR PURPOSES OF A FORTY-YEAR RECORD TITLE UNDER THE MODEL MARKETABLE TITLE ACT.

Related Standards: Mich., 1.3; Neb., 52.

Comment: The Model Act defines "root of title" as a title transaction "purporting to create the interest claimed." See § 8(e). "Title transaction" is defined to include a variety of transactions, among which are title by quitclaim deed, by will and by descent. See § 8(f). In some instances a particular title transaction may have to be construed before it can be determined what interest it "purports to create." Thus, in a jurisdiction where there is no decree of distribution in the settlement of a decedent's estate, and the significant muniment of title in a testate estate is a will which describes no real estate but merely devises to a named person "all the residue of" the testator's estate, it is necessary to determine what is in the residue before deciding what interests in land the will "purports to create."
It should be emphasized, however, that the same cannot be said of a quitclaim deed as a root of title. Thus suppose a case where there is a break in the chain of title, and the first instrument after the break is a quitclaim deed. Assume that the first recorded instrument in the chain of title is a patent from the United States to A, recorded in 1890, and that the next is a warranty deed from A to B in fee simple, recorded in 1910. Then in 1915, there is a quitclaim deed from C to D purporting to convey "all my right, title and interest in the above described land" to D in fee simple. Further assume that there are no other recorded title transactions or notices after this deed, and that D is in possession, claiming to be the owner in fee simple. Under the Model Marketable Title Act, the 1915 deed is the root of title and purports to create a fee simple in D. Therefore, in 1955 D had a good title in fee simple.

If, as is the case in nearly all states, quitclaim deeds are used to convey actual titles, neither the recording acts nor marketable title acts will operate successfully unless a quitclaim deed is regarded as purporting to convey the estate expressly stated or impliedly indicated in its language. Thus, entirely aside from any marketable title legislation, the great weight of authority is to the effect that a person who takes under a quitclaim deed can be a bona fide purchaser for the purpose of securing the protection of the recording acts.

Clearly the quitclaim deed can be a link in a chain of record title under the provisions of the Model Act. See §§1(b) and 8(f). If it can be an effective link, it must necessarily follow that it can be an effective "root."

[The recent case of Smith v. Berberich, 168 Neb. 142, 95 N.W.2d 325 (1959), held that a quitclaim deed was not an effective "root of title" to a fee simple absolute, where an earlier recorded instrument showed that the grantor in the quitclaim deed had only an undivided one-tenth interest. If it is desired to follow the Nebraska case, then Title Standard 4.11 could be modified to read as follows: "A recorded quitclaim deed or residuary clause in a recorded will can always be a link in a chain of title for purposes of a forty-year record title under the Model Marketable Title Act."
CHAPTER V

NAME VARIANCES

[Note: If the Model Name Variance Act (see The Improvement of Conveyancing by Legislation, p. 70) were in force the standards would go further in declaring a presumption of identity than those which follow.]

The following title standards deal with name variances:
Colo., 18, 19, 58, 60, 62; Conn., 64; Fla., 10.1 to 10.5; Idaho, 1; Ill., 2, 3, 6; Kan., 3.2; Mich., 2.1 to 2.5, 5.6; Minn., 1 to 5, 54; Mo., 14, 24; Mont., 18, 19, 23, 27, 28, 36; Neb., 1, 37, 38; N.H., A-1 to A-7; N.M., 2 to 10; N.Y., 18; N.D., 2.01, 2.02, 2.03; Ohio, 3.8; Okla. 3; S.D., 2 to 12; Utah, 31, 36, 39; Wash., 6; Wis., 5; Wyo., 2, 21.

STANDARD 5.1

RULE OF IDEM SONANS

DIFFERENTLY SPelled NAMES ARE PRESUMED TO BE THE SAME WHEN THEY SOUND ALIKE, OR WHEN THEIR SOUNDS CANNOT BE DISTINGUISHED EASILY, OR WHEN COMMON USAGE BY CORRUPTION OR ABBREVIATION HAS MADE THEIR PRONUNCIATION IDENTICAL.

Authorities: Basye, § 36; Patton, §§ 72-78.

Similar Standards: The majority of title standards include some form of the idem sonans rule. See, for example, Fla., 10.2; Iowa, 8.1; Mich., 2.1.

Comment: This standard expresses the common law doctrine of "idem sonans." Names having the same sound are presumed to refer to the same person. Even if the names are spelled differently, nevertheless, if they are pronounced alike, or nearly alike, the same presumption should be applied. Thus, if the grantee in one deed is "John Macomber" and the grantor in the next deed is "John McOmber," these names are presumed to refer to the same person. Or the grantee in one deed may be given as "William Conolly" and the grantor in the next, "William Conley." The same presumption should be applied.

STANDARD 5.2

USE OR NON-USE OF MIDDLE NAMES OR INITIALS

THE USE IN ONE INSTRUMENT AND NON-USE IN ANOTHER OF A MID­DLE NAME OR INITIAL ORDINARILY DOES NOT CREATE A QUESTION OF IDENTITY AFFECTING TITLE, UNLESS THE EXAMINER IS OTHERWISE PUT ON INQUIRY.

Authorities: 65 Corpus Juris Secundum, "Names," § 4; and compare Patton, § 76.

Similar Standards: Fla., 10.4; Ill., 6; Iowa, 8.2; Mich., 2.2; Minn., 2, 3; Neb., 37, 38; N.H., A-2; N.M., 4; S.D., 3; Utah, 36.

STANDARD 5.3

ABBREVIATIONS

ALL CUSTOMARY AND GENERALLY ACCEPTED ABBREVIATIONS OF FIRST AND MIDDLE NAMES SHOULD BE RECOGNIZED AS THE EQUIVALENT THEREOF.

Similar Standards: Fla., 10.1; Mich., 2.3; Minn., 5; Mo., 14; Neb., 1; N.H., A-3; N.M., 5; Ohio, 3.8; S.D., 4; Utah, 39.

STANDARD 5.4

RECITALS OF IDENTITY

A RECITAL OF IDENTITY, CONTAINED IN A CONVEYANCE EXECUTED BY THE PERSON WHOSE IDENTITY IS RECITED, MAY BE RELIED UPON UNLESS THERE IS SOME REASON TO DOUBT THE TRUTH OF THE RECITAL.

Authorities: Basye, § 36; Patton, § 78.

Similar Standards: Fla., 10.3; Iowa, 8.5; Mich., 2.4; N.H., A-5; N.M., 7; S.D., 6.
STATEMENT INDICATING IDENTITY OF MARRIED WOMAN

IF, IN A CONVEYANCE OR MORTGAGE BY A MARRIED WOMAN, THERE OCCURS IN THE BODY, SIGNATURE OR ACKNOWLEDGMENT OF SUCH INSTRUMENT A STATEMENT INDICATING HER FORMER NAME, THAT STATEMENT IS SUFFICIENT EVIDENCE TO SHOW IDENTITY WITH HER FORMER NAME AS GRANTEE IN A PRIOR INSTRUMENT, UNLESS THERE IS SOME REASON TO DOUBT THE TRUTH OF THE STATEMENT. SUCH A STATEMENT IS IMPLIED WHERE A SURNAME IS ADDED TO HER FORMER NAME.

Authorities: Basye, § 36; Patton, § 72.
Similar Standards: Minn., 54; N.H., A-4.

Comment: If the grantee in an instrument in the chain of title is "Mary Jones" and the grantors in the next succeeding instrument are "Mary Jones Smith and her husband, John Smith," Mary Jones Smith is presumed to be the same person as Mary Jones. The same conclusion is reached if the grantor in the second deed is "Mary Smith, widow," or "Mary Smith, formerly Mary Jones," or "Mary Smith, née Jones," or if the grantor in the second deed is merely "Mary Jones Smith."

STANDARD 5.8

VARIANCE IN NAME OF WIFE


MODEL TITLE STANDARDS

STANDARD 5.9

VARIANCE IN INDICATION OF SEX

If a recorded instrument contains one or more personal pronouns indicating that a person named therein is of a certain sex; and a subsequent instrument in the chain of title contains one or more personal pronouns indicating that such person is of the opposite sex, such variance does not make the title unmarketable.

Similar Standard: Colo., 60.

Comment: It should be noted that this standard is merely to the effect that the two names are regarded as referring to the same person. The standard lays down no presumption as to what the sex of that one person is. Nor does it say that a determination of the sex of that person is immaterial. Indeed, in a number of situations the marketability of the title can turn on the question whether the grantor is male or female. Thus, if the jurisdiction recognizes inchoate dower in real property owned by a married man, but no estate of curtesy or other similar interest in real property owned by a married woman; or if one type of acknowledgment is required for a conveyance by a married woman, and another type for a conveyance by a married man, the sex of the grantor can be significant.

CHAPTER VI

EXECUTION, ACKNOWLEDGMENT, AND RECORDING

STANDARD 6.1

REMEDIAL EFFECT OF CURATIVE LEGISLATION

The Model Curative Act [or, here insert the statutory citation of the jurisdiction's legislation curative of matters of execution, acknowledgment and recording] is a valid remedial measure, and eliminates objections based upon the imperfections of title which fall within its scope. Action corrective of such imperfections is unnecessary.

(Special Note: All jurisdictions have legislation, of some kind and scope, which validates recorded instruments notwithstanding departures from the formalities of conveyancing, authentication, and recordation. Misconceptions, and lack of comprehensiveness and technique in the statutes, have prevented full realization of the potential of this type of legislation. A jurisdiction should have a continuously operative statute which dispenses, after a rather brief interval, with all statutory requirements relating to such matters as seals, witnesses, acknowledgment, and all other requirements which are made conditions to proper recordation. Stated affirmatively, an instrument representing the irreducible minimum of (1) a writing displaying an intention to transfer title (2) signed by the proper parties, and (3) spread upon the records should be made good for all purposes. See Report, Committee on Improvement of Conveyancing and Recording Practices, Proceedings, Section of Real Property, Probate and Trust Law, American Bar Association, 1959. For the Model Curative Act, see Improvement of Conveyancing by Legislation, p. 20. The validity and effectiveness of such legislation is beyond cavil. See Basye, §§ 201-206; Improvement of Conveyancing by Legislation, Appendix A Title Standards should call attention to such legislation (or such statutes as the jurisdiction may have) and emphasize that reliance upon it should be usual, rather than extraordinary, and that redoing of the conveyancing is unnecessary.

Authorities: Basye, §§ 201-206; Patton, §§ 83, 84.
Comment: In matters of form and formalities, the examiner must continually remind himself that a safe purchase or investment, rather than a perfection or style, is the objective of his work. With respect to every irregularity, it is necessary to ask, "Who, if anyone, could take advantage of it?" and "What could that person do about it?" More elegantly stated: Does the imperfection prevent passage of legal title? Equitable title? Prevent introduction of the instrument in evidence? Eliminate the notice-giving effect of its record? Create an imminent possibility of litigation? The curative acts should be carefully considered before an affirmative answer is returned to any of these questions. Where the acts apply, their operation is as reliable as, if not more so than, proper initial conveyancing.

STANDARD 6.2
DATES: OMISSIONS AND INCONSISTENCIES

OMISSION OF THE DATE OF EXECUTION FROM A CONVEYANCE OR OTHER INSTRUMENT AFFECTING TITLE DOES NOT, IN ITSELF, IMPAIR MARKETABILITY. EVEN IF THE DATE OF EXECUTION IS OF PECULIAR SIGNIFICANCE, AN UNDATED INSTRUMENT WILL BE PRESUMED TO HAVE BEEN TIMELY EXECUTED IF THE DATES OF ACKNOWLEDGMENT AND RECORDATION, AND OTHER CIRCUMSTANCES OF RECORD, SUPPORT THAT PRESUMPTION.

INCONSISTENCIES IN RECITALS OR INDICATIONS OF DATES, AS BETWEEN DATES OF EXECUTION, ATTESTATION, ACKNOWLEDGMENT, OR RECORDATION, DO NOT, IN THEMSELVES, IMPAIR MARKETABILITY. ABSENT A PECULIAR SIGNIFICANCE OF ONE OF THE DATES, A PROPER SEQUENCE OF FORMALITIES WILL BE PRESUMED NOTWITHSTANDING SUCH INCONSISTENCIES.


Similar Standards: Colo., 41; Fla., 3.2; Mich., 3.1; Minn., 43; N.D., 1.02; Ohio, 3.7.

[Note: This standard is not based upon statute, and is believed to be unaffected by local statutes or decisions; however, that belief should be verified locally. Ordinary statutory-form-

EXECUTION, ACKNOWLEDGMENT, AND RECORDING

EXECUTION, ACKNOWLEDGMENT, AND RECORDING

DELIVERY: DELAY IN RECORDATION

DELIVERY OF INSTRUMENTS ACKNOWLEDGED ANDRecorded IS PRESUMED IN ALL CASES. SPECIFICALLY, DELAY IN RECORDATION, WITH OR WITHOUT RECORD EVIDENCE OF THE INTERVENING DEATH OF THE GRANTOR, DOES NOT DISPEL THE PRESUMPTION. AS AN ADDED, EXCEPTIONAL PROTECTION TO HIS CLIENT, AN EXAMINER MAY SATISFY HIMSELF AS TO THE FACTS BY CERTAIN INQUIRIES.

Note: This standard is not dependent upon statute (exceptions: Colo. Rev. Stat. (1953) § 118-6-1; Mass. Laws Ann. c. 183,
§ 5). Statutes making records prima facie evidence of due execution and delivery (collected, Basye, § 13, n. 3) are helpful, but are not necessary to and do not necessitate modification of the standard.


Similar Standards: Colo., 13; Conn., 40; Idaho, 9; Iowa, 4.12; Kan., 3.5; Mich., 3.8; Minn., 17; Mo., 13; Mont., 15; N.Y., 11; N.D., 1.06; Ohio, 3.3; Wash., 20; Wyo., 16.

Comment: In theory, delivery is a formality essential to the effectiveness of conveyances, recorded or otherwise. Accordingly, to the examiner, delivery or its absence is an evidentiary matter unaffected by notice or lack of notice. Insofar as prima facie proof of title by public records, and marketability of record titles, are concerned, the presumption of delivery of recorded instruments is a built-in feature of the system. Further, the presumption is not overcome by any inference to the contrary, subtle or obvious, which can be drawn from other matters of record. That is the law, and the standard so declares it.

How far should examiners go in attempting to improve upon the system in this particular? Practicability must furnish the only answer. It is important to note that corrective action, as the placing of additional evidence of record, is unnecessary and may create more doubts than it dispels. The presumption, and the rule as to marketability, obviate any necessity for that.

With respect to the one recurrent non-delivery situation—post-mortem "delivery" without valid escrow or conditional delivery—and the principal indication of record of it—marked discrepancy between execution and recordation dates—the following suggestions are made: (1) if the instrument has been recorded longer than the period for recovering land, do not inquire; (2) if the abstract or records, or convenient inquiries, do not reveal the death of the conveyor, do not inquire further; and (3) if death intervened between the dates of execution and recordation, inquire further but appraise the situation realistically with a view to the factual probability of assertion or non-assertion of lack of delivery. It should be emphasized that delay in recordation, and post-mortem recordation, are, in themselves, unobjectionable.

[Special Note: The actual risk inherent in non-delivery and related matters is easily overemphasized. For, by the use of presumptions, estoppel, manipulation of the elements of delivery, and other devices, courts properly display an almost insurmountable hostility to claims against innocent purchasers of apparently clear record titles. Nevertheless, corrective legislation is feasible and desirable. The Model Act Concerning Evidentiary Effect of the Record would fortify the presumption of delivery in all cases, specifically including those of delayed recordation. See Improvement of Conveyancing by Legislation, p. 30. The Model Act Concerning Delivery would conclusively eliminate questions of delivery as against purchasers after the instrument has been of record for five years. See Improvement of Conveyancing by Legislation, p. 63. The five-year, recorded color-of-title limitation of the Model Real Property Limitation Act should be of estimable value in this and other connections. See Improvement of Conveyancing by Legislation, p. 44.]

STANDARD 6.4
FEDERAL REVENUE STAMPS

THE ABSENCE OF FEDERAL REVENUE STAMPS FROM AN INSTRUMENT OR ITS RECORD DOES NOT IMPAIR MARKETABILITY OR NECESSITATE INQUIRY.


Similar Standards: Colo., 20; Conn., 23; Mo., 16; Mont., 20; N.M., 17; N.Y., 15; Okla., 23; Utah, 40; Wyo., 8.

Comment: Penalties prescribed for failure to affix the required revenue stamps do not (1) prevent the instrument's introduction in evidence, (2) impair the effectiveness of its record, or (3) affect purchasers. Although it is commonplace to assign some slight inferential value to the presence, absence, or amount of stamps in certain limited situations, the reliability of any inference which can be drawn probably does not justify the practice.

STANDARD 6.5
CORRECTIVE INSTRUMENTS

A GRANTOR WHO HAS CONVEYED BY AN EFFECTIVE, UNAMBIGUOUS INSTRUMENT, CANNOT, BY EXECUTING ANOTHER INSTRUMENT, MAKE
A substantial change in the name of the grantee, decrease the size of the premises or the extent of the estate granted, impose a condition or limitation upon the interest granted, or otherwise derogate from the first grant, even though the latter instrument purports to correct or modify the former. However, marketability dependent upon the effect of the first instrument is not impaired by the second instrument.

Authorities: Patton, § 82; Decennial Digests, Deeds, Key No. 48.

Similar Standards: Fla., 3.6; Mich., 3.10.

Comment: Although descriptions most frequently give rise to the problem, inept conveyancing results in a considerable variety of situations within the purview of the standard. In any case, the law is clear: a former owner, as any other stranger, cannot affect the title. A "correction instrument," however, is effective as to interests held by the grantor and not granted in the former instrument, even though, in form, the second instrument encompasses interests previously conveyed. Moreover, a "correction instrument" may have the effect of a recital, and be valuable to resolve ambiguities in the former instrument, or as evidence on which to base an equity of reformation.

This standard is illustrated by the following examples.

(1) A conveyed to B and C by a deed which created a tenancy in common. Later, A conveyed the same land to B and C, "as joint tenants, with right of survivorship." Marketability dependent upon survivorship is not obtained; marketability dependent upon heirship exists, and is not modified by the joint tenancy deed.

(2) A conveyed by deed "to B or C." [It is assumed that decisions of the jurisdiction hold such a deed to be a nullity.] Later, A conveyed the same land "to B and C, as joint tenants, with right of survivorship." Marketability dependent upon survivorship is not impaired by the first deed.

(3) A owned the North half of Section 35. A conveyed the Northeast quarter to B. Later A conveyed the Northwest quarter to B by a deed containing a recital that it was executed to correct an erroneous description in the previous deed. Still later, A conveyed the Northeast quarter to C. The marketability of C's title is not obtained. C should secure a conveyance from B.

(4) A conveyed to B a part of a tract of land he owned by a metes and bounds description which did not close. Later, A executed a correction deed to B closing the description in a manner which may or may not coincide with the best guess as to the way a court would have closed the description. Record titles through A and B are consistent with the correction. Both titles are marketable in keeping with the correction deed.
CHAPTER VII

DESCRIPTIONS

STANDARD 7.1

WHEN DEFECTIVE DESCRIPTIONS DO NOT IMPAIR MARKETABILITY

Errors, irregularities and deficiencies in property descriptions in the chain of title do not impair marketability unless, after all circumstances of record are taken into account, a substantial uncertainty exists as to the land which was conveyed or intended to be conveyed, or the description falls beneath the minimal requirement of sufficiency and definiteness which is essential to an effective conveyance. Lapse of time, subsequent conveyances, the manifest or typographical nature of errors or omissions, accepted rules of construction, and other considerations should be relied upon to approve marginally sufficient or questionable descriptions.

Authorities: Patton, §§ 111-62; Basye, § 237; Powell, Real Property (1958) §§ 888-92; Clark, Surveying and Boundaries (2d Ed., 1939).

Similar Standards: Colo., 96; Fla., 3.3; Minn., 64; Mont., 50; N.M., 20; Ohio, 3.2; Utah, 12, 41.

[Special Note: Existing standards touch upon a few miscellaneous points of description or permit disregard of minor errors after substantial periods of time. Descriptions, however, constitute a considerable portion of the work of examining titles, and lead to a significant number of questionable or unmarketable titles. Accordingly, even though "questions of survey" or the like are excluded from opinions, it would appear that time devoted to the development of standards tailored to local rules and titles would be well spent. Legislatively, inadequate descriptions are a rather difficult matter to reach. The Model Act for the Determination of Boundaries would provide a simplified procedure which should prove useful in connection with many description problems. See Improvement of Conveyancing by Legislation, p. 92. The Model

Affidavits Act provides for the recordation of affidavits to overcome record description difficulties. See Improvement of Conveyancing by Legislation, p. 64. And, of course, inadequate or irregular descriptions in instruments beyond the period of an effective marketable title should be eliminated from concern. See the Model Marketable Title Act, Improvement of Conveyancing by Legislation, p. 6. Expiration of the period for recovering land, and perhaps the recording of affidavits of continuous possession should have a significance and value, especially in connection with occupied land and in the rather typical case in which the record description problem is more apparent than real. See the Model Real Property Limitation Act and the Model Affidavits Act, Improvement of Conveyancing by Legislation, p. 44 and p. 64.]

Comment: Essentially, a sufficient description is any one which affords the means of identifying the property intended to be conveyed. Considerations of marketability add only the requirements that the means appear of record and that identification be beyond reasonable doubt or question. In theory, any existing description is only as good as the weakest link in the chain of descriptions. Practical considerations, however, fully justify reliance placed upon corrections or improved descriptions appearing in later conveyances, and upon the passage of time in which difficulties have not arisen from the less than perfect description. Further, all matters of record—adjoining descriptions, land owned by the grantor, and the like—become, in effect, sources of explanation for the dubious description. Ambiguities and problems which are covered by recognized "constructions," or rules for their resolution, cannot be said to create a doubt which impairs marketability. Similarly, typographical mistakes and kindred apparent errors and omissions are regularly held not to detract from the "obvious intendment" of instruments. An examiner may consider them in the same light.
CHAPTER VIII
THE USE OF AFFIDAVITS AND RECITALS

[Special Note: Standardization of practice with respect to affidavits and recitals can be one of the most significant accomplishments of title standards because (1) their use is one of the important means of improving practice, and (2) a high degree of uniformity is essential to effective usage. An inclusive statute providing for the recordation of affidavits, and assigning immediate evidentiary value to affidavits and recitals, is highly desirable. See the Model Affidavits Act and the Model Act Concerning Evidentiary Effect of the Record, Improvement of Conveyancing by Legislation, p. 64 and p. 30. See, also, the Model Act Concerning Recordation of Certificates of Death, Birth, and Marriage, Improvement of Conveyancing by Legislation, p. 64. Thus supported, standards can prescribe uses and limitations. Statutes and standards, especially those dealing with particular types of recitations (see Basye, §§ 31 to 45) commonly give a delayed effectiveness to affidavits and especially to recitals. Thirty years has historical support in being the period of the so-called ancient documents rule. As risk, rather than evidence, is the practical concern, the period for recovering land, with or without the extension for disabilities, would probably make a more logical period in a general title standard. Of course, standards or statutes dealing with particular recitations are desirable and take much of the vagueness out of a general standard or statute. A residual measure should remain, however. Illustrative examples, tailored to local practice and titles, should be added (see, for example, Fla., 3.09).

Authorities: Basye, §§ 31 to 45.

Similar Standards: The following standards are similar to one or more of the standards contained in this chapter: Fla., 3.9; Idaho, 15; Ill., 19; Iowa, 8.8; Kan., 6.1 to 6.5; Minn., 22; Mont., 24; Mo., 20; Neb., 13, 31; N.H., B-9; N.M., 10; N.Y., 9; N.D., 4.01; S.D., 9, 32; Wyo., 9.

THE USE OF AFFIDAVITS AND RECITALS

STANDARD 8.1
IN GENERAL

(1) EMPLOYMENT OF AFFIDAVITS AND FACTUAL RECITALS IN CONVEYANCES IS SOUND, LIBERAL PRACTICE. ADEQUATE AFFIDAVITS OR RECITALS SHOULD BE ACCEPTED AND RELIED UPON IN CONFORMITY WITH STATUTES PROVIDING FOR THEIR USE, IN ACCORDANCE WITH THESE STANDARDS, AND IN KEEPING WITH RECOGNIZED LIBERAL USAGE.

(2) ABSENT EXTRAORDINARY CIRCUMSTANCES, THEY SHOULD NOT BE ACCEPTED IN LIEU OF THE USUAL, RECOGNIZED CONVEYANCING, PROBATE OR JUDICIAL PROCEDURES. THEY SHOULD NOT BE REQUIRED UNLESS THERE IS A DEFINITE NEED FOR EXPLANATION, OR RECORD OR SUPPORTING EVIDENCE.

Comment: Neither current usage nor acceptance of affidavits or recitals in titles is affected by contract terms or other considerations determinative of the required kind or quality of title. Appropriately used, affidavits and recitals of record are elements of a marketable record title; inappropriately used, they do not aid a title, however characterized.

STANDARD 8.2
WHOSE AFFIDAVITS OR RECITALS ACCEPTABLE

AFFIDAVITS OR RECITALS SHOULD BE MADE BY PERSONS COMPETENT TO TESTIFY IN COURT, STATE FACTS, RATHER THAN CONCLUSIONS, AND DISCLOSE THE BASIS OF THE MAKER'S KNOWLEDGE. THE VALUE OF AN AFFIDAVIT OR RECITAL IS NOT SUBSTANTIALLY DIMINISHED BY THE FACT THAT THE MAKER IS INTERESTED IN THE TITLE OR THE SUBJECT MATTER OF THE AFFIDAVIT OR RECITAL.

STANDARD 8.3
CERTIFICATES OF DEATH, BIRTH, OR MARRIAGE PREFERRED

IN GENERAL, CERTIFIED COPIES OF CERTIFICATES OF DEATH, BIRTH, AND MARRIAGE ARE PREFERABLE TO AFFIDAVITS OR RECITALS TO ESTABLISH THE FACTS OF DEATH, BIRTH, AND MARRIAGE.
STANDARD 8.4

AFFIDAVITS AND RECITALS ACCEPTED AFTER [FIVE] YEARS

AFTER [FIVE] YEARS HAVE ELAPSED IN WHICH, AS APPEARS FROM THE RECORD, NO QUESTIONS HAVE ARISEN AS TO AFFIDAVITS OR RECITALS IN THE TITLE, THE FACTS OR MATTERS TO WHICH THEY RELATE, OR THE TITLE THEY SUPPORT, THE AFFIDAVITS OR RECITALS SHOULD BE ACCEPTED AS ESTABLISHING THE FACTS RECITED AND AS A SATISFACTORY ELEMENT IN THE TITLE. SUCH ACCEPTANCE SHOULD NOT BE LIMITED BY CURRENT STANDARDS AS TO EITHER THE SUFFICIENCY OR THE PARTICULAR AFFIDAVITS OR RECITALS, OR THE ADEQUACY OR APPROPRIATENESS OF AFFIDAVITS OR RECITALS FOR THE PURPOSE INTENDED. WHATSOEVER PERIOD HAS ELAPSED, LIBERALITY BEYOND CURRENT STANDARDS SHOULD BE EMPLOYED TO AVOID REJECTION OF AFFIDAVITS OR RECITALS ALREADY IN THE TITLE.

Comment: This standard does not mean that there must be a delay for a named period (indicated as five years) before an affidavit can ever be accepted as proof of the facts therein stated. Thus the Model Affidavits Act and the statutes of some states make affidavits prima facie evidence of the facts recited as soon as the affidavits are recorded. See Improvement of Conveyancing by Legislation, pp. 55 and 84. On the other hand, if conflicting affidavits have been on record for the five-year period, or if an affidavit to the effect that a named person is dead has been on record for this period, but there is evidence that the person is alive, it is obvious that the affidavits would not be treated as conclusive under this standard.

CHAPTER IX

MARITAL INTERESTS

STANDARD 9.1

RECITAL OF STATUS; NO SHOWING OF MARRIAGE

WHERE THE RECORD CHAIN OF TITLE DOES NOT SHOW THAT A GRANTOR WAS EVER MARRIED, A CONVEYANCE BY HIM OR HER AS SINGLE, UNMARRIED, WIDOW OR WIDOWER IS SUFFICIENT INDICATION OF MARITAL STATUS WITHOUT INQUIRY OR FURTHER EVIDENCE.

Similar Standards: Mich., 4.2; Minn., 9.

STANDARD 9.2

WIDOW OR WIDOWER

DESIGNATION OF A GRANTOR AS "A WIDOW" OR "A WIDOWER" IS EQUIVALENT, INSOFAR AS THE EXISTENCE OF MARITAL INTERESTS IS CONCERNED, TO THE DESIGNATIONS "A SINGLE WOMAN" OR "A SINGLE MAN."

Similar Standards: Mich., 4.3; Minn., 8.

STANDARD 9.3

RECITAL OF STATUS; MARRIAGE SHOWN

WHERE THE RECORD CHAIN OF TITLE SHOWS THAT A GRANTOR HAD BEEN MARRIED, A CONVEYANCE BY HIM OR HER AS WIDOW OR WIDOWER, IS SUFFICIENT AS A RECITAL OF THE DEATH OF THE SPOUSE AND OF THE FACT THAT THE GRANTOR HAD NOT REMARRIED.

Similar Standard: Minn., 10.
MODEL TITLE STANDARDS

STANDARD 9.4

RELEASE BY JOINDER

If the spouse of the owner has joined in the execution and acknowledgment of a conveyance, the fact that the name of the spouse does not appear in the deed, and the fact that no mention is made of the marital interest of the spouse, do not prevent effective release of the marital interest or require corrective action.


[Special Note: The standard must be compared with statutes which may prescribe a specific form for the release of marital interests.]

STANDARD 9.5

IN JOINT TENANCIES

A spouse has no marital interest in property owned by the other spouse and one or more other persons as joint tenants. Marital interests may exist in property owned by a sole surviving joint tenant.

Comment: the provisions of the standard are as follows:

1. A and B own property as joint tenants. They convey as married men, but without having their wives join. The title is free of marital interests of the wives of A and B.

2. A and B own property as joint tenants. A dies, leaving a widow. B conveys as a married man, but without having his wife join. The title is free of any marital interest of the widow of A, but is subject to any marital interest of the wife of B.

MARITAL INTERESTS

STANDARD 9.6

PURCHASE MONEY MORTGAGES

The security interest created by a purchase money mortgage given by a husband or wife alone is superior to marital rights of the other spouse in the encumbered property. Release of any such rights is unnecessary to marketability of title through foreclosure.


STANDARD 9.7

BAR OR PRESUMPTION OF NON-EXISTENCE OF MARITAL INTERESTS

Marketability of title is not impaired by the possibility of an outstanding marital interest in the spouse of any former owner whose title has passed by instruments of record for not less than [see Special Note] years unless such marital interest has been established or asserted by proceedings or other matters of record. Inquiry or corrective action is unnecessary.

[Special Note: The most important standard respecting dower, curtesy, and homestead is one which prescribes the time after which the possibility of those interests is completely ignored. In the absence of statute, the period prescribed should probably slightly exceed a generalization as to the period of adulthood. The most feasible solution to the problem is statutory. A statute barring or requiring recordation of claims of inchoate interests can be tailored to any conception of policy or desired degree of severity. For discussions and model statutes, see Improvement of Conveyancing by Legislation, pp. 187, 192; Basye, § 39. With a statute, standards should merely state its provisions in terms of practice and marketability.]

Similar Standards: m., 5, 16 (60 years); Kan., 3.3 (40 years); Mich., 4.1 (25 years; statute); Minn., 7 (statute); Mont., 12 (40 years; statute); Mo., 6 (statute); N.Y., 12 (33 years); Ohio, 3.6 (50 years); Utah 8 (pre-1898 conveyances).
Comment: The standard assumes that an inchoate interest may have been left outstanding. Hence its application is not dependent upon the voluntary or involuntary nature of the conveyance, indication of marital status, or other circumstances which may increase or decrease the possibility that an interest was left outstanding. As the standard involves the calculated passing of a risk, albeit a slight one, to purchasers, uniform adherence to and support of the standard is of especial importance.

STANDARD 9.8

INTER-SPOUSE CONVEYANCE

MARKETABILITY OF TITLE DEPENDENT UPON A CONVEYANCE BETWEEN SPOUSES RECORDED PRIOR TO IS NOT IMPAIRED UNLESS THE RECORD DISCLOSES A PROCEEDING OR NOTICE OF A PROCEEDING COMMENCED PRIOR TO TO SET ASIDE OR REFORM THE CONVEYANCE. THE FORM OF ANY CO-TENANCY WHICH MAY HAVE EXISTED BETWEEN THE SPOUSES IS IMMATERIAL.

[It is assumed that inter-spouse conveyances have been made permissible by a statute which was not retroactive; and that subsequently the Model Inter-Party Curative Act was enacted. As to the Model Inter-Party Curative Act, see Improvement of Conveyancing by Legislation, p. 200. The dates to be filled in, in the text of the standard, are the dates found in the Model Inter-Party Curative Act. These dates are designed to be the effective date of the prior statute permitting inter-spouse conveyances.]
CONVEYANCES IN WHICH A GRANTOR IS ALSO A GRANTEE

[Assumption: That the Model Inter-party Curative Act is in force. For the text of that Act see Improvement of Conveyancing by Legislation, p. 200.]

MARKETABILITY OF TITLE DEPENDENT UPON THE EXISTENCE OF A JOINT TENANCY OR TENANCY BY THE ENTIRETIES IS NOT IMPAIRED BY THE FACT THAT THE TENANCY IS BASED UPON AN INSTRUMENT RECORDED PRIOR TO IN WHICH A HUSBAND CONVEYED TO HIMSELF AND HIS WIFE AS TENANTS BY THE ENTIRETIES, OR A WIFE CONVEYED TO HERSELF AND HER HUSBAND AS TENANTS BY THE ENTIRETIES, OR ANY PERSON CONVEYED TO HIMSELF AND ONE OR MORE OTHER PERSONS AS JOINT TENANTS, UNLESS THE RECORD DISCLOSES A PROCEEDING OR NOTICE OF A PROCEEDING COMMENCED PRIOR TO TO SET ASIDE OR REFORM THE INSTRUMENT.

[Special Note: See Improvement of Conveyancing by Legislation, p. 196. The standard and the statute assume that direct conveyances have been authorized, and deal only with past, questionable efforts. See Standard 9.8, supra. Standards commonly state the presently existing rules. That may be desirable if there is any misunderstanding.]

[Special Note: Establishment of Title by Survivorship. Title standards usually prescribe the requirements for acceptance of title from or through a surviving joint tenant or tenant by the entireties. The least desirable standards merely state preferred practice. Others distinguish between requirements to be made if the survivor is the proposed grantor, and requirements for approval of survivorship as a link in the chain. The best standards state sound practice, but prescribe specific periods after which various requirements may be dispensed with or substitute procedures may be accepted. A standard on this subject is highly desirable, but must be keyed to local practices. See the following standards: Colo., 36, 54; Conn., 6; Iowa, 4, 4; Kan., 7, 2; Mich., 5, 11, 5, 12; Mo., 19; Mont., 70; Neb., 48; N.Y., 24; Ohio, 3, 4; Okla., 18; Utah, 15.]

CO-TENANCIES

BY, OR CAN BE READILY INFERRED FROM, OTHER RECORDED INSTRUMENTS, ACKNOWLEDGMENTS OR AFFIDAVITS.

Similar Standards: Iowa, 5, 5; Mich., 5, 6, Neb., 51.

[Special Note: The comment should be checked for conformity with local law. A reliable bar of marital interests diminishes the problems of this standard (see Special Note to Standard 9.7).]

Comment: Inept conveyancing with respect to plural owners creates two distinguishable problems: (1) establishing that the owners were married to each other is necessary to exclude the possibility of marital interests of other spouses, and (2) inept and inconsistent identification of one owner, usually a wife, jeopardizes the necessary presumption of identity. Thus in case of a conveyance to and a conveyance by John Doe and Mary Doe, the problem is one of marital interests; in case of a conveyance to Mr. and Mrs. John Doe, and a conveyance by John Doe and Mary Doe, his wife, identity of Mary and Mrs. John is the concern. The key to unraveling the various combinations is recalling that (1) marital status is never established by anything more than recitals, and (2) identity is established by mere similarity of names and the fact that a grantor purports to be a prior grantee. Recital and identification of record is necessary, but one place of record is as good as another. Thus, in the first example, if the second conveyance or its acknowledgment indicates that John and Mary were husband and wife, nothing further is required. In the second example, a contract in favor of John and Mary preceding the first conveyance should establish identity. Affidavits may be relied upon, to overcome lack of recital of marital status and to establish identity. In cases of joint tenancy, the marital interests aspect of the problem does not exist (See Standard 9.5).
CHAPTER XI

CONVEYANCES BY AND TO TRUSTEES

[It is assumed that the Model Act Concerning References to Fiduciaries and the Model Act Limiting Proceedings to Set Aside Conveyances by a Fiduciary to Himself, are in force. As to the text of these acts see The Improvement of Conveyancing by Legislation, pp. 110 and 112. With the exception of the last standard, the standards in this chapter are based upon these model acts.]

STANDARD 11.1

EFFECT OF DESIGNATION "TRUSTEE"

WHEN THE WORD "TRUSTEE" FOLLOWS THE NAME OF A PARTY TO AN INSTRUMENT, AND NEITHER THIS INSTRUMENT NOR ANY OTHER RECORDED INSTRUMENT IN THE CHAIN OF TITLE SETS FORTH THE POWERS OF SUCH PERSON, A TITLE FROM SUCH PERSON CAN BE APPROVED WITHOUT ANY INVESTIGATION OF THE POWERS OF SUCH PERSON TO CONVEY.

Similar Standards: Colo., 80, 81; Conn., 60, 72; Fla., 13.1; Iowa, 4.9; Mich., 8.1, 6.2; Mont., 32; Neb., 32; S.D., 17; Utah, 10, 16.

Comment: If a person is designated as "trustee" in the instrument which gives him title, and there is nothing on record showing his power, it is presumed, in the absence of evidence to the contrary, that he has unlimited powers to convey. If, however, a purchaser has notice that the powers of the trustee are more limited, then he is bound by them, and cannot take a good title in violation of such powers.

Moreover, even though a purchaser takes good title because he has no notice of limitations on the power of the trustee, this does not prevent a beneficiary of the trust from recovering in an action against the trustee for breach of trust, if the trustee in fact exceeded his powers in making the conveyance. But in such action the recovery will be against the trustee personally, and will not bind the property conveyed.

CONVEYANCES BY AND TO TRUSTEES

It is to be noted that the Model Act differs materially from some other legislation, which, in effect, says that, in a conveyance of the kind here considered, the purchaser has no notice of the existence of a trust. Under that type of statute, if the instrument named beneficiaries, the instrument would not be within the statute. Or if the instrument did not name beneficiaries, and was within such a statute, a wife of the person named as trustee might have dower. Under the Model Act, however, the purchaser does have notice that there may be a trust, but he does not have notice that there are any limitations on the powers of the trustee. Hence, the wife of the trustee could not claim dower, and the naming of beneficiaries would not exclude the operation of the act.

STANDARD 11.2

CONVEYANCE BY TRUSTEE TO HIMSELF

SINCE A CONVEYANCE BY A FIDUCIARY TO HIMSELF, EITHER DIRECTLY OR INDIRECTLY, CANNOT BE SET ASIDE AFTER THE FIVE-YEAR PERIOD OF LIMITATION ON SUCH A PROCEEDING HAS EXPIRED, NO OBJECTION SHOULD BE MADE TO A TITLE ON THIS GROUND AFTER THE EXPIRATION OF FIVE YEARS FROM THE DATE OF RECORDING OF SUCH INSTRUMENT.

Comment: Assume that a trust instrument involving real estate is on record, in which the powers of the trustee and the terms of the trust are stated. T is trustee and C is beneficiary. T, acting within the stated powers, conveys some of the trust real estate to X, and the deed is at once recorded. Later, X conveys the same land to Y and the deed is at once recorded. Thereafter Y conveys to Z and the deed is at once recorded. Then Z conveys to T and the deed is at once recorded. When five years have elapsed after the recording of the deed from Z to T, T's title can be approved. Before five years have elapsed, an investigation should be made to determine whether T was guilty of any breach of trust in connection with this series of transactions. Even after five years have expired, C may recover in a suit against T, if in fact there was a breach of trust, but the particular piece of real estate cannot be reached.
STANDARD 11.3

TERMINATION OF TRUST

A DEED FROM THE TRUSTEE TO THE BENEFICIARY OF A TRUST AT THE TIME SUCH TRUST TERMINATES BY ITS TERMS ON A FIXED DATE OR UPON THE HAPPENING OF A NAMED EVENT IS UNNECESSARY. IT IS HOWEVER RECOMMENDED THAT ATTORNEYS MAKE EVERY EFFORT TO PLACE SUCH INSTRUMENTS ON RECORD IN THE FUTURE AS WILL AID TITLE SEARCHERS IN ASCERTAINING THE FACTS.

Similar Standards: Colo., 93; Conn., 85.

Comment: A trust instrument provides that "when the said beneficiary, X, attains the age of twenty-five years, this trust shall cease, and thereupon X shall become the owner of all assets of the trust estate, real and personal." Blackacre is an asset of the estate. When X attains the age of twenty-five years, title to Blackacre vests in him: However, the record may now show this fact, and it is desirable that, the trustee make a conveyance to X at the termination of the trust.

CHAPTER XII

CORPORATE CONVEYANCES

STANDARD 12.1

NAME VARIANCES

CORPORATIONS ARE SATISFACTORYLY IDENTIFIED ALTHOUGH THEIR EXACT NAMES ARE NOT USED AND VARIATIONS EXIST FROM INSTRUMENT TO INSTRUMENT IF, FROM THE NAMES USED AND OTHER CIRCUMSTANCES OF RECORD, IDENTITY OF THE CORPORATION CAN BE INFERRED WITH REASONABLE CERTAINTY. AMONG OTHER VARIANCES, ADDITION OR OMISSION OF THE WORD "THE" PRECEDING THE NAME; USE OR NON-USE OF THE SYMBOL "&" FOR THE WORD "AND"; USE OR NON-USE OF ABBREVIATIONS FOR "COMPANY," "LIMITED," "CORPORATION" OR "INCORPORATED"; AND INCLUSION OR OMISSION OF ALL OR PART OF A PLACE OR LOCATION, ORDINARILY MAY BE IGNORED. AFFIDAVITS AND RECITALS OF IDENTITY MAY BE USED AND RELIED UPON TO OBVIAE VARIANCES TOO SUBSTANTIAL OR TOO SIGNIFICANT TO BE IGNORED.

Authorities: Basye, § 19; Patton, § 403.

Similar Standards: Colo., 17, 87; Idaho, 1; Iowa, 3.4, 3.5; Minn., 6; Mont., 17; Neb., 2; N.H., E-2, E-3; N.M., 13; N.Y., 10; N.D., 2.04; Ohio, 3.8; Okla., 4; S.D., 13, 14; Utah, 39; Wyo., 3.

Comment: Although corporations frequently have closely corresponding names, except in the case of reorganizations or subsidiaries, purported conveyance by an interloper seems extremely unlikely. The significance of variances should be appraised with a view to actual identity of the corporation, rather than by a standard of mechanical perfection.

STANDARD 12.2

NAME OMITTED FROM SIGNATURE

THE SIGNATURE TO A CORPORATE INSTRUMENT IS SUFFICIENT NOTWITHSTANDING THE OMISSION OF THE CORPORATE NAME OVER THE
SIGNATURE OF THE SIGNERS, IF THE CORPORATION APPEARS AS THE PARTY TO THE INSTRUMENT AND THE INSTRUMENT IS OTHERWISE PROPERLY EXECUTED AND ACKNOWLEDGED.

Authorities: Basye, § 205.

Similar Standards: Fla., 4.6; Mich., 9.1; Mo., 8; Ohio, 3.11; Wyo., 13.

STANDARD 12.3

AUTHORITY OF PARTICULAR OFFICERS EXECUTING INSTRUMENTS

WHERE AN INSTRUMENT OF A PRIVATE CORPORATION APPEARS IN THE TITLE, AND THE INSTRUMENT IS EXECUTED, ACKNOWLEDGED AND SEALED IN PROPER FORM, THE EXAMINER MAY ASSUME THAT THE PERSONS EXECUTING THE INSTRUMENT WERE THE OFFICERS THEY PURPORTED TO BE, AND THAT SUCH OFFICERS WERE AUTHORIZED TO EXECUTE THE INSTRUMENT ON BEHALF OF THE CORPORATION.

 Authorities: Basye, §§ 293, 294; Patton, § 404.

Similar Standards: Conn., 68; Fla., 4.2, 4.3, 4.7; Idaho, 7; Iowa, 3.3; Kan., 3.1; Neb., 11; N.H., B-7; Okla., 25, 33; Utah, 7; Wash., 8, 9; Wis., 6.

[Special Note: See Model Execution of Corporate Conveyances Act and Model Curative Act, § 2, Improvement of Conveyancing by Legislation, p. 95 and p. 20.]

STANDARD 12.4

CORPORATE EXISTENCE

WHERE AN INSTRUMENT OF A PRIVATE CORPORATION APPEARS IN THE TITLE, AND THE INSTRUMENT IS EXECUTED IN PROPER FORM, THE EXAMINER MAY ASSUME THAT THE CORPORATION WAS LEGALLY IN EXISTENCE AT THE TIME THE INSTRUMENT TOOK EFFECT.


Similar Standards: Minn., 33; Mo., 15; N.Y., 8, 9.
CHAPTER XIII
CONVEYANCES INVOLVING PARTNERSHIPS AND UNINCORPORATED ASSOCIATIONS

[It is assumed, in Standard 13.1, that the Uniform Partnership Act is in force.]

STANDARD 13.1
CONVEYANCE OF REAL PROPERTY HELD IN PARTNERSHIP NAME

REAL PROPERTY ACQUIRED BY A PARTNERSHIP AND HELD IN THE PARTNERSHIP NAME MAY BE CONVEYED ONLY IN THE PARTNERSHIP NAME. ANY CONVEYANCE FROM THE PARTNERSHIP SO MADE, AND SIGNED BY ONE OR MORE MEMBERS OF THE PARTNERSHIP, WHICH CONVEYANCE APPEARS TO BE EXECUTED IN THE USUAL COURSE OF PARTNERSHIP BUSINESS, SHALL BE PRESUMED TO BE AUTHORIZED BY THE PARTNERSHIP IN THE ABSENCE OF KNOWLEDGE OF FACTS INDICATING A LACK OF AUTHORITY; AND THE RECITALS IN THE INSTRUMENT OF CONVEYANCE SHALL BE ACCEPTED AS SUFFICIENT EVIDENCE OF SUCH AUTHORITY.

Authorities: Uniform Partnership Act, §§ 9 and 10.

Similar Standards: Mich., 10.1 and 10.3; Utah, 32 and 33.

Comments: Elmer Jones and Robert Smith are partners, doing a real estate business in the name of Enterprise Associates. Real estate is purchased for the partnership and title is taken in the name of Enterprise Associates, a partnership. The partnership wishes to sell the land to Henry Green. The deed should be executed in the name of Enterprise Associates, a partnership. It may be signed by one or both of the partners. Thus the signature can read: "Enterprise Associates, a partnership, consisting of Elmer Jones and Robert Smith." If the latter form of execution is used, the deed should show, by its recitals, or evidence should be secured to show, that Elmer Jones is one of the partners. The purchaser should have no knowledge negativing the presumption that Elmer Jones was acting with authority of the partnership. If the deed should read "Enterprise Associates, a partnership, by Elmer Jones, one of the partners," it should be passed by the title examiner in the absence of any knowledge of lack of authority on the part of Jones.

Suppose, title to partnership real estate has been taken in the name of Enterprise Associates, a partnership, and the partnership consists of Elmer Jones and Robert Smith. Suppose Elmer Jones and Robert Smith and their wives execute a conveyance of the property to Henry Green, the deed making no reference to a partnership. Green would have only an equitable title to the land. See Uniform Partnership Act, § 10(2).

STANDARD 13.2
AUTHORITY OF ONE PARTNER TO ACT FOR ALL

WHEN REAL PROPERTY IS HELD BY A PARTNERSHIP, AND A CONVEYANCE IS MADE ON BEHALF OF THE PARTNERSHIP BY ONE OR MORE, BUT LESS THAN ALL, OF THE PARTNERS, AND THE CONVEYANCE APPEARS TO BE EXECUTED IN THE USUAL COURSE OF PARTNERSHIP BUSINESS, IT IS PRESUMED, IN THE ABSENCE OF EVIDENCE TO THE CONTRARY, THAT THE CONVEYANCE WAS MADE BY THE PARTNER OR PARTNERS EXECUTING IT FOR THE PURPOSE OF CARRYING ON IN THE USUAL WAY THE BUSINESS OF THE PARTNERSHIP; AND NO FURTHER EVIDENCE OF AUTHORITY OF SUCH PARTNER OR PARTNERS TO EXECUTE THE INSTRUMENT SHOULD BE REQUIRED BY THE TITLE EXAMINER.

[It is assumed that the Uniform Partnership Act is in force. If it is not in force, then substitute for the first eight words of the standard the following: WHEN PARTNERSHIP REAL PROPERTY IS HELD BY ALL THE MEMBERS OF A PARTNERSHIP, . . . .]


STANDARD 13.3
NO MARITAL RIGHTS IN PARTNERSHIP REAL PROPERTY

[It is assumed that the Uniform Partnership Act is in force.]
NEITHER DOWER, CURTESY NOR HOMESTEAD RIGHTS ATTACH TO THE INTEREST OF A MARRIED PARTNER IN SPECIFIC PARTNERSHIP REAL PROPERTY. IF BY RECITALS IN INSTRUMENTS IN THE CHAIN OF TITLE, OR OTHERWISE, IT APPEARS THAT PARTNERSHIP REAL PROPERTY WAS CONVEYED, THE TITLE EXAMINER SHOULD NOT REQUIRE ANY EVIDENCE OF RELEASE OR NON-EXISTENCE OF SUCH MARITAL RIGHTS.

Authorities: Uniform Partnership Act, § 25(e).

Similar Standard: Mich., 10.2

Comment: Suppose real property has been conveyed to "Enterprise Associates, a partnership, consisting of Elmer Jones and Robert Smith," and a conveyance of the same property is then made to Henry Green, signed in the name of "Enterprise Associates, a partnership, by Elmer Jones and Robert Smith, co-partners." Both Jones and Smith are married but their wives do not join in the conveyance. Green gets a marketable title, and nothing further is required to explain why the wives did not join.

Suppose real property has been conveyed to Elmer Jones and Robert Smith, a co-partnership. A conveyance is then made of the same property to Henry Green, executed by "Elmer Jones and Robert Smith, a co-partnership." The wives of Jones and Smith do not join in the conveyance. Green gets a marketable title, and nothing further is required.

Suppose a conveyance to the co-partnership, as in the preceding hypothetical case. In this case, the partnership does not sell the real property, and Elmer Jones dies leaving a widow. The widow cannot claim dower in the land.

STANDARD 13.4

CONVEYANCE OF PARTNERSHIP REAL PROPERTY AFTER DEATH OF A PARTNER

[It is assumed that the Uniform Partnership Act is in force.]


STANDARD 13.5

CONVEYANCE OF REAL PROPERTY TO PARTNERSHIP IN PARTNERSHIP NAME

WHERE, ACCORDING TO THE TERMS OF A RECORDED CONVEYANCE, REAL PROPERTY HAS BEEN ACQUIRED BY A PARTNERSHIP IN A PARTNERSHIP NAME WHICH DOES NOT INCLUDE ANY OF THE NAMES OF THE PARTNERS, THE GRANTOR IN SUCH CONVEYANCE, OR HIS HEIRS OR DEVISEES, SHOULD EXECUTE A NEW CONVEYANCE TO THE INDIVIDUAL MEMBERS OF THE PARTNERSHIP AS TENANTS IN COMMON "DOING BUSINESS UNDER THE FIRM NAME OF [STATING THE FIRM NAME]." THEREUPON A CONVEYANCE FROM THE PARTNERSHIP SHOULD BE APPROVED IF IT IS EXECUTED BY ALL SUCH MEMBERS AND THE INSTRUMENT STATES THAT THEY ARE ALL THE MEMBERS OF THE PARTNERSHIP.


Similar Standards: Conn., 10; Ohio, 3.5.

Comment: The prevailing theory, in a situation like this, is that title cannot be held in the partnership name, and that the grantor holds the legal title in trust for the firm. Hence, both the partners and the grantor have an interest in the property and the record should show that these interests have been conveyed.

Suppose the record shows a conveyance from Richard Rose to the "Enterprise Associates, a partnership." Following that is a conveyance from "Elmer Jones and Robert Smith, a co-partnership doing business as the Enterprise Associates," signed by both the partners, conveying the same land to Henry Green. Before Green can give a marketable title to the land, a conveyance
from Richard Rose to "Elmer Jones and Robert Smith, a co-partnership doing business as Enterprise Associates," or to the individual members of the partnership in similar form, should be recorded.

STANDARD 13.6

CONVEYANCE OF REAL PROPERTY HELD IN NAME OF SOME BUT NOT ALL THE PARTNERS

WHEN A CONVEYANCE IS MADE AS PARTNERSHIP REAL PROPERTY TO SOME BUT NOT ALL THE MEMBERS OF A PARTNERSHIP, SUCH GRANTEES HOLD THE PROPERTY IN TRUST FOR ALL THE PARTNERSHIP. A CONVEYANCE OF SUCH PROPERTY FROM THE PARTNERSHIP SHOULD BE APPROVED IF IT IS EXECUTED BY ALL MEMBERS OF THE PARTNERSHIP AND THE INSTRUMENT SO STATES.


Similar Standards: Conn., 19; Ohio, 3.5; Mont., 72.

Comment: This standard proceeds upon the theory that, although legal title is in some but not all the members of the firm, it is held by them in trust for all the members of the firm. Hence, all the partners should join in a conveyance, since all have either a legal or equitable interest in the property. It is not necessary, however, that every partner actually execute the conveyance. If one partner is expressly or impliedly authorized to act for the partnership, he may execute the conveyance in the name of all the partners. As to this, see Standard 13.2.

STANDARD 13.7

NO MARITAL RIGHTS BEFORE TERMINATION OF PARTNERSHIP

PRIOR TO THE TERMINATION OF A PARTNERSHIP, REAL PROPERTY OF THE PARTNERSHIP MAY BE CONVEYED BY THE PARTNERS FREE FROM DOWER, CUSTEY, OR HOMESTEAD RIGHTS OF THE SPOUSES OF ANY OF THEM. IF, BY RECITALS IN INSTRUMENTS IN THE CHAIN OF TITLE, OR OTHERWISE, IT APPEARS THAT PARTNERSHIP REAL PROPERTY WAS CONVEYED DURING THE EXISTENCE OF THE PARTNERSHIP, THE TITLE EXAMINER SHOULD NOT REQUIRE ANY EVIDENCE OF RELEASE OR NON-EXISTENCE OF SUCH MARITAL RIGHTS.
CHAPTER XIV

TITLE THROUGH DECEDENTS' ESTATES

[In this chapter it has been possible to include only a very few of the subjects commonly included in title standards on decedents' estates. The reason is that most such standards are based on purely local law. Among subjects comprehended in standards of this character are the following: whether spouse of heir need be joined in proceeding to sell intestate real estate; after what period of time recitals or affidavits as to heirship are acceptable in determining heirship; after what period of time affidavits are acceptable in an intestate estate in lieu of administration; whether there is a presumption of intestacy; whether the omission of land from the inventory should be a ground for objecting to a title; whether a judgment against an heir should affect probate sales; whether minor irregularities in probate sales may be disregarded; whether all executors must join in a sale under a testamentary power of sale; when surviving or successor fiduciaries have the same powers of sale as their predecessors or as the original co-fiduciaries.]

STANDARD 14.1

FINALITY OF DECREE OF DISTRIBUTION

[It is assumed that probate procedure statutes provide for a final order distributing the real and personal estate of a decedent.]

A DECREES OF DISTRIBUTION CONTRARY TO THE TERMS OF AN ADMITTED WILL OR STATUTES OF DESCENT DOES NOT MAKE A TITLE BASED UPON SUCH DECREE UNMARKETABLE IF THE DECREE HAS NOT BEEN APPEALED FROM AND THE TIME FOR APPEAL HAS EXPIRED.

Similar Standard: Minn., 24.

STANDARD 14.2

JUDGMENTS AGAINST HEIRS

WHERE A WILL DIRECTS THE EXECUTOR TO SELL REAL ESTATE AND SUCH SALE IS MADE, JUDGMENTS AGAINST THE HEIRS DO NOT CONSTITUTE A LIEN ON THE LAND SO SOLD, AND THE ABSTRACT NEED NOT DISCLOSE A SEARCH THEREFOR.

Similar Standard: Mont., 67.

STANDARD 14.3

SALES WHEN COURT HAS JURISDICTION

AN EXAMINER SHOULD NOT OBJECT TO A TITLE ON THE GROUND OF ANY FAILURE TO COMPLY WITH STATUTORY REQUIREMENTS OR ORDERS OF THE COURT, OR OF INSUFFICIENCY OR IRREGULARITY IN THE PROCEEDINGS, WITH RESPECT TO THE SALE, IF THE COURT WHICH ORDERED THE SALE HAD JURISDICTION OF THE ESTATE, THE SALE WAS CONFIRMED BY ORDER OF THE COURT, SUCH ORDER HAS NOT BEEN APPEALED FROM, AND THE TIME FOR APPEAL HAS EXPIRED.

[It is assumed that the Model Probate Sales Validation Act is in force in the jurisdiction. For the text of this Act see The Improvement of Conveyancing by Legislation, p. 99.

In some jurisdictions this standard would be appropriate even without such a statute.]

Comment: There is a general principle that, if a court has jurisdiction, a final order, judgment or decree, when unappealed from, is valid, notwithstanding irregularities or omissions in the procedure. This principle should apply to an order confirming a probate sale, and in the Model Act it is expressly applied. An example of its application to particular facts would be as follows: In the Estate of X, deceased, the court has ordered a sale of real estate to pay debts. The sale was made and duly confirmed by the court. The probate court record, however, shows that the land was not included in the inventory of the estate, and that the sale price was five dollars less than the minimum as determined by the terms of the probate statute. Nevertheless, the record shows that all steps were taken whereby the court acquired jurisdiction of the estate. The sale was made to
Y, who seeks to sell the property to Z. No objection to Y's title should be made on the basis of irregularities in the probate proceedings.

STANDARD 14.4

SALES WHEN IRREGULARITY MAY BE JURISDICTIONAL

An examiner should not object to a title on the ground of any failure to comply with statutory requirements or orders of the court, or of insufficiency or irregularity in the proceedings with respect to the sale, if (1) the sale was confirmed by order of the court, (2) the order of confirmation or a certified copy thereof was recorded in the registry of deeds, (3) one year has elapsed after the date of such recording, (4) no action has been brought to attack the validity of such sale within the one-year period, and (5) if the defect or omission is jurisdictional, requirements for due process of law have been complied with.

[It is assumed that the Model Probate Sales Validation Act is in force in the jurisdiction. See The Improvement of Conveyancing by Legislation, p. 99. It is also assumed that a statute requires service by registered mail of the proceeding to order the sale, and that this requirement has been held to be jurisdictional.]

Comment: Suppose notice of the sale was given by certified mail to all interested parties whose names and addresses were known, and that there was also published notice. The sale would be valid at the end of one year under this standard.

CHAPTER XV
EXECUTION AND ATTACHMENT

[It is assumed that the following model acts are in force: the Model Curative Act, the Model Act Limiting the Duration of Judgment Liens, and the Model Act Limiting the Duration of Execution and Attachment Liens. For the text of these acts, see The Improvement of Conveyancing by Legislation, pp. 20, 165, and 166.]

STANDARD 15.1
EXECUTION SALE VALID AFTER ONE YEAR

No objection should be made by a title examiner to a judicial sale on execution, if (1) the sale has been duly confirmed by the court, (2) one year has elapsed after such order has been issued and (3) within such one-year period no proceeding has been brought to attack the sale in which notice of lis pendens was duly recorded and relief was in due course granted.

Comment: This standard is based on Model Curative Act, § 3(b).

STANDARD 15.2
SHERIFF’S DEED VALID AFTER TWO YEARS

No objection should be made by a title examiner to a sheriff's deed issued pursuant to a writ of execution, if (1) such deed was recorded in the registry of deeds for the county in which the real estate is situated; (2) it purports to be executed by the sheriff of such county; (3) such deed has been on record for a period of two years, and (4) within such two-year period no proceeding has been brought to attack the deed in which notice of lis pendens was duly recorded and relief was in due course granted.
CHAPTER XVI
MORTGAGES AND MORTGAGE FORECLOSURES

STANDARD 15.3
LIEN OF JUDGMENT, EXECUTION OR ATTACHMENT

THE LIEN OF A JUDGMENT RENDERED IN ANY COURT OF THIS STATE BEGINS ON THE FILING OF A TRANSCRIPT OF THE DOCKET ENTRY AS PROVIDED IN THE MODEL ACT LIMITING THE DURATION OF JUDGMENT LIENS, THE LIEN OF A WRIT OF EXECUTION OR ATTACHMENT BEGINS ON THE FILING OF A CERTIFICATE OF LEVY AS PROVIDED IN THE MODEL ACT LIMITING THE DURATION OF EXECUTION AND ATTACHMENT LIENS. AFTER THE APPLICABLE PERIOD OF LIMITATION ON THE DURATION OF A JUDGMENT, EXECUTION OR ATTACHMENT LIEN HAS EXPIRED, SUCH LIEN SHALL CEASE TO BE A CLOUD ON THE TITLE, AND NO RELEASE SHALL BE REQUIRED BY THE TITLE EXAMINER.

STANDARD 16.1
MORTGAGE RECORDED PRIOR TO DEED

THE VALIDITY OF A MORTGAGE IS NOT IMPAIRED BY THE FACT THAT IT IS RECORDED PRIOR TO THE RECORDING OF THE INSTRUMENT BY WHICH OWNERSHIP IS ACQUIRED, EXCEPT TO THE EXTENT THAT RIGHTS OF THIRD PARTIES MAY HAVE INTERVENED.


Similar Standards: Fla., § 9.4; Mich., § 1.1.

Comment: If A has conveyed to B, and B thereafter has mortgaged to A or C, the validity of the mortgage is not affected by its being recorded prior to the recording of the conveyance. Further, after recordation of the conveyance, the mortgage is in the line of search unless it was recorded prior to the indicated date of the conveyance. The situation is to be distinguished from that of estoppel by deed (or mortgage; see Standard 16.2) and the related recording problem (see Standard 3.2). It is, also, to be distinguished from the "wild deed" problem. (See Standard 3.3.) Of course, rights may have intervened between recordation of the mortgage and recordation of the conveyance. An examiner, however, may rely upon the absence of instruments recorded in the interval.

STANDARD 16.2
AFTER-ACQUIRED TITLE

A MORTGAGE GIVEN BY A PERSON THEN HAVING NO TITLE, BUT SUBSEQUENTLY ACQUIRING IT, IS VALID EXCEPT TO THE EXTENT THAT RIGHTS OF THIRD PARTIES ARE INVOLVED.

Authorities: Patton, §§ 69, 70, 215-20; Osborne, Handbook of Mortgages (1951) 89.
Similar Standards: Fla., 9.5; Mich., 8.2.

[Special Note: The standard and comment require tailoring to the local conception of the line of search and its significance.]

Comment: The familiar principles of estoppel by deed and inurement of after-acquired titles apply in favor of mortgagees. (Compare Standard 3.2.) Unlike the case of a deed, covenants of warranty in the mortgage generally are not necessary to application of the principles. As the mortgage is recorded out of the line of search (even after recordation of the conveyance to the mortgagor), however, its re-recording is desirable. Determining the relative priority of the mortgage with other claims which accrued prior to the conveyance to the mortgagor, as, for example, a judgment against the mortgagor, requires special study.

STANDARD 16.3

DEED FROM MORTGAGOR TO MORTGAGEE

(1) MARKETABILITY IS NOT IMPAIRED BY THE FACT THAT TITLE IS DERIVED THROUGH A CONVEYANCE FROM AN OWNER TO THE HOLDER OF A MORTGAGE. IN THE ABSENCE OF AN AFFIRMATIVE INDICATION OF RECORD THAT THE CONVEYANCE WAS GIVEN AS ADDITIONAL SECURITY, OR THAT THE MORTGAGOR HAS OR CLAIMS GROUNDS FOR SETTING ASIDE THE CONVEYANCE, INQUIRY IS UNNECESSARY, WHETHER TITLE IS HELD BY THE MORTGAGEE OR BY A GRANTEE FROM HIM.

(2) MARKETABILITY IS NOT IMPAIRED BY AN UNDISCHARGED MORTGAGE WHERE AN UNQUALIFIED CONVEYANCE HAS BEEN MADE BY A PERSON WHO WAS BOTH RECORD HOLDER OF THE MORTGAGE AND RECORD TITLE HOLDER. INQUIRY, OR DISCHARGE OF THE MORTGAGE, IS UNNECESSARY UNLESS THE RECORD AFFIRMATIVELY DISCLOSES AN INTENTION THAT THE MORTGAGE CONTINUE IN EFFECT.

Authorities: Basye, § 281; Patton, §§ 425, 564.

Similar Standards: Conn., 23, 76; Fla., 9.7; Iowa, 4.3; Kan., 4.1; Mich., 8.5; Minn., 34, 38; Mont., 13; N.Y., 4; N.D., 1.09; Ohio, 3.14; Okla., 20; S.D., 16; Wash., 28; Wis., 14.

[Note: Existing standards give various treatments to the two prongs of the mortgage "merger" problem. The variety apparently does not reflect differences in the law as to the avoidability of the conveyance or continuance of the mortgage, but rather differences in opinion as to where to try to hold the line on inquiry and correction. There is no logical compromise of the positions of the standard; existence of such a standard should prove highly persuasive with a court considering avoidance of the conveyance or continuance of the mortgage as against a purchaser or encumbrancer.]

Comment: (1) Deeds from mortgagors to mortgagees are often suspected of being given for additional security or of being voidable at the instance of the mortgagor. Protection of the mortgagor and equities as between him and the mortgagee, however, are one thing; the duties of inquiry and rights of a subsequent purchaser or encumbrancer are another. The standard is calculated to declare those duties and rights. Strict observance of the standard is of especial importance. "Affirmative indication" means a positive assertion in the conveyance that it is redeemable, an extension of the mortgage recorded after the conveyance, a subsequent sale of the property by the mortgagor, or other unequivocal showing of record that the parties treat the mortgage relation as continuing.

(2) A conveyance from mortgagor to mortgagee often results in the mortgage going undischarged of record. Although termination of the security interest is usually said to result from "merger," more pertinent questions are whether the conveyance was accepted in payment of the mortgage, and whether the mortgagee can assert continuance of the mortgage against his grantees, immediate or remote. The immediate grantee should insist upon discharge of the mortgage. A subsequent purchaser may rely, of course, upon any indication that the conveyance to the mortgagee was given in payment of the debt or to discharge the mortgage. By his conveyance, the mortgagee confirms that effect. In the absence of any such indication, an unqualified conveyance by the mortgagee (one not reciting that it is subject to the mortgage, or excepting the mortgage from warranties, or in the form of a quitclaim) reliably manifests termination of the mortgage, quite apart from merger. Determining the effect upon interests or claims intervening between the mortgage and the conveyance to the mortgagee requires special study.
MODEL TITLE STANDARDS

STANDARD 16.4

IRREGULARITIES AND DISCREPANCIES IN DISCHARGES

A DISCHARGE OF A MORTGAGE IS SUFFICIENT NOTWITHSTANDING ERRORS IN DATES, AMOUNTS, BOOK AND PAGE OF RECORD, PROPERTY DESCRIPTIONS, NAMES AND POSITION OF PARTIES, AND OTHER INFORMATION, IF, CONSIDERING ALL CIRCUMSTANCES OF RECORD, SUFFICIENT DATA ARE GIVEN TO IDENTIFY WITH REASONABLE CERTAINTY THE SECURITY INTEREST SOUGHT TO BE DISCHARGED. A QUITCLAIM DEED IS SUFFICIENT AS A DISCHARGE IF, FROM CIRCUMSTANCES OF RECORD, IT CAN BE INFERRED WITH REASONABLE CERTAINTY THAT DISCHARGE WAS INTENDED.

[Special Note: Although discharge procedures and instruments are prescribed by statute and vary from state to state, the standard is believed to be appropriate in most jurisdictions. An efficient corrective for discharge problems is a reliable special mortgage limitation statute. See the Model Mortgage Limitation Act; Improvement of Conveyancing by Legislation, p. 142; Basye, §§ 71-128. If such a statute exists, a standard should point out that discharge problems are completely obviated insofar as barred mortgages are concerned. Other discharge points commonly covered by standards, but requiring local treatment, are discharges by (1) some but not all plural mortgagees, (2) corporate officers not authorized to convey land, (3) "local" executors and administrators, and (4) "foreign" representatives.]

Authorities: Basye, §§ 353.

Similar Standards: Colo., 8, 85; Conn., 21, 46; Idaho, 4; Iowa, 4; Kansas, 4, 2; Mich., 8; Mo., 12; Mont., 8, 59; Neb., 5; N.M., 14; N.Y., 14; Okla., 12, 22; S.D., 18; Utah, 37; Wash., 13, 14, 15; Wis., 6, Wyo., 7.

Comment: In the usual case, a mortgage discharge or release instrument merely evidences a termination of the security interest which has already occurred by reason of payment. Hence the discharge and its record should not be held to the more exacting standards appropriate for operative instruments. In any case, identification of the mortgage discharged or released, rather than description of the parties, obligation, or property, is the important matter. A quitclaim deed is an effective release or discharge if that operation was intended for it. Some indication of intention other than the inference which arises from recording the quitclaim should be required, however.

STANDARD 16.5

TITLE THROUGH FORECLOSURE; FAILURE TO RELEASE

MARKETABILITY OF A TITLE DERIVED THROUGH FORECLOSURE OF A MORTGAGE IS NOT IMPAIRED BY FAILURE TO RELEASE OF RECORD THE INSTRUMENT WHICH CREATED THE INTEREST FORECLOSED, OR ANY INSTRUMENT WHICH CREATED A JUNIOR LIEN OR INTEREST WHICH WAS EXTINGUISHED BY THE FORECLOSURE.

Authorities: Patton, §§ 584-86.

Similar Standards: Ind. (Allen County), 30; Neb., 18; Ohio, 4, 5; Wyo., 19.

Comment: Release of the instrument foreclosed, or instruments which created interests wiped out by foreclosure, is an unnecessary formality. The situation does not raise the question of merger which arises in cases of voluntary conveyances to the security holder (see Standard 16.3). Continuance of the foreclosed security interest as security for any deficiency, and the revival of junior security interests, are dependent upon reacquisition by a person obligated to discharge the superior or junior obligation. Inquiries are unnecessary unless the record discloses such reacquisition. If the record discloses reacquisition but continuance or revival are determined not to exist, explanation of record is desirable but releases are not mandatory.

STANDARD 16.6

RELEASE OF ASSIGNMENT OF RENTS

FAILURE TO RELEASE AN ASSIGNMENT OF RENTS DOES NOT IMPAIR MARKETABILITY IF, FROM THE RECORD, IT CAN BE DETERMINED OR INFERRED WITH REASONABLE CERTAINTY THAT THE ASSIGNMENT WAS GIVEN AS ADDITIONAL SECURITY FOR AN OBLIGATION SECURED BY A MORTGAGE WHICH HAS BEEN DISCHARGED OF RECORD.

Authorities: Basye, § 353.

Similar Standards: Colo., 10; Conn., 29; Mont., 10; Okla., 13; Wyo., 10.

Comment: It is good practice to insert in a rental assignment a provision that release or discharge of the mortgage securing
the obligation for which the assignment is also security shall operate as a release of the assignment.

STANDARD 16.7

RELEASES; CORRECTION OR RE-RECORDED MORTGAGE

WHERE A MORTGAGE IS FOLLOWED BY ANOTHER WHICH CAN BE DETERMINED FROM THE RECORD TO HAVE BEEN GIVEN TO CORRECT OR MODIFY THE FORMER, OR TO BE A RE-RECORDING OF THE FORMER, OR TO SECURE THE SAME OBLIGATION, MARKETABILITY IS NOT IMPAIRED BY A FAILURE TO DISCHARGE ONE OF THE MORTGAGES IF THE OTHER IS DISCHARGED OF RECORD.

Authorities: Basye, § 353; Patton, § 567.

Similar Standards: Colo., 7; Conn., 24, 25; Mich., 8.3; Minn., 58; Mont., 7; N.Y., 13; N.D., 3.02; Okla., 11; Wash., 12; Wyo., 6.

Comment: Although the record of a "correction" mortgage does not, of itself, prove that the correction or modification has been effectively made (see Standard 6.5 respecting corrective instruments), by discharging the correction mortgage the mortgagee acknowledges the modification. Hence, the discharge does not leave outstanding any rights under the earlier form. With respect to discharge of the earlier mortgage, conceivably the parties may have been attempting to clear the record of it and to leave in force the correction or re-recorded mortgage. The record and the circumstances of the case will usually reveal that remote possibility, however.

[Alternative 1]

STANDARD 16.8

REFERENCE TO UNRECORDED MORTGAGE

A REFERENCE IN ANY INSTRUMENT IN THE CHAIN OF TITLE TO A MORTGAGE WHICH CANNOT BE IDENTIFIED WITH ANY MORTGAGE IN THE CHAIN OF TITLE DOES NOT IMPAIR MARKETABILITY OR NECESSITATE INQUIRY OR CORRECTIVE ACTION AFTER THE INSTRUMENT IN WHICH THE REFERENCE IS MADE HAS BEEN OF RECORD [See Special Note] YEARS OR LONGER.

Similar Standards: Fla., 9.3; Iowa, 4.1; Kan., 4.3; Mich., 8.4; Minn., 2.5; Mo., 5; N.Y., 2.5.

[Special Note: Although the second alternative is preferable to the first, the necessity of adopting either seems unfortunate because there are several good statutory remedies for the problem to which they are addressed. The Model Act Concerning Indefinite References would permit disregard of such references to mortgages and various other interests without regard to the length of time the reference has been of record. See Improvement of Conveyancing by Legislation, p. 103. Special statutes limiting the time for enforcement of such ghostly mortgages have been enacted (see, for example, Iowa Code Ann. § 614.21). Either the Model Mortgage Limitation Act or the Model Marketable Title Act would eliminate the problem after the respective periods specified in those acts. See Improvement of Conveyancing by Legislation, p. 142 and p. 6. In the absence of statute (traditional statutes of limitation have no bearing), the second alternative is justified by two considerations: (1) enlightened courts might well hold that, in view of the standard, the reference does not impose a burden of inquiry after the period specified, and (2) if a period longer than the life of most mortgages is specified, any risk in the situation is negligible.]
MODEL TITLE STANDARDS

WITH THE DOMINANT OR SUPERIOR INTEREST ARE IMMATERIAL TO THE INTEREST BEING TRANSFERRED AND TO ITS TITLE. ABSTRACT ENTRIES, AND REFERENCES IN TITLE OPINIONS OR CERTIFICATES, PERTINENT TO SUCH ENCUMBRANCES AND PROBLEMS ARE UNNECESSARY AND IMMATERIAL.

Similar Standard: Neb., 41.

Comment: Under the best abstract and examination practice, frequent use is made of the technique of showing the inception of dominant or superior interests and labeling them, in effect, "Not Followed Out." Neither abstract nor opinion is cluttered with encumbrances upon or the devolution and problems of the superior interest. In the most common case of easements, the client is not only not prejudiced—he is not interested. If he should become interested, as in an action to clear title, he can and must have the abstract continued and examination made to date.

Note on Ancient Undischarged Mortgages: Standards often prescribe a period after which undischarged mortgages may be passed without requirement. Various considerations, such as activity of the title, conveyances not referring to the mortgage, and the period since recordation or maturity of the mortgage, are reflected in such standards. Traditional statutes of limitation have almost no bearing from the title standpoint and, appropriately, are not especially relied upon. In the absence of an effective limitation statute, such a standard is desirable. See Conn., 34, 54; N.Y., 4; Utah, 11; Wash., 11. The only satisfactory solution, however, is statutory. A reliable mortgage limitation act can be shaped in accordance with almost any conception of local policy. See the Model Mortgage Limitation Act, Improvement of Conveyancing by Legislation, p. 142; Basye, §§ 71-128. Further, a good statute is so drawn that its purpose and applications cannot be mistaken. A few standards do, however, call attention to such statutes, and that may be appropriate. See Colo., 24, 40; Ill., 4; Kan., 44; Mich., 8.10; Minn., 25; Mont., 38; Neb., 28; S.D., 19; Utah, 11.

CHAPTER XVII
MECHANICS' LIENS

[It is assumed that there is a mechanics' lien law in force, that it requires a filing or recording of a statement or notice of the lien claimed, and that after the expiration of a fixed period of time, no action can be brought to foreclose it.]

STANDARD 17.1
NO RELEASE OF LIEN NECESSARY

A MECHANICS' LIEN MAY BE DISREGARDED AFTER LAPSE OF THE TIME WITHIN WHICH SUIT FOR FORECLOSURE MAY BE FILED, UNLESS PROCEEDINGS FOR ITS FORECLOSURE HAVE PREVIOUSLY BEEN COMMENCED; AND NO RELEASE SHALL BE REQUIRED BY THE TITLE EXAMINER.

Similar Standards: Idaho, 3; Mich., 15.1; Mont., 51; Neb., 7; Okla., 14; S.D., 21; Utah, 14.

STANDARD 17.2
RECITALS OF OWNERSHIP

THE STATEMENT OF OWNERSHIP IN A MECHANICS' LIEN STATEMENT SHALL BE DISREGARDED BY A TITLE EXAMINER.

Similar Standard: Minn., 77.

Comment: Normally the person who files a mechanics' lien has very little accurate information about the ownership of the property. Any statement he would make would be practically worthless; and, if given evidentiary value, might be regarded as a cloud on the real owner's title.
CHAPTER XVIII
TAX TITLES

[In the standard presented in this chapter, it is assumed that the Model Tax Title Limitation Act is in force. For the text of that act, see The Improvement of Conveyancing by Legislation, p. 183. Of course, the law of tax sales is purely local law; and, therefore, it may be appropriate in particular states to include additional title standards.]

STANDARD 18.1

VALIDITY OF TAX TITLE

IF (A) FIVE YEARS HAVE ELAPSED AFTER THE RECORDING OF A TAX DEED, AND (B) AN AFFIDAVIT OF POSSESSION IN THE FORM REQUIRED BY LAW HAS BEEN FILED BY THE GRANTEE, SHOWING THAT SUCH GRANTEE WAS CONTINUOUSLY IN POSSESSION FOR A PERIOD OF AT LEAST SIX MONTHS SUBSEQUENT TO THE EXPIRATION OF FOUR YEARS AND SIX MONTHS AFTER THE RECORDING OF SUCH TAX DEED, THEN A TITLE BASED UPON THE TAX DEED SHOULD BE APPROVED IN THE ABSENCE OF KNOWLEDGE OF FACTS INDICATING THAT THE AFFIDAVIT OF POSSESSION IS UNTRUE.

Comment: The applicable statute is merely a special act on title by adverse possession. Hence it would make no difference that the tax sale was totally void, or that the tribunal or officer supervising the sale had no jurisdiction in the matter. Essentially the tax deed merely constitutes color of title for a limitation statute with respect to adverse possession.

CHAPTER XIX
BANKRUPTCY

[In most title standards the question of title through a bankruptcy proceeding is not included. A few title standards on bankruptcy are found in Connecticut, Florida, Minnesota, and Utah. Some standards merely state very elementary propositions of bankruptcy law. On the other hand, Connecticut standards on this subject deal with rather minute points of law. It would seem that the kind of standards, and whether any standards at all are to be promulgated, would depend upon local conveyancing practices. Hence, only one standard is presented here. It is assumed, in this standard, that a state "conformity act," such as Minn. Stat. Ann. § 386.45, has been passed.]

STANDARD 19.1

BANKRUPTCY SEARCHES

IT IS NOT NECESSARY TO REQUIRE A BANKRUPTCY SEARCH IN ANY DIVISION OF THE UNITED STATES DISTRICT COURT OTHER THAN THE DIVISION IN WHICH THE LAND IS LOCATED.

Authority: Patton, § 653.

Related Standards: Conn., 41, 49, 63, 69, 70; Fla., 2.1 to 2.5; Minn., 29, 35; Utah, 4; Minn., 29 is identical with this standard.
Note: It is believed to be desirable to include in a set of title standards a few standards concerning Federal tax liens. Generally, these should not merely state the applicable law, but should express the local practice with respect to such liens. While, of course, the law itself is not local, it is believed that the practice with respect to search for Federal tax liens is local and cannot be embodied in a set of model title standards.

Thus Connecticut Standard 38 is in part as follows:

Problem:

... If the account in an estate in excess of $40,000 shows the payment of some amount by way of Federal estate tax, how long must we thereafter consider that the real estate is subject to an inchoate lien for the Federal estate tax?

Recommendation:

... that the payment of the Federal estate tax, appearing in a probate account, be considered final in absence of record facts indicating a further assessment by the Commissioner.

Discussion:

... As to the Federal estate tax, prior to the expiration of the 10 year limitation upon the lien therefor, it is next to impossible to be certain at any time, from facts appearing of record, that no further lien can possibly be asserted by the Commissioner. Even if the estate appears clearly to be under the specific exemption of $40,000, a revaluation may be claimed at a later date so as to create a tax liability. We are forced to take a sound business risk. In the absence of information of any loss ever sustained from such source, the committee has made the above recommendation.

Minnesota Standard 73 is as follows:

That abstracts of title be accepted which contain a ten year judgment and Federal tax lien search.
CHAPTER XXI
SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

STANDARD 21.1
RE-RECORDING PERIOD NOT EXTENDED

WHERE A STATUTE OF THIS STATE REQUIRES THE RECORDING OF A NOTICE OR THE RE-RECORDING OF AN INSTRUMENT WITHIN A DESIGNATED PERIOD OF TIME IN ORDER TO PRESERVE OR SECURE AN INTEREST IN PROPERTY SUCH STATUTE IS NOT A STATUTE OF LIMITATIONS WITHIN THE MEANING OF 50 U.S. CODE § 525, AND THE PERIOD IS NOT EXTENDED BY THIS SECTION.

[It is assumed that one or more of the following model acts is in force: Model Marketable Title Act, Model Lis Pendens Act, Model Act Limiting the Duration of Judgment Liens, Model Act Limiting the Duration of Execution and Attachment Liens, and Model Act Limiting the Duration of Existing Rights of Entry and Possibilities of Reverter When No Notice Recorded. As to the text of these acts, see The Improvement of Conveyancing by Legislation, pp. 6, 126, 165, 166, 215.]


Comment: A statute which requires a re-recording, or a recording of a notice, to protect an interest is not a statute of limitations and not within § 525 of the Soldiers' and Sailors' Civil Relief Act. Thus the forty-year period for recording a notice, as provided in the Model Marketable Title Act, is not extended because of the fact that a person who has a claim is or was in military service.

STANDARD 21.2
JUDICIAL PROCEEDING PRESUMED TO COMPLY WITH ACT

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 AND AMENDMENTS THERETO, ARE SOLELY FOR THE BENEFIT OF THOSE IN MILITARY SERVICE, AND, IF THE COURT HAS PRESUMED TO TAKE JURISDICTION AND THERE IS NOTHING IN THE RECORD THAT WOULD AFFIRMATIVELY INDICATE THAT ANY PARTY AFFECTED BY THE COURT PROCEEDINGS WAS IN MILITARY SERVICE, THE FORM OF THE AFFIDAVIT AS TO MILITARY SERVICE OR ITS ENTIRE ABSENCE FROM THE RECORD DOES NOT JUSTIFY THE REJECTION OF THE TITLE.

Similar Standards: Okla., 9; Colo., 34 and 35.

Requiring compliance are: Fla., 14.1 and 14.2; Iowa, 6.8; Mont., 49.

Comment: It must be recognized that the purchaser of land, under this standard, is assuming the risk of non-compliance with the Soldiers' and Sailors' Civil Relief Act. But under the circumstances stated in the standard, that risk is slight. Just as the purchaser assumes the risk of non-delivery of deeds or incapacity of grantors, so it is reasonable for him to assume this risk. If in any particular situation, there is a substantial risk being assumed by the vendee, he should be so advised.

STANDARD 21.3
EFFECT OF MILITARY SERVICE ON FORECLOSURE UNDER POWER OF SALE

A TITLE THROUGH FORECLOSURE OF A MORTGAGE BY POWER OF SALE, WHERE THERE WAS NO JUDICIAL PROCEEDING TO FORECLOSE, AND SUCH SALE WAS HELD ON OR AFTER THE EFFECTIVE DATE OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (October 17, 1940), IS INVALID AS AGAINST A PARTY IN INTEREST WHO WAS IN MILITARY SERVICE ON THE DATE OF SALE OR WITHIN THREE MONTHS PRIOR THERETO.


Authority: U.S.C.A. Tit. 50, § 532(3).

Comment: Before approving the title the examiner should require either (1) an affidavit showing that no interested party was a member of the armed forces at any time which would bring him within the Soldiers' and Sailors' Civil Relief Act, or (2) satisfactory evidence of a written agreement, as provided by § 517 of the Act, authorizing such foreclosure, as against a person in the armed forces.
CHAPTER XXII
MISCELLANEOUS

STANDARD 22.1
NON-JURISDICTIONAL DEFECTS IN COURT PROCEEDINGS

Defects or irregularities in court proceedings not involving jurisdiction should be disregarded. Among such matters may be mentioned misjoinder or parties or actions and existence of other than jurisdictional grounds for demurrer.

Similar Standards: Minn., 56; Mont., 3; Okla., 8; Wyo., 5.

STANDARD 22.2
FAILURE TO RELEASE NOTICE OF LIS PENDENS

An unreleased notice of the pendency of proceedings does not impair marketability after the noticed proceedings have terminated.

[Special Note: The standard should be correct under any of the statutory lis pendens systems, including those in which recorded notices have functions and effects somewhat beyond the giving of notice of the proceedings. The effect of the recorded notice never outlasts the suit. See, for example, Stone v. Lacy, 245 Ala. 521, 17 So.2d 865 (1944); Jernelson v. Bradley, 306 N.Y. 511, 127 N.E.2d 313 (1955). A statutory limit upon the effective duration of recorded notices is much to be desired and, of course, makes possible a different standard. See Basye, § 136. For a draft statute containing this feature and various other points of title significance, see the Model Lis Pendens Act, Improvement of Conveyancing by Legislation, p. 126.]

Authors: Basye, § 136; Patton, §§ 580, 652; Merrill, Notice (1952), §§ 1141-92.

Similar Standards: Conn., 26; Mont., 61; Neb., 6; N.Y., 19; S.D., 20; Wis., 7.

STANDARD 22.3
QUITCLAIM DEEDS

The fact that a conveyance necessary to the chain of title, including the conveyance to the proposed grantor, is a quitclaim deed does not impair marketability or necessitate inquiry or corrective action.

Authors: Patton, § 16; Powell, Real Property (1958) § 918.

Similar Standards: Iowa, 4.2; Neb., 52; N.D., 1.07, 1.071.

[Special Note: The standard is not based upon statute. Statutes which improve the position of the quitclaim grantee (e.g., Fla. Stat. Ann. § 695.01; Minn. Stat. Ann. § 507.06) may be meritorious, but are not necessary to adoption of the standard. Similarly, differences in the case law treatment of the quitclaim grantee do not affect the standard. Any comment to the standard, however, must be tailored in accordance with the local case law.]

Comment: Quitclaim deeds are sometimes employed as releases, sometimes to achieve a desired absence of warranty, and sometimes for no particular reason. An occasional court has viewed the use of such a deed, when it is used as a primary conveyance, as indicating a lack of confidence in the title which should place the grantee on notice of prior "equities" or claims, or even of unrecorded instruments. That notice is never extended, however, to a taker with warranty from the quitclaim grantee. Such a taker is, at least, in the position of a purchaser-without-notice from a purchaser-with-notice. Hence, in examining for a taker with warranty, the examiner may ignore the quitclaim character of conveyances in the chain, including the conveyance to the present owner. Inquiries, and corrective action such as recording
affidavits against unrecorded interests, and even speculation as to why the quitclaim was used, are fruitless. The few situations in which the character of the conveyance does make a difference (see, e.g., Standard 16.3, respecting mortgage mergers) are diagnosed from the situation and not from the type of conveyance.
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