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TRANSFERRING NORTH CAROLINA REAL ESTATE PART I: HOW THE PRESENT SYSTEM FUNCTIONS

DALE A. WHITMAN*

Let me introduce our hero: Tom Taylor, who is newly married and busy acquiring possessions. He is about to buy two of the most expensive: a new car and a home.

The car Tom selects is a luxury model from the local dealership of one of the major auto manufacturers. The price is four thousand dollars. Tom's ten-year-old clunker suffices for a five-hundred-dollar down payment with the remainder of the price being financed over a three-year period. The entire transaction is consummated in approximately an hour, and, of course, neither of the parties is represented by counsel. Tom drives away in his new limousine having been assured by the dealer that the certificate of title will arrive from the Department of Motor Vehicles within a few days.

Later, in the less pressured atmosphere of his own apartment, Tom examines more carefully the papers he signed. He notes that (as seems universally true) he is going to pay a bit more than the stated four-thousand-dollar price. Specifically, there is sales tax of eighty dollars;¹ a title transfer and registration fee of two dollars;² and the ubiquitous finance charge, tantamount to interest, which in the case of Tom's purchase runs about five hundred dollars. Although the finance charge seems exorbitant and the sales tax is irritating, Tom observes philosophically that at least one can hardly complain about a mere two-dollar charge to assure one's title to such a large investment.

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¹ N.C. GEN. STAT. § 105-164.4 (Supp. 1969).

² N.C. GEN. STAT. § 20-85 (1965) (the two-dollar figure includes one dollar that is levied as a driver-education fee.).

Tom's next major purchase is a residence. This decision seems more weighty, and Tom and his wife spend several weeks acquainting themselves with the local real estate market. They finally settle on what seems to them the best compromise of size, design, amenity, convenience, and price: a five-year-old split-level selling for twenty thousand dollars. Tom signs a contract to purchase and gives the realtor with whom the house is listed a one-thousand-dollar "earnest money" deposit. The realtor offers to help arrange financing, and the local savings and loan association, after making an appraisal and credit check, commits itself to loan ninety per cent of the twenty-thousand-dollar price. The commitment assumes that a private mortgage insurance firm will guarantee to the lender that the "top twenty per cent" (*i.e.*, the four-thousand-dollar difference between the fourteen thousand dollars the association would lend without mortgage insurance and the eighteen thousand dollars they are willing to loan with insurance) will be recouped if, in the event of foreclosure, the property does not yield enough to cover the loan's outstanding balance.

Since everyone appears to assume that an attorney will be required to search the title and handle the sale, Tom is willing to retain one. He is not personally acquainted with any lawyers, so he asks the loan officer at the savings and loan association for a recommendation and follows the suggestion he is given. The attorney he contacts informs Tom that the deal can be closed in about two weeks. When the date set for closing arrives, Tom appears at the lender's offices prepared to write a check for the additional one thousand dollars remaining to be paid as a down payment on the purchase price. Although the attorney has previously mentioned that there will be some additional charges, Tom is aghast when informed that he owes an additional 908 dollars based on the following statement:

Mortgage insurance premium ³	\$360.00
Attorney's fee ⁴	225.00

³ This amount is paid to the private mortgage insurance company and is usually computed at the rate of two per cent of the loan amount. Some mortgage insurers give the borrower the option of paying this premium at the rate of one-fourth of one per cent per year for ten years, but no one has bothered to explain this option to Tom.

⁴ The attorney has charged in accord with his county bar association's suggested minimum fee schedule, which calls for an amount equal to one percent of the first twenty thousand dollars of purchase price and one-half of one per cent of the next eighty thousand dollars, with an additional twenty-five dollar fee for supervision of the settlement.

Title insurance premium ⁵	45.00
Appraisal fee	25.00
Loan origination fee ⁶	180.00
Recording fees	8.00
Survey	45.00
Transfer tax ⁷	20.00
TOTAL	<u>\$908.00</u>

Fortunately, Tom has sufficient savings to cover these unexpected costs, and the closing is held without incident. That evening, as he and his wife sit among the packing crates in their new home, Tom broods about his experience. "The lending institution," he thinks, "is getting a bit more out of me than their quoted interest figure would suggest. Financing is usually expensive, but why do all of these charges have to be loaded on at the front end? When I bought my car, the lender certainly didn't want his finance charges in advance."

Tom's thoughts then turn to the cost of transferring and assuring the title to his new property. "It seems irrational—the title transfer and protection for my new car cost only two dollars, but those charges for the house amounted to 343 dollars. I can see why a somewhat greater charge is justified for houses than cars, but this is ridiculous. Where are the economies of scale?"

Before attempting to answer the questions Tom has raised, let me add another chapter to the story. The events described thus far are entirely typical of transactions repeated with only minor variations thousands of times each year. But the situation which follows is atypical, occurring in only a tiny fraction of one per cent of all home purchases. Nonetheless,

⁵ The premium for a mortgagee's policy is two dollars and fifty cents for every one thousand dollars loaned. This rate appears to be uniformly followed by companies writing title insurance in amounts up to fifty thousand dollars in North Carolina. See LAWYERS TITLE INS. CO., TITLE INSURANCE RATES (1962); FIRST TITLE INS. CO., SCHEDULE OF RATES AND CHARGES (undated). This rate is probably typical of that charged by companies operating throughout the nation under the "approved attorney" system.

⁶ There is no point in trying to ascribe this fee to any particular service rendered by the lender. It is in reality a loan discount intended simply to increase the lender's yield or effective interest. It is limited by statute to one per cent of the amount loaned. N.C. GEN. STAT. § 24-10 (Supp. 1969).

⁷ Prior to January 1, 1967, a transfer tax of fifty-five cents per five hundred dollars of purchase price was imposed on real estate transfers by the federal government. Upon the repeal of the federal tax, a number of states, including North Carolina, substituted taxes at an identical or similar rate. N.C. GEN. STAT. §§ 105-228.28-36 (Supp. 1969). The rate in North Carolina is fifty cents per five hundred dollars. *Id.* § 105-228.30.

its consequences, as illustrated through the following telephone conversations, are instructive:

Hello, counselor? This is Tom Taylor calling. You may recall representing me in buying that house on Oak Street last month. Well, I have a problem. There's an elderly lady sitting in my living room who claims she has the right to live in my house for the rest of her life. She and her husband apparently lived here several years ago; now he's dead, and she has some kind of court order which appears to give her the right to the house. You must have missed this in your title search, and I hope that you'll get busy and straighten it out immediately.

The attorney is patient but not helpful. He carefully explains to Tom that the stranger's claim is apparently based on a statutory right similar to common-law dower.⁸ Although he is sympathetic, he has no legal obligation to come to Tom's aid for at least three reasons: First, his title opinion was expressly limited to matters appearing in the public land records, which contained no information about this purported widow of the prior owner. Second, he cannot be guilty of malpractice since that would require proof of negligence and he conformed in every particular to the standard of skill and care of a prudent lawyer; indeed, no degree of care would have been likely to disclose the instant claim. Third, the attorney's title opinion was addressed to the savings and loan association, and not to Tom. Thus, any liability would run only to the lender (if and when it sustained a loss).

In despair, Tom mutters, "I thought you fellows had insurance to cover situations like this." He receives another patient explanation: "The insurance, Tom, is *liability* insurance. The company will make good a loss only if the attorney is himself legally obligated to do so—and that is not the case here." Tom's attorney, in conclusion, suggests that there may well be legal defenses to the widow's claim and that if Tom wishes to retain him, the attorney will be happy to investigate them. Tom declines, not very politely.

Yet hope springs again in Tom's breast. He remembers the title insurance! Quickly he places a call to the insurance company: "I want to report a claim." The clerk listens to Tom's story, pauses to locate the file on his property, and responds with a crushing blow: "I'm sorry, Mr. Taylor, but the policy you purchased was a mortgagee's policy, not an

⁸ See notes 63-66 & accompanying text *infra*.

owner's. It covers only loss sustained by the lender. I'm afraid we can take no action unless the lender makes a claim based on an actual loss to it."

This situation is the stuff of which the legal profession's public image is made, at least in the residential-real-estate field: Custom and law seem to conspire against the layman to charge him much but to offer him little protection in return. The attorney's view is, of course, quite different. But it is undeniable that the present system creates its share of public resentment and that it fails to offer the degree of economy or protection we might reasonably expect from a method of conveyancing and title assurance.

SURVEYING THE SYSTEM

There is plenty of public discontent with the way real estate transactions are handled. The lawyer, of course, is only one of the several objects of criticism. Many sellers are offended to learn that the broker takes six per cent of the sales price as his commission; this is particularly irritating in those instances when the payment of the commission has the effect of wiping out the seller's expected profit on the sale. Institutional lenders, in these days of high interest and "discount points," fall under severe criticism from both buyers and sellers. Indeed, compared with a typical real estate commission or the amount commonly collected as "points," the attorney's fee seems rather modest. Yet there is an increasing resentment sensed by members of the profession against allegedly high fees for little service. Some attorneys already fear that unless present practices are reformed the public will find an alternative to the lawyer's role in real estate transfers.⁹

It is the purpose of this article to evaluate these criticisms in a systematic way and to examine specifically the nature and quality of legal services rendered in North Carolina real estate transactions in relation to the fees charged for those services.

⁹ Several members of the Real Estate Committee of the North Carolina Bar Association have expressed this view to the author. Compare the account of the Arizona lawyer-realtor battle in M. BLOOM, *THE TROUBLE WITH LAWYERS* ch. 6 (1968). Bloom's book, written from a trenchant antilawyer viewpoint, has itself probably been a factor in the declining public confidence in the profession. More scholarly accounts of the Arizona dispute—which resulted in the approval, by a four-to-one public majority, of a constitutional amendment effectively excluding lawyers from routine real estate transactions—are found in Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A.J. 139 (1963); Riggs, *Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment*, 37 S. CAL. L. REV. 1 (1964).

When the present study was undertaken, there were virtually no available data on the way North Carolina lawyers handle real estate matters.¹⁰ The author therefore undertook to make a survey of the state's attorneys. The scope of the survey was not as inclusive as might have been ideal, but its results are believed to be generally indicative and representative of practices within the state. The following procedure was used: A twelve-page questionnaire requesting detailed information about real estate practice was prepared. The North Carolina Bar Association had recently appointed a subcommittee to study the role of the lawyer in real estate transactions, and that subcommittee met with the author several times to make recommendations and suggest revisions of the questionnaire. The subcommittee's work was helpful, and the resulting draft of the questionnaire was surely more germane and coherent than would otherwise have been the case.¹¹

Nine North Carolina counties were then chosen as the targets for distribution of the questionnaires. The counties were selected to offer as wide a range as possible of geographic and urban-rural settings within the state.¹² A mailing list was compiled from sources made available by the North Carolina State Bar, the North Carolina Bar Association, and the state Attorney General's office. The list was composed with considerable care with the aim of including on it every private practitioner of law in the nine selected counties. The resulting list contained slightly less than one thousand names, or about one-fourth of the licensed attorneys in the state. Questionnaires were then mailed to all persons on the list.

About four hundred responses to the mailing were received, and about half of these were from lawyers who did no real estate work or did so little that they felt they could not appropriately answer the questions. Thus, a total of 197 questionnaires remained for study. The data from them were card-punched and tabulated by computer; the results form the statistical backbone of the discussion which is to follow.

¹⁰ A general survey of North Carolina practitioners was conducted in 1966 for the N.C. Bar Association, but the information it produced on real estate practice was minimal. See material cited note 13 *infra*.

¹¹ The author is particularly grateful to Louis C. Allen, Jr., Esq., of Burlington, North Carolina, chairman of the subcommittee, for his unflagging encouragement and interest. The views expressed in this article are, however, only those of the author and not necessarily those of the subcommittee or any of its members.

¹² The counties chosen, by geographic distribution, were as follows: Eastern—Craven, Wayne, Brunswick; Central—Durham, Lee, Richmond; Western—Buncombe, Mecklenburg, Wilkes.

It must be emphasized that no claim of complete generality is made for the statistics derived from the survey. The nine counties surveyed were selected arbitrarily with no bias other than to include a spectrum of statewide conditions. But there was obviously some degree of self-selection by the attorneys who received the questionnaire. It is not possible to say whether the more than five hundred attorneys who received questionnaires and did not return them failed to do so because they did no real estate work, because they had so much (real estate?) work to do that they had no time to answer questionnaires, or simply because they forgot. Thus, it is possible that the data would have been somewhat different if every attorney in the state had been compelled to answer the questionnaire as fully as possible. Nevertheless, the results of the present limited survey seem quite valuable. The reader has now been warned of the statistical perils, and they will not be adverted to again.

The remainder of the first part of this two-part article will be concerned with the actual services attorneys perform in connection with real estate transfers—specifically title search, the “closing” process, and the procurement of title insurance. The second part, which will appear in the final issue of this volume of the *North Carolina Law Review*, will treat the ethical and financial problems confronting the real estate practitioner and will discuss some avenues to reform of the present system. The survey and this article discussing it necessarily do not deal with many types of real estate practice. For example, no attempt has been made to investigate representation in zoning or other land-use proceedings; neither residential nor commercial leases have been considered; financing of commercial and income-producing properties is dealt with only tangentially. The major focus of the study has been on the transfer of title to real property with special emphasis on the transfer of the single-family home.

The attorneys responding to the questionnaire practiced under a variety of arrangements. Fifty-five per cent of those responding were partners in law firms, twenty per cent were sole practitioners, and eleven per cent were associates employed by an attorney or a partnership. Various other practice arrangements account for the balance of the respondents. These proportions are probably quite close to the distribution of practice arrangements among the totality of North Carolina attorneys.¹³ The geographical

¹³ See generally, NORTH CAROLINA BAR ASS'N, SUMMARY REPORT OF NORTH CAROLINA BAR ASSOCIATION SURVEY OF THE ECONOMICS OF LAW PRACTICE 1-16 (1966).

distribution of the respondents is shown in the footnote.¹⁴ The responses appear to represent a group of lawyers with a fairly intensive real estate practice: the average respondent reported spending 11.6 per cent of his practice time on single-family home purchases, and an additional 14.4 per cent of his time on other real estate work, for a total of twenty-six per cent.

The questionnaire drew a sharp distinction, at many points, between single-family home purchases and other real estate transactions. The single-family purchase is an ideal vehicle for study since it tends to follow a standard, repetitive pattern. By contrast, the phrase "all other real estate work" was defined by the questionnaire as including representation of builders and developers in acquiring acreage for subdivisions; obtaining construction and permanent financing for developers; overseeing sales and leases of rental and commercial property; and obtaining refinancing or secondary financing of homes (whether or not owner-occupied) when there is no transfer of title. Clearly there is so much diversity in this latter category that only rather general information could be acquired about it in a questionnaire of moderate size.

RESULTS OF THE SURVEY

Roles, Time, and Fees

The single-family home purchase is the stable and staple business of many real estate attorneys. Rather surprisingly, our respondents indicated that home-buyers themselves are the most frequent sources of this business although other sources, almost as productive, are developers or sellers, lenders, and brokers.¹⁵ Typically only one attorney is involved in

¹⁴	Brunswick	5	Buncombe	37
	Craven	7	Mecklenburg	94
	Wayne	11	Wilkes	8
	Durham	25	Other	2
	Lee	4	Total	<u>197</u>
	Richmond	4		

¹⁵ The questionnaire asked how many real estate transactions had been referred to the attorney during the preceding twelve months by various parties. The mean responses were as follows:

	<i>Single-family home purchases</i>	<i>All other real estate work</i>
By broker	9.5	2.6
By lender	9.4	3.9
By developer or seller	9.4	5.8
By buyer	13.4	7.8
Other	1.8	2.4
Do not know who selected attorney	2.9	1.3

the house sale; the median estimate given by our respondents was that 78.9 per cent of such transactions were handled by only one lawyer. The attorney's activities in a home sale may be broken into two categories: title examination and the mechanics of closing. Under the category of "title examination," the attorney will visit the Register of Deeds office in the county where the land is located and make the customary search of grantor and grantee indices and books of recorded documents. He will check with the superior court clerk's office to determine whether any docket entries or other possible recorded claims impose liens on the land. He will determine at the appropriate county and municipal offices whether there are liens existing for delinquent taxes or assessments. He may examine a survey to determine whether encroachments or easements raise title problems, and he may go so far as to view the property itself. Under the heading "the mechanics of closing," the attorney may prepare such documents as a deed, application for title insurance, title certificate, and closing statement. He may spend some time in explaining these documents to the parties, and he will attend a formal closing at which the necessary instruments will be signed and acknowledged. He will then attend to the recording of the appropriate documents and their distribution to the parties entitled to them. The respondents in our survey were asked to estimate the number of hours attorney's work involved in the various activities of a single-family-home-purchase transaction. The median of their responses is shown below:

Preparing & examining abstract of title	3.6 hours
Preparing documents	1.0
Counselling & negotiation	.49
Attending closing & recording documents	.86
	<u>6.1 total hours</u>

The figures given, including the figure for "total hours," are only medians; obviously there is great room for variation from one transaction to the next. For example, a particular title examination may consume inordinate time because of multiple parties or parcels involved in the title chain, apparent missing links, or other problems. In another transaction the title chain may be unusually simple and require only a few minutes to trace. Similarly, a party to the transaction who seems unusually dense or obstreperous may require a great deal of counselling and explanation, while another client may be both cooperative and

sophisticated and therefore require no counselling at all. Moreover, the hourly estimates given by the respondent attorneys may not be highly accurate; about three-quarters of the respondents admitted that they kept records of time spent on single-family transactions only occasionally or not at all. Nevertheless, the figures given in the table above probably constitute a fair estimate of the time actually involved in these transactions.

The attorney's fee for this set of services is ordinarily paid by the home buyer. Ninety per cent of the survey respondents indicated that they followed the local bar's suggested minimum fee schedule in billing for single-family-home-purchase services. These fee schedules vary from county to county but usually provide for a fee of one per cent of the first twenty thousand dollars of purchase price and a somewhat reduced percentage of the price in excess of the twenty thousand dollars, plus a small fee for handling the closing—about twenty-five dollars. The attorney will thus receive a 225 dollar fee for handling the sale of a twenty-thousand-dollar house, and that price is probably toward the lower end of the range of housing prices in many communities of the state today.¹⁶ If the 6.1 total-hour figure discussed above is fairly representative, the attorney is earning about thirty-five dollars per hour. Such a figure is not extraordinarily high, but most attorneys would probably consider it an adequate level of compensation. The remainder of this part of the article will examine each of the attorney's functions, along with some specific topics related to these functions, in this transaction in some detail in order to discover just what the home buyer is purchasing for the fee he pays.

¹⁶ Sales prices of homes in the South have tended to run substantially below the national average. The data for 1968 are:

	<i>Median price— new houses</i>	<i>Median price— existing houses</i>
United States	\$24,700	\$20,050
South	21,500	18,980.

See HUD, 1968 HUD STATISTICAL YEARBOOK 67-68. Although North Carolina cities are among the lowest housing-costs areas of the nation [see *Why Housing Costs are Going Through the Roof*, TIME, Oct. 31, 1969, at 88], costs have risen at a national rate of about eight per cent per annum recently, and North Carolina prices have probably gone up at least proportionately. See *generally House Hunting? Costs You Face, City by City*, U.S. NEWS & WORLD REPORT, May 18, 1970, at 81-82. The National Association of Home Builders estimated median 1960 prices of new homes at 25,000 dollars for the South, an increase of sixteen per cent over the 1968 HUD estimate! See *Inflation: A Futile Search For a Home*, N.Y. Times, Mar. 2, 1970, at 1, col. 3 (City ed.). There is little reason to suppose the inflationary trend has abated during 1970.

The Negotiation Function

Although the median estimate given by our respondents for "counseling and negotiation" in single-family transactions was .49 hours, it is apparent that the bulk of this effort goes into counseling. Attorneys are involved in very little negotiation, for reasons that are not hard to discover. Our respondents were asked the percentage of single-family transactions in which they negotiated on the buyer's behalf with the seller before a contract of sale was signed. The average response was 5.3 per cent of all transactions. At first blush, this miniscule percentage of negotiated contracts seems strange in light of the fact that 88.7 per cent of the respondents considered the home buyer to be a client in the transaction. The explanation, of course, is that in the vast preponderance of cases the contract of sale has already been executed when the attorney is first consulted. The contract commonly takes the form of an "offer to purchase" prepared by the real estate salesman on a printed form in the buyer's behalf and submitted for approval to the seller. With the addition of the seller's signature, the offer becomes a binding contract. The salesman is exceedingly unlikely to encourage the buyer to consult an attorney for advice before the offer is submitted since the attorney might suggest changes (or, as the salesman would say, "flyspeck") that could delay or deter the transaction. Whether the broker or salesman is engaging in the unauthorized practice of law by preparing the contract and negotiating its terms has been a subject of great dispute and much litigation in other jurisdictions.¹⁷ This matter will be treated in Part II of this article; for present purposes, it is enough to observe that the contract will probably be fully formed before the attorney sees it, and there is consequently very little in the way of negotiation to be done with the seller.

Somewhat more remarkable is the response of the attorneys surveyed when asked in what percentage of single-family transactions they negotiated on the buyer's behalf with a lender before a loan was made. The average response was a mere 4.3 per cent of the cases. It is common for the real estate salesman, with both new and used properties, to arrange a tentative commitment with a local lender before beginning efforts to sell the property. But since the salesman's primary interest is in selling the property rather than in assuring the buyer the best possible financing arrangements, there is no reason to suppose that the salesman will exert unusual effort to arrange the most favorable terms that might be found. Many

¹⁷ See, e.g., materials cited note 9 *supra*.

home buyers are inexperienced in real estate financing practices and quite legitimately suppose that their attorneys will be more familiar than themselves with such nuances as interest rates, discount points, acceleration clauses, prepayment penalties, and the like.

Most attorneys are, in fact, familiar with all of these concepts and are quite willing to explain them to buyer-clients if asked to do so. But even the most charitable view of the statistics cited above suggests that the attorneys of North Carolina are not especially eager to intercede in behalf of buyers with the lending institutions. This phenomenon might be explained by the supposition that the attorney does not consider negotiation with lenders to be his role in the transaction; perhaps he does not do it because he is not asked to do it; and perhaps the buyer does not ask him because the buyer is not sufficiently sophisticated to recognize the attorney's abilities in this sphere. A more probable explanation, and one that will be explored in some detail in Part II of this article, is that the attorney considers both the lender and the buyer to be his clients and feels he cannot properly negotiate in behalf of one against the other. In all events, it is clear that negotiation on the buyer's behalf is not an activity which forms a major portion of the attorney's services in the typical single-family transaction.

The Record Title Search

The fundamental core of "title examination" work takes place in the Register of Deeds office. The attorney performs basically three activities: (1) He uses the grantee-grantor index to construct a chain of title, working backward from the present owner. (2) He uses the grantor-grantee index to determine whether any conveyances were made by persons in the chain to persons outside which would have the effect of impairing or destroying the title in the chain. (3) He reads the actual instruments which his search of the indices has disclosed in order to determine their validity, correctness of land description, inclusion of the proper parties, and the like.

The foregoing procedure may not be sufficient in many cases. For example, it may be necessary to check in the superior court clerk's office for probate or intestacy proceedings which fill in apparent gaps in the title chain. The clerk's office must also be checked for information about possible judgment liens, mechanics' and materialmen's liens, special proceedings involving members of the title chain which might have affected

title, public assistance liens, lis pendens, and the like. The activities of the title searcher in the Register of Deeds office and the clerk's office are usually quite standardized and routine; it is reasonable to assume that the vast majority of attorneys performing this work in the state are entirely competent, and they may be forgiven the natural boredom which results from such routine and unchallenging work.

Every title searcher must make an important policy decision with regard to the historical period his search will cover. Obviously, the attorney does not wish to go further back into the past than is necessary to assure a "safe" title search since the effort expended is at a minimum proportional to the period covered. But in many cases adding ten years, for example, to the period of search will mean considerably more than a proportional increase in the attorney's work. Several factors account for this. Instruments recorded during the early part of this century and before are found in the record books in longhand script and are therefore more difficult to read than instruments typewritten and photocopied into the record books by a more modern process. Moreover, the more ancient instruments are far more likely to raise difficulties in interpretation of legal descriptions. It is common to find references to "the old oak tree," "the large white rock by the creek," and other monuments. These references are at best ambiguous and at worst totally unrelatable to the modern topography of the land. The title searcher must somehow decide whether a document containing such language actually affects the title to the land he is searching. In an important and difficult case, this inquiry may require interviews with long-time residents or surveyors familiar with the history of the property. Such problems can arise even with a relatively short period of title search, but the probability of encountering them increases greatly as the search period is extended.

The questionnaire asked each attorney how far back in time his usual title search went in each of two situations: when title insurance is to be obtained and when no title insurance is involved. The reason for introducing the distinction was that many title insurance companies require of their approved attorneys a particular search period; sixty years is probably the most common requirement.¹⁸

The following table shows the search periods most commonly used

¹⁸ See, *e.g.*, LAWYERS TITLE INS. CO., TITLE INSURANCE MANUAL 9 (1962). At least one company has begun leaving the search period to the discretion of the attorneys, evidently in response to some lawyers' practice of making an additional charge for a sixty-year search. Letter from Herbert L. Toms, Jr., President of First Title Insurance Co., to the author, Dec. 1, 1970.

<i>Search Period</i>	<i>Title Insurance to be obtained</i>	<i>No Title Insurance</i>
70 years	3.7%	2.7%
60 years	74.2%	44.4%
50 years	9.5%	11.8%
40 years	4.2%	22.5%
30 years	2.6%	9.6%

by the attorneys answering our questionnaire and indicates the percentage of respondents selecting each search period.

The table suggests the significant influence that title insurance firms have over attorneys in the choosing of a search period. When insurance is to be obtained, nearly three-quarters of the attorneys follow the insurance firm's suggested sixty-year search. When no insurance is involved, the sixty-year search becomes much less popular, and most of the attorneys who forsake it drop back to a forty-year search. This shift may reflect the view of the attorneys that the title insurance companies are unnecessarily cautious and that a search of something less than sixty years provides adequate protection.

If the reader suspects that the choice of a search period is merely the application of a rather arbitrary rule of thumb, he is probably right. North Carolina has no "marketable title" statute,¹⁹ nor does it have even a more limited statute that would cut off such ancient nonpossessory interests in land as rights of entry and possibilities of reverter.²⁰ The only comparable legislation in North Carolina purports to cut off certain ancient mineral interests.²¹ Its constitutionality has never been judicially tested, and it has only a trivial impact on the selection of an appropriate search period.

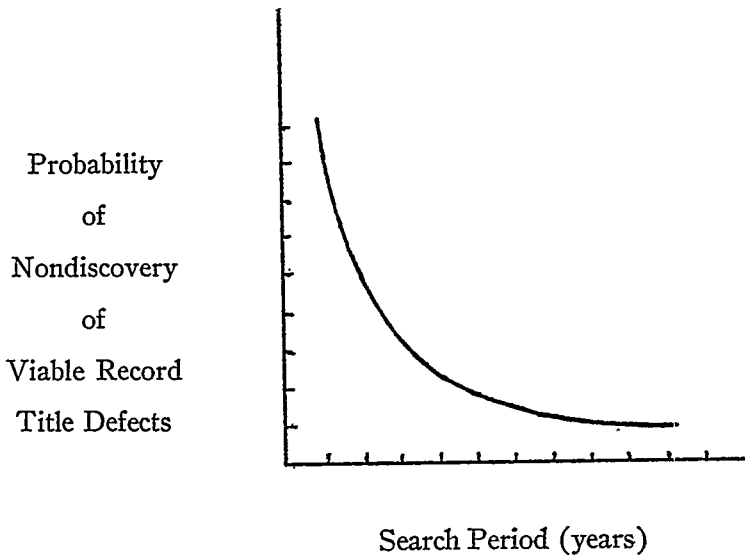
¹⁹ Professor James A. Webster's prodigious efforts to procure the enactment of marketable title legislation have not thus far succeeded. See Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina via Marketable Title Legislation*, 44 N.C.L. REV. 89 (1965). The North Carolina Bar Association has recently shown renewed interest in the topic and in October of 1969 appointed a special subcommittee of the Real Estate Committee to study it. The subcommittee is presently in the process of drafting legislation for submission to the North Carolina General Assembly in 1971. Telephone interview with Charles Rose, Chairman of N.C. Bar Ass'n Real Estate Committee, in Fayetteville, N.C., Feb. 11, 1971.

²⁰ See Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. REV. 807 (1964).

²¹ N.C. GEN. STAT. § 1-42.1 (1969). This statute is a syntactical disaster of unparalleled proportions. In its present form it cannot possibly do anyone any good, and it deserves immediate repeal.

Nor is it profitable to try to determine the appropriate search period by analogy to the statute of limitations on adverse possession of realty. The statute (twenty years when the adverse possessor has no color of title²² and seven years when he has color of title)²³ runs only against possessory interests; therefore no protection is afforded against the assertion of anciently created future interests, severed mineral estates, or easements.²⁴ And the statute's protection is limited to persons who have been in actual and open possession;²⁵ the holder of undeveloped land is likely to get no benefit from it. Nor does the statute run against persons under such disabilities as infancy, insanity, or imprisonment.²⁶

Thus, there is really no statutory standard upon which to base the selection of a search period. Clearly, as the period is extended the risk of failing to uncover an extant title defect is lessened. The relationship between search period and the probability of undiscovered title defects of record might be represented by an exponential curve in the following form.



²² N.C. GEN. STAT. § 1-40 (1969).

²³ N.C. GEN. STAT. § 1-38 (1969).

²⁴ *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950); see N.C. GEN. STAT. § 1-42 (1969) (severed mineral estates). See also *Brown v. Brown*, 168 N.C. 4, 84 S.E. 25 (1915); R. POWELL, REAL PROPERTY ¶ 1024 (abr. ed. 1969) (future interests).

²⁵ The North Carolina statute requires possession under "known and visible lines and boundaries." N.C. GEN. STAT. § 1-40 (1969). See *Mallet v. Huske*, 262 N.C. 177, 136 S.E.2d 553 (1964); R. POWELL, REAL PROPERTY ¶ 1013 (abr. ed. 1968).

²⁶ N.C. GEN. STAT. § 1-40 (1969), gives fee title to an adverse possessor "against

Unfortunately, no data is available (and the author can see no practical way of generating it) which would assign numerical values to the graph above. Ideally, it would be quite helpful to be able to assert that, with a thirty-year search period, the probability of an undiscovered defect would be three per cent, while with a sixty-year search period, the probability would drop to one per cent. Common sense suggests such a trend, but the numerical factors are anyone's guess.

From the client's viewpoint, it does seem ironic that where title insurance is to be obtained, the present North Carolina custom also gives the client the benefit of a longer search period. It is in the opposite case, where no title insurance is to be procured, that the client has a more genuine need for the longer search period. If we could be sure that, for example, a forty-year search period is sufficient to bring the probability of error down to an acceptably low level, then no complaint could be made about shortening the search to forty years; but there is no scientific basis for such assurance.

The majority of attorneys recognize that their title search duties are not completed in the Register of Deeds and the superior court clerk's offices. Another obvious step is to determine the currency of city and county taxes. Our survey assumed that every attorney would make this check in every case, for failure to do so would be a clear example of malpractice.²⁷ But tax liens are not the only liens which may be imposed upon real estate by a local government agency. It is common for North Carolina cities and counties to finance such local improvements as street and sidewalk paving and water and sewer lines by the imposition of special assessments.²⁸ A lien is imposed on the real property benefiting from the assessment to secure its payment.²⁹ Quite frequently the improvement work which has been done is not visually evident, and the potential buyer may have no reason to suspect that the property is

all persons not under disability." The types of disability are enumerated in N.C. GEN. STAT. § 1-17 (1969). See *Warlick v. Plonk*, 103 N.C. 81, 9 S.E. 190 (1889) (insanity); *Clayton v. Rose*, 87 N.C. 106 (1882) (infancy). To be immunized from adverse possession, the disability must exist when the statute of limitations begins to run. *Battle v. Battle*, 235 N.C. 499, 70 S.E.2d 492 (1952).

²⁷ *Hill v. Cloud*, 48 Ga. App. 506, 173 S.E. 190 (1934); *Zurich Gen. Accident & Life Ins. Co. v. Klein*, 181 Pa. Super. 48, 121 A.2d 893 (1956).

²⁸ N.C. GEN. STAT. §§ 153-294.1-.19 (1964) (assessments by counties for water and sewage); N.C. GEN. STAT. §§ 160-78 to -105 (1964) (assessments by cities for streets, sidewalks, water, and sewerage).

²⁹ N.C. GEN. STAT. § 153-294.10 (1964) (county lien); N.C. GEN. STAT. § 160-88 (1964) (city lien).

burdened by an assessment lien. The only practical method of discovering the lien is a check in the relevant city or county office. Rather surprisingly, about five per cent of the survey respondents stated that they did not customarily make this check as a part of their title search procedure. Such a failure would almost surely result in liability of the attorney if it developed that the property were burdened by an assessment.

A further problem in checking both tax and assessment liens is the often-haphazard condition of the records of the relevant city or county office. An attorney wishing to check the state of the taxes may, for example, be invited to look in the files directly to see if there are delinquencies, or an employee of the office may volunteer to make the check for him. In either event, there is no assurance that a card or other record of delinquency may not be misfiled or absent from the files entirely or that an employee volunteering to make the check will do so carefully. Because of the general principle that there is no estoppel against the government, it is generally assumed that the governing body could freely assert the tax or assessment lien despite the failure of its own records to disclose the lien at the time the attorney made his title search.³⁰ During the 1969 session of the North Carolina General Assembly, the organized bar made a strenuous effort to get enacted legislation which would have obliged the tax collector's offices to give binding written statements of the state of tax accounts on property being searched,³¹ but city and county officers opposed the bill, and it failed to pass. It is improbable that the negligence of the tax collector and his employees would be imputed to the searching attorney in these cases, but the fact remains that the customary form of attorney's search does not adequately protect the buyer against the risk of delinquent taxes or assessments.

Discoverable Non-Record Defects

There are a variety of title defects which may be discovered by an inspection of the property, but which are not disclosed by a search of the

³⁰ The imposition and collection of taxes are, of course, governmental functions; and the State cannot, by the conduct of its agents[,] be estopped from collecting taxes lawfully imposed and remaining unpaid. . . .

Henderson v. Gill, 229 N.C. 313, 316, 49 S.E.2d 754, 756 (1948). The *Gill* case involved incorrect legal interpretations of the state sales tax given by state agents to a retailer, but the result would probably be the same in a case of erroneous tax delinquency information. See generally 31 C.J.S. *Estoppel* § 147 (1964).

³¹ Senate Bill 106, which provided for the certification of the existence and amounts of assessment liens against real property, was postponed indefinitely by the North Carolina House of Representatives on May 30, 1969. III INSTITUTE OF GOVERNMENT, DAILY LEGISLATIVE BULLETIN 1025 (No. 98 May 30, 1969).

public records. These are primarily defects which do not arise from written instruments and, therefore, to which the recording act does not apply. Examples include adverse possession, encroachments, prescriptive easements, and leases running from their making for three years or less.³² The surveyed attorneys were asked whether they customarily viewed the property to check for such outstanding rights. Fourteen and four-tenths per cent replied that they did in single-family-home-purchase transactions, and 25.7 per cent stated that they did so in other transactions involving title search.

It is, of course, understandable that busy attorneys would prefer not to spend the time necessary to view personally every property as a part of the title-search procedure. Yet the inescapable fact is that matters which may seriously affect title can sometimes be discovered only by physical inspection. Perhaps an adequate alternative is an indication to the buyer of the matters to observe and questions to ask in order to disclose such title defects. But it is doubtful that very many attorneys take the time to educate buyers on these matters.

Other matters, while perhaps not technically title defects, are so closely allied with title that the typical buyer probably expects the attorney to have found them acceptable. These include compliances with zoning and subdivision ordinances and housing and building codes.³³ Problems in these areas are much more likely to arise with commercial or income-producing property than with single-family homes in tract developments. For example, it is quite unlikely that a tract housing development would be constructed with improper zoning on the property;³⁴ similarly, it would be unlikely that a builder would ignore a subdivision ordinance since the plat of the subdivision would not ordinarily be accepted for recordation by the Register of Deeds until the necessary governmental

³² Unrecorded leases running from the time of their making for three years or less are valid against subsequently-recording purchasers. N.C. GEN. STAT. § 47-18 (1966).

³³ Failure of a prior owner to comply with subdivision regulations was held not a *title* defect in *Hocking v. Title Ins. & Trust Co.*, 37 Cal. 2d 644, 234 P.2d 625 (1951). The same conclusion would be likely with other police-power regulations.

³⁴ Builders must obtain building permits prior to commencing construction. N.C. GEN. STAT. § 160-122 (Supp. 1969) (city). *See also* N.C. GEN. STAT. § 153-9 (52) (Supp. 1969) (county authority to appoint building inspector). The building inspector would not ordinarily issue a permit for a nonconforming structure. However, problems sometimes arise as to nonconforming uses of homes. These problems typically involve commercial uses of homes: a beauty-shop operation, an architect's studio, etc. The careful attorney will ask the buyer about such intended uses and verify their legality.

approvals had been obtained.³⁵ Building and housing code violations are perhaps somewhat more frequent among single-family houses, both because of deterioration of older houses and because homeowners frequently do work which they categorize as "home improvement" but which is in fact in violation of local codes. Such "bootleg" improvement on houses can often be discovered simply by advising the buyer to ask the seller if any improvement work has been done,³⁶ but it is doubtful that many attorneys make a practice of bringing up this matter.

Note that there are several levels at which these police-power problems may exist. If the violation of an ordinance has been cited by city or county officials, a check of the local government's offices may reveal it.³⁷ But if the violation exists and has not been discovered by local officials, it is likely to be turned up only by personal investigation by the buyer, lender, or attorney. Plainly the attorney is in the best position to see that this investigation is done.

The respondent attorneys evidently agreed that zoning, subdivision, and code compliance was a less important feature of title searches of single-family homes than of commercial properties. Forty-six per cent replied that they customarily checked the zoning on single-family homes, while seventy-seven per cent did so in commercial transactions. Forty-eight per cent checked compliance with subdivision ordinances in single-family home transactions, and for commercial transactions that figure rose only to fifty-seven per cent.³⁸ Code violations were deemed less important than either zoning or subdivision compliance by the respondents: thirteen per cent checked for code violations with single-family homes, and twenty-eight per cent made such checks in commercial transactions.³⁹

³⁵ N.C. GEN. STAT. § 153-266.4 (1964) (county approval); N.C. GEN. STAT. § 160-226.2 (1964) (city approval). It is illegal, but certainly not impossible, for an unapproved plat to be recorded.

³⁶ This technique has the added advantage of sometimes disclosing unfiled mechanics' and materialmen's claims.

³⁷ But an official statement that no violation exists will probably not bind the enforcement authorities. See note 30 *supra*, and accompanying text.

³⁸ Note that commercial and industrial property may well be subject to subdivision ordinances. "Subdivision" is defined generally as:

all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, or building development. . . .

N.C. GEN. STAT. § 160-226.6 (1964) (cities). See also N.C. GEN. STAT. § 153-266.7 (1964) (counties).

³⁹ Since some of the less populous counties to which the questionnaire was sent have no zoning, subdivision ordinances, or building codes, the attorneys were asked only what procedures they followed when the ordinances did apply.

The differential suggested by these figures between single-family home transactions and commercial transactions is arguably justifiable because of the greater probability of violations in commercial and industrial structures. At the same time, the results are ironic in that the commercial-transaction buyer, who is most likely to be sophisticated and careful to avoid local ordinance violations, gets the greater protection from his attorney in pinpointing such violations, while the more naive single-family home buyer is left to fend for himself. Again, the attorney's minimum duty here would appear to be a detailed explanation to the client of the nature of possible ordinance violations and the procedure the client should go through to check for them.

Personal Property and Fixtures

Nearly every piece of improved real estate sold has closely associated with it items which are, or once were, chattels.⁴⁰ The presence of these articles raises two issues of consequence to the title searcher: (1) Will they pass to the purchaser of the real estate, and (2) if they do pass, will they be subject in the purchaser's hands to security interests imposed on them prior to the transfer?

Let me pose a case for analysis of these problems. Owens, who owns his home, decides to remodel the kitchen. As part of the project, he purchases from the local Sears, Roebuck and Co. store a drop-in electric range. This range is designed to fit into a pre-cut counter space, and when in place it gives the appearance of being built-in, but, in fact, only its own weight holds it in place. Its only other connection with the house is its short electrical cord, which plugs into a wall outlet underneath the cabinet. Owens signs an installment contract with Sears agreeing to pay for the range over a two-year period.

A year later, Owens lists his house for sale, and it is purchased by Peters. The range remains in the house, and Peters assumes he now owns it, but there is no written memorandum or bill of sale referring to it. Shortly after the sale closes, Owens discontinues making payments on the range to Sears; his lack of interest in continuing the payments is, if not forgivable, at least understandable. Peters is distraught when Sears personnel arrive to repossess the range. He calls the lawyer who handled the home purchase: "How could this happen?" he cries.

⁴⁰ A sampling of such items in the average home might include television antenna, curtain rods, curtains and drapes, carpeting, disposal, washer, dryer, dishwasher, range, refrigerator, water heater, furnace, plantings, wall-hung cabinets, and various racks and shelves.

Observe that the first of the two issues mentioned above is not raised by the facts of the hypothetical. If Owens had attempted to remove the range before Peters took possession of the house, the dispute between them would raise the first issue, and that issue would typically be analyzed in "fixture" terms: If the range is designated a fixture by the court, it would pass with a deed to the realty; if it is not a fixture, but merely a chattel, the realty deed would not affect it. In the latter case, unless the fixture was mentioned in the contract or a separate bill of sale covering it was executed or some other agreement to transfer it can be found or invented, Owens may keep the range.⁴¹ Such a seller-buyer dispute is a tribute to the carelessness or ignorance of the parties and the real estate salesman, none of whom took the trouble to enumerate in the sales contract which items went with the house. Since the lawyer is so rarely involved in the transaction until the contract-negotiation stage is over, he cannot be blamed for the disagreement—although a thoughtful attorney might have saved the buyer some grief by suggesting, even after the contract of sale had been signed, that before closing the parties walk through the house and prepare a list of the items to pass with its sale.

But let us return to the hypothetical case in which a claim to the range is made, not by Owens, but by Sears, the installment seller. Even if the contract is clear in purporting to pass the title to the range to Peters, does he take it free of Sears' security interest? And if he does not, is the presence of that interest a risk to which Peters' attorney should have alerted him before the sale of the house was consummated? Indeed, is there any reasonable way Peters or his attorney could have learned of the prior interest (remembering that a fellow like Owens is not likely to disclose it voluntarily)?

These questions must be answered by reference to the same issue discussed in connection with the Owens-Peters dispute above: is the range a fixture? The relevance of the fixture classification lies in the fact that section 9-313 of the Uniform Commercial Code applies only to fixtures and further provides that the "fixture" concept is defined, for code purposes, by non-code state law.⁴² One should not assume from this reference

⁴¹ *Jenkins v. Floyd*, 199 N.C. 470, 154 S.E. 733 (1930); *Horne v. Smith*, 105 N.C. 322, 11 S.E. 373 (1890).

⁴² N.C. GEN. STAT. § 25-9-313 (1965). The usual state definition of "fixture" contains three elements: (1) some physical connection of the item with the land; (2) the "adaptation" of the item to the real estate; and (3) the intent of the annexer that the connection be permanent. North Carolina formulations have tended

that the non-code law is likely to put easily to rest the question whether a drop-in range is or is not a fixture;⁴³ quite the contrary. The law of fixtures is in North Carolina (as in many states) a pitiful morass of apparently contradicting and disorganized precedents.⁴⁴ Indeed, the range in this hypothetical is an example of an item which might as easily be categorized

to ignore the "adaptation" element. See, *e.g.*, *Ingold v. Phoenix Assurance Co.*, 230 N.C. 142, 145, 52 S.E.2d 366, 368 (1949):

Whatever is so firmly affixed or annexed to the freehold as to become thoroughly and substantially a part of the realty cannot afterward be removed except by him who is entitled to the inheritance. . . . The trend of modern decisions has tended to relax the rigidity of this common law rule so that now, subject to certain limitations, the intent of the parties as evidenced by their contract, express or implied, is controlling.

See generally R. POWELL, *REAL PROPERTY* ¶¶ 651-60 (Rohan ed. 1970); Horowitz, *The Law of Fixtures in California—A Critical Analysis*, 26 S. CAL. L. REV. 21 (1952).

⁴³ A major problem with the UCC's reference to state fixture law is that state courts are called upon to draw fixture/chattel distinctions in a wide variety of contexts which quite properly require the weighing of different factors. Among the types of cases in which the North Carolina Supreme Court has considered fixture classification are the following:

1. Does the item pass by a deed of the land? See cases cited note 41 *supra*.
2. May a tenant remove the item upon termination of the lease? *Springs v. Atlantic Refining Co.*, 205 N.C. 444, 171 S.E. 635 (1933).
3. May a conditional seller remove the item upon the default in payments of a tenant-purchaser? *Brunswick-Balke-Collender Co. v. Carolina Bowling Alleys*, 204 N.C. 609, 169 S.E. 186 (1933).
4. Does a tenant have an insurable interest in the item? *Ingold v. Phoenix Assurance Co.*, 230 N.C. 142, 52 S.E.2d 366 (1949).
5. May a purchase-money mortgagee of the disputed item obtain a deficiency judgment with respect to it? *Fleishel v. Jessup*, 244 N.C. 451, 94 S.E.2d 308 (1956).
6. What are the rights in the item of a remainderman following a life tenancy? *Overman v. Sasser*, 107 N.C. 432, 12 S.E. 64 (1890).
7. What are the rights of a realty mortgagee in the item? *Brown v. North Carolina Joint Stock Land Bank*, 213 N.C. 594, 197 S.E. 140 (1938).
8. Is the item subject to real property taxation? *Ex parte Makepeace*, 31 N.C. 91 (1848).

It seems fatuous to suppose that a simple definition of "fixture" such as that quoted in the preceding note could satisfactorily solve such diverse issues. And since these issues generate divergent lines of authority, to which line should one turn when seeking a classification for purposes of UCC § 9-213? The Code is silent on this point.

⁴⁴ [I]t is not always easy to determine what are and what are not such fixtures as to become a part of the realty and pass as a part thereof under a conveyance or a transmission of the real estate.

Woodworking Co. v. Southwick, 119 N.C. 611, 616, 26 S.E. 253, 254 (1896). The matter was put more pungently by the Washington Supreme Court in *Strain v. Green*, 25 Wash. 2d 692, 695, 172 P.2d 216, 218 (1946):

[E]very lawyer knows that cases can be found in this field that will support any position that the facts of his particular case require him to take. "[T]here is a wilderness of authority Fixture cases are so conflicting that it would be profitless . . . to review . . . them."

(after protracted litigation) a fixture as not.⁴⁵ Thus, the solution to our problem must be presented in the alternative.

If the range is (by hindsight) a fixture, section 9-313 yields the following result: Peters will take free of the security interest of Sears only if he purchases the real estate for value, without knowledge of Sears' interest, and before Sears perfects its interest. As originally enacted, section 9-313 stipulated that perfection of a security interest in a fixture could be accomplished as against persons acquiring interests in the real estate only by filing a financing statement or other instrument in the office of the Register of Deeds of the appropriate county, and the Register of Deeds was instructed by the Code to file such instruments in the manner of recording mortgages. But this language was stricken by amendment in 1967 for no easily discernible reason. However, a similar result⁴⁶ appears to flow from section 9-401(1)(b), which provides that:

⁴⁵ No North Carolina decision has been found which comes close to resolving the drop-in range case. Perhaps the most direct authority is *Dunn v. Assets Realization Co.*, 141 Ore. 298, 16 P.2d 370 (1932), in which electric ranges in an apartment house were held not fixtures in a dispute between the conditional seller of the ranges and a mortgagee of the realty. An Oregon statute protected the realty mortgagee as to fixtures unless the conditional sale contract was recorded. But the ranges in *Dunn* were not built-ins, and the court emphasized that "[i]t was not necessary to alter the construction [of the building] to receive them. . . ." *Id.* at 303, 16 P.2d at 372. Cf. *Builders Appliance Supply Co. v. A. F. John Constr. Co.*, 253 Ore. 582, 455 P.2d 615 (1969), involving a dishwasher installed in a well cut-out below a formica kitchen counter, but not screwed into place. It was attached to water and drain lines by tubing and to the house's electrical system by conduit. The court held this to be a fixture and therefore lienable by the materialman.

Other cases involving gas ranges or stoves have usually held them not fixtures in a variety of contexts. See *Daniger v. Hunter*, 114 Cal. App. 2d 796, 251 P.2d 353 (1952) (unit containing stove, sink, and refrigerator not a fixture for mechanic's lien purposes); *Hanson v. Vose*, 144 Minn. 264, 175 N.W. 113 (1919) (gas stoves held not fixtures in dispute between ground lessor and assignee of installing tenant); *Orbon Stove Co. v. Schroeder*, 241 App. Div. 832, 271 N.Y.S. 242 (1934) (gas stoves held not fixtures in contest between conditional seller of stoves and realty mortgagee); *Modern Security Co. v. Thwaites*, 138 Misc. 469, 246 N.Y.S. 405 (Sup. Ct. 1930) (same); *State v. Feres*, 228 Ore. 273, 365 P.2d 97 (1961) (gas ranges not fixtures for eminent domain purposes). *Contra*, *Peed v. Bennett*, 114 Ind. App. 412, 52 N.E.2d 629 (1944) (gas stove held a fixture so as to pass under realty deed). None of these cases appears to involve drop-in ranges, which are a recent phenomenon.

⁴⁶ The result is not quite the same, for the following reasons: Under the UCC as originally enacted, the fixture interest would have been *indexed* in the mortgagor-mortgagee index, just as if it were an ordinary real estate mortgage. N.C. GEN. STAT. §§ 25-9-313(4)(c), 25-9-403(4) (1965). But by virtue of the deletions from both of these sections prior to their effective date in 1967, and the addition of N.C. GEN. STAT. §§ 25-9-403(4)(a)-(d) (Supp. 1969), the financing statement is now required to be indexed only in the *index to financing statements* maintained by the Register of Deeds—an index that is separate from that maintained for real estate mortgages.

(b) when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then [filing is proper] in the office where a mortgage on the real estate concerned would be filed or recorded.

Thus, Sears can adequately protect its interest against Peters only by filing a financing statement or other instrument evidencing the interest in the office of the Register of Deeds, and if it is thus filed, Peters' attorney will discover it in the course of an ordinary title search.⁴⁷

Let us turn now to the alternate possibility: that the kitchen range will not be deemed a fixture by the courts. It seems inescapable that the range would then be considered "consumer goods,"⁴⁸ and section 9-302(d) permits perfection of a purchase-money security interest (such as that of Sears) in consumer goods without the necessity of filing a financing statement. However, section 9-307 permits a subsequent purchaser of the goods who pays value and has no knowledge of the prior interest (such as Peters) to take free of it unless the secured party has filed a financing statement.⁴⁹ Again, according to section 9-401(1)(a), the place for proper filing is with the county Register of Deeds.

The conclusion we have reached is that whether the range is or is not categorized as a fixture, the attorney's search of the records in the Register of Deeds office is a sufficient protection for Peters against undisclosed security interests. There are, however, at least two complicating factors that limit the generality of the conclusion thus drawn. First, even though the title search protects Peters adequately, does it also protect the lender who grants a new loan to finance Peters' purchase of the house? If the range is deemed a fixture, the lender has the same protections as Peters himself since the definitions of "purchase," "purchaser," and "value" in section 1-201 make it perfectly clear that the lender is a "subsequent pur-

⁴⁷ Provided that the "ordinary" search includes a check of the financing statement index in the Register of Deeds office.

⁴⁸ N.C. GEN. STAT. § 25-9-109 (1965): "Goods are (1) 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes. . . ."

⁴⁹ Section 9-307, N.C. GEN. STAT. § 25-9-307 (1965), has been construed to give this benefit to the subsequent purchaser only if *both* he and his seller held the property as "consumer goods." Thus, if Owens had used the property for rental purposes before selling it to Peters, Peters would be bound by the security interest despite his use of the goods for household purposes. See *New England Merch. Nat'l Bank v. Auto Owners Fin. Co.*, 355 Mass. 487, 245 N.E.2d 437 (1969); *Everett Nat'l Bank v. Deschuiteneer*, 109 N.H. 112, 244 A.2d 196 (1968); *Muir v. Jefferson Credit Corp.*, 108 N.J. Super. 586, 262 A.2d 33 (1970).

chaser for value of any interest in the real estate," and this is the operative language of the fixtures section, 9-313.

On the other hand, if the range is considered "consumer goods" rather than a fixture, the protection granted Peters by section 9-307(2) arguably does not extend to Peters' institutional lender since that section benefits only those who buy for their "own personal, family, or household purposes." When we recall that section 9-302 allows perfection of a purchase-money interest in consumer goods without any filing at all, there appears to be no practical way for the new institutional lender to discover such interests even though it may be subject to their priority.⁵⁰ The title attorney is blameless in these circumstances; the most we might expect of him is that he ask the seller of the house if any of the items passing with it are subject to installment contracts.

The institutional lender's position is improved if the security interest to which the range is subject was imposed, not in a purchase-money transaction, but to secure an independent loan from a finance company, for example. Under these facts, the interest of the finance company could be perfected, according to section 9-302, only by filing a financing statement, and the standard title search would disclose the interest.

Another factor not previously considered may be illustrated by changing our basic case in a different way. Assume that the house in which the kitchen range is located is owned by Owens, not as a personal residence, but as income-producing rental property, and further assume that Peters is buying the house for the same purpose. If the range is a fixture, the analysis above is still valid; but if it is not a fixture, it is probably not a "consumer good" either since that designation should be limited to items

⁵⁰ My colleague, Professor Richard Smith, argues that this interpretation is not inevitable. If the consumer protected by section 9-307 were to sell the range to a non-consumer, would not the transferee be protected on the ground that he has acquired the consumer's "clear" title? If so, should not the consumer's freedom from the prior lien also be "transferable" to a chattel mortgagee of the range or, as in the present case, a mortgagee of the house to which the range is attached (assuming the mortgage language is broad enough to cover it)? Professor Smith suggests that it is desirable to cut off inquiry into what ultimately happens to the collateral at some definite time—and the most convenient time is the instant after purchase by the section 9-307 consumer. To put it another way, the buyer can hardly be said to be "free" of the security interest unless he can freely transfer and mortgage his goods.

Sears could, of course, avoid this result by the simple expedient of filing a financing statement instead of relying upon section 9-302, N.C. GEN. STAT. § 25-9-302 (1965); filing would alert both the section 9-307 consumer and his mortgagee of the prior interest. If it declines to do so, arguably the defeasance of its rights by section 9-307 should be broadly construed.

held by persons who will *themselves* use the goods primarily for personal, family, or household purposes.⁵¹

If the range is not a consumer good, it is all the clearer under section 9-302 that perfection of Sears' security interest can be accomplished only by the filing of a financing statement—but now the place of filing may have changed. Section 9-401 provides that, for interests in items which are neither fixtures nor consumer goods, filing shall be in the office of the Secretary of State

and in addition, if the debtor has a place of business in only one county of this State, also in the office of the register of deeds of such county, or, if the debtor has no place of business in this State, but resides in the State, also in the office of the register of deeds of the county in which he resides.

The quoted language is fraught with unanswered questions: What about the debtor who has places of business in two different counties? What about places of business which have nothing to do with the collateral property? Is an apartment building a "place of business"? If so, what about a single one-family rental house? The only safe procedure, when rental property is involved, is a check by the title attorney of the financing statement files maintained by the Secretary of State.

Moreover, the definition of "consumer goods"⁵² does not really make it clear whether the test is to be applied to the goods in the hands of Owens, Peters, or both. Arguably goods can switch in and out of the "consumer" category with changes of ownership and uses.⁵³ Caution would suggest the necessity of searching the Secretary of State's files whenever the real estate being transferred has had or will have a use other than as a personal residence by either the seller or the buyer. Although our survey questionnaire did not request information from title attorneys

⁵¹ See *In re Sam's Furniture & Appliance Stores*, 1 U.C.C. Rptr. 422 (W.D. Pa. 1962) (bankruptcy referee); *United Gas Improvement Co. v. McFalls*, 18 Pa. D.&C.2d 713 (C. P. Lancaster County 1959).

⁵² See note 48 *supra*.

⁵³ Cf. N.C. GEN. STAT. § 25-9-109 (1965), Comment 2:

Goods can fall into different classes at different times; a radio is inventory in the hands of a dealer and consumer goods in the hands of a householder. Logically, the relevant time to test the "consumer-ness" of the goods (in deciding the propriety of the place of filing) is the date of the filing—probably a few days after the original sale by Sears to Owens. But if the goods were originally used by Owens personally and Sears erroneously filed with the Secretary of State, would a later shift by Owens to rental use of the goods "cure" the filing? No authority has been found on the point, but such a position does not seem absurd.

regarding their efforts to disclose personal property security interests, it seems unlikely that many of them make the search of the Secretary of State's files when the circumstances above indicate that this should be done.

The entirety of the foregoing analysis may be summarized quite briefly: A search of the financing statement index in the office of the Register of Deeds will protect both realty buyers and lenders from pre-existing security interests in both fixture and non-fixture items, except (1) real estate lenders arguably are not protected in the case of non-fixture consumer items subject to purchase-money security interests and cannot be protected by any search, and (2) if the real estate has been or is to be used as other than the residence of the owner, a search in the Secretary of State's files is also necessary to protect non-fixture items.⁵⁴

Other Non-Record Defects

Although the foregoing discussion has pointed out a number of ways in which the typical attorney's record search in the single-family real estate transaction leaves something to be desired in terms of title assurance, there is another fairly lengthy list of possible title defects which neither a search of the public records nor an inspection of the property, however careful, will disclose:

1. Without delivery a deed passes no title.⁵⁵ The fact that the deed is recorded may or may not indicate a valid delivery, depending on whether the recordation was procured by the grantor with the intent that it constitute a delivery.⁵⁶

2. Forgery of an instrument is not cured by its recordation; the instrument is entirely void.⁵⁷

3. The incapacity of a deed grantor—due to insanity or other mental

⁵⁴ The title attorney might argue that these exceptions are of no consequence to him since his task is merely to certify title to real property and since both of these exceptions relate solely to non-fixture items—not realty by definition. The argument is disingenuous since no one—not the courts or the lawyers, much less homebuyers and lenders—can identify with any certainty which items *are* fixtures. The title attorney ought to fulfill his client's reasonable expectations or else make an explicit disclaimer of doing so. The former course seems more in keeping with a profession devoted to public service.

⁵⁵ *Vinson v. Smith*, 259 N.C. 95, 130 S.E.2d 45 (1963); *Fortune v. Hunt*, 149 N.C. 358, 63 S.E. 82 (1908).

⁵⁶ *Corbett v. Corbett*, 249 N.C. 585, 107 S.E.2d 165 (1959); *Ballard v. Ballard*, 230 N.C. 629, 55 S.E.2d 316 (1949).

⁵⁷ 3 AMERICAN LAW OF PROPERTY § 12.58 (A.J. Casner ed. 1952); R. POWELL, REAL PROPERTY ¶ 885 (abr. ed. 1968).

defect, infancy, or the like—may impair the effectiveness of his instruments.⁵⁸ A check of the lunacy dockets may turn up information about the grantor's capacity, but it may well not since there is no reason to suppose that most cases of adult incapacity are adjudicated. Similar problems arise with instruments executed under duress⁵⁹ or undue influence⁶⁰ or fraud in the execution.⁶¹

4. If the chain of title includes links of devolution upon death, there is the possibility that an unprobated will will later be offered for probate or that previously undisclosed heirs will appear and make claims to the land.⁶²

5. Under the North Carolina statute which substitutes for common-law dower and curtesy, a surviving spouse may claim a life estate in one-third (measured by value) of the decedent's real estate, despite the fact that he sold the property in question before his death; it is only necessary that the decedent-spouse have owned the property at some time during the marriage.⁶³ Thus, it is possible that a surviving spouse will appear who did not join a conveyance made by her spouse during his lifetime and whose existence is not even suggested by the deed in question.⁶⁴ In order to make such a claim, the surviving spouse must make several preliminary choices which are probably not commonly made;⁶⁵ nonetheless, the possibility certainly exists and would be especially attractive to a sur-

⁵⁸ *Thompson v. Thomas*, 163 N.C. 500, 79 S.E. 896 (1913) (recordation does not validate deed made without capacity). See *Hendricks v. Hendricks*, 272 N.C. 340, 158 S.E.2d 496 (1968), for a discussion of the elements of capacity to make a deed.

⁵⁹ *Harshaw v. Dobson*, 67 N.C. 203 (1872).

⁶⁰ *Lee v. Ledbetter*, 229 N.C. 330, 49 S.E.2d 634 (1948).

⁶¹ *Mills v. Dunk*, 263 N.C. 742, 140 S.E.2d 358 (1965); *Nixon v. Nixon*, 260 N.C. 251, 132 S.E.2d 590 (1963) (deed procured by fraud in factum passes no title to innocent third parties).

⁶² The law in such situations is inordinately complex; it is sufficient here to observe that the innocent purchaser from an estate is not adequately protected. A thorough discussion is found in Note, *Wills—Ghosts in North Carolina—The Haunting Problem of the After-Discovered Will*, 47 N.C.L. REV. 723 (1969).

⁶³ N.C. GEN. STAT. § 29-30 (1966).

⁶⁴ This was the case in *Petta v. Host*, 1 Ill. 2d 293, 115 N.E.2d 881 (1953). There the court held the surviving wife's claim subordinate to that of an innocent purchaser for value from the husband, but there is no assurance that North Carolina courts would take this view.

⁶⁵ She must first dissent from the decedent's will; but this right is not available unconditionally. See N.C. GEN. STAT. §§ 30-1 to -3 (1966). Then she must elect not to take the fee simple intestate share provided by N.C. GEN. STAT. §§ 29-14 or -21 (1966). And, finally, she must apparently choose between a life estate in one-third (measured in terms of value) of all real estate under N.C. GEN. STAT. § 29-30 (a) (1966), and a life estate in the dwelling house of the decedent and her at the time of his death under N.C. GEN. STAT. § 29-30 (b) (1966). These rights are available to a surviving spouse of either gender.

viving spouse in the situation where the estate was heavily burdened by the claims of creditors.⁶⁶

6. Adverse possession need not be evidenced by a recorded document⁶⁷ and is not always evident from a visual inspection of the property. For example, an adverse claimant might have occupied the property for the requisite time period and then abandoned it; clearly, once he has acquired the title, later abandonment will not divest him of it unless another adverse claimant moves onto the land and the prescriptive period runs anew.⁶⁸

7. Mechanic's liens under North Carolina law need only be filed within four months of the time the work on the property was completed.⁶⁹ Thus, it is entirely possible for a buyer of improved real estate to complete a purchase in the belief that the title is clean and then, a month or two later, to find himself faced with a lien filed by an unpaid workman hired by the former owner. In some cases, the cautious buyer will request and receive a lien waiver before completing his purchase, but there is always the possibility that a particular unpaid workman or supplier will remain undisclosed and therefore not be invited to sign the waiver form.

Neither the author nor anyone else with whom he has discussed this matter has any realistic estimate of the frequency of occurrence of the types of title defects listed above. Some are obviously quite rare; others, such as the mechanic's lien claim, probably crop up with significant frequency. But to the buyer who has been stung by a particular defect, the frequency is irrelevant. He only knows that the protection he thought was inherent in the attorney's search has turned out to be vacuous and impotent. Reputable attorneys are often fond of saying (and have frequently told the author) that, when such cases arise, they are more than willing to pay off the outstanding claim despite their apparent lack of legal obligation to do so. Such an attitude on the part of practitioners, whether based on motives of charity or a desire to maintain one's professional reputation, is highly creditable, but it is a poor substitute for a

⁶⁶ The life estate thus obtained is free of most claims of the decedent's creditors. N.C. GEN. STAT. § 29-30(g) (1966).

⁶⁷ See 3 AM. JUR. 2d *Adverse Possession* § 243 (1962).

⁶⁸ *Klaar v. Lemperis*, 303 S.W.2d 55 (Mo. 1957); *Mugaas v. Smith*, 33 Wash. 2d 429, 206 P.2d 332 (1949); Annot., 9 A.L.R.2d 450 (1950). See *Morse v. Freeman*, 157 N.C. 386, 72 S.E. 1056 (1911) (adverse possession prevails over record title). A dictum apparently to the contrary in *Ricks v. Batchelor*, 225 N.C. 8, 33 S.E.2d 68 (1945), can probably be safely disregarded since the court did not have the adverse possession problem in mind.

⁶⁹ N.C. GEN. STAT. § 44A-12(b) (Supp. 1969).

well-defined route of legal recourse to the client: first, because not every attorney who does title work is likely to take such a generous view of his own responsibility; second, because the attorney's generosity is likely to be inversely proportional to the size of the claim, with a complete failure of title to a valuable tract of land likely to result in an attorney's re-evaluation of his noble intentions; and third, because it is both untidy and unseemly to rest a system of title assurance on such an ill-defined and casual foundation.

The Title Certificate

It is appropriate at this point to inquire into the nature of the representations made by the attorney in his title opinion and to ask to whom those representations are made. Our questionnaire survey furnishes some data on the second point. The respondent attorneys were asked, "In transactions involving the making of a new loan, to whom is your certificate of title customarily addressed?" The attorneys were asked to respond separately with respect to single-family home purchases and with regard to other transactions involving title search. The single-family purchasers did not fare well. In such transactions, seventy-one per cent of the attorneys responding addressed their title certificates only to the lender, while nine per cent addressed the buyer and nineteen per cent customarily named both the buyer and lender. The buyers of income-producing property fared somewhat better; about fifty-two per cent of them would receive a title certificate either jointly with the lender or independently. The question stipulated a transaction in which a new loan was being made. Presumably in cases where an old loan is assumed or the entire purchase price is paid in cash, the attorney would always send his title certificate to the buyer.⁷⁰

Thus, based on our questionnaire respondents' customs, fewer than thirty per cent of single-family home buyers obtaining new loans get a title certificate addressed to themselves. It seems exceedingly doubtful that a buyer would be permitted to recover against an attorney for malpractice in the attorney's preparation of a certificate addressed only to the lender,⁷¹ but recovery is not inconceivable. Perhaps a theory based on

⁷⁰ Note, however, the probability that in many cases involving no new loan, there will be no title search at all or perhaps only a search back in time to the date on which the most recent full search was made. Realtors probably encourage this practice as an economy measure in many loan-assumption sales.

⁷¹ There is a discernible tendency of the bar to assume the primary lawyer-client relationship is between attorney and lender. See N.C. State Bar Ethics Opinion No. 715 (July 17, 1970) (attorney's duty of confidentiality owed to lender).

justifiable reliance, third party beneficiary, or something of the sort could be constructed. An even more intriguing matter is the content of the certificate itself. Our questionnaire respondents were invited to mail to the author copies of the title opinion or certificate forms they customarily used. Forty-two of the respondents in fact returned their title certificate forms for analysis. Nearly all of the forms begin with a statement in the following form:

This is to certify that I have examined the public records of Durham County relating to the following described real property

After identifying the property, the certificates then go on to express an opinion as to the state of the title:

In my opinion, marketable fee simple title to the subject property is vested in John A. Doe, subject to the following exceptions

A title certificate in this form seems on its face incompetent unless the exceptions listed include every one of the possible non-record title defects discussed above. Indeed, many of the certificates do mention some of the non-record defects discussed above, but there seems to be no consistent thread running through them. The items most commonly listed as exceptions include zoning and subdivision controls, building and safety codes, mechanic's and materialmen's liens, and matters which would be revealed by survey. Very few of the certificate forms received even mention all of these exceptions.

About two-thirds of the forms, however, purport to exculpate the issuing attorneys from non-record defects, in a way different from an express exculpatory clause, by adding to the language of the second paragraph quoted above a phrase such as: "so far as disclosed by the records," "based on my examination," "based on the public records," or the like. Such a phrase, properly drafted, appears to relieve the attorney of responsibility for non-record defects in a much more adequate way than the attempted listing of such defects as exceptions to the certificate's coverage. A more difficult question is whether a court would construe the initial paragraph which says, in effect, "I have examined the public records," as similarly exculpating the attorney for liability for non-record defects on the ground that the certifying attorney obviously does not intend to guarantee that which he has not examined. Resolving this question requires us to consider the nature of the liability that an attorney may incur as a result of issuing a title certificate.

Despite the fact that the attorney-client relationship frequently flows from a contract of employment, the courts have uniformly treated the attorney's liability as arising under tort law.⁷² The issue is whether the attorney is guilty of professional negligence, often called "malpractice." Attorney negligence cases are frequently analogized to those involving physician malpractice, although there are some important distinctions.⁷³ The standard of care was articulated by the North Carolina Supreme Court in *Hodges v. Carter*:

Ordinarily when an attorney engages in the practice of law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.⁷⁴

Although no reported North Carolina case has dealt with the application of this standard of care to an attorney's title certificate, the principles enumerated in *Hodges* are typically found in cases involving title search in other jurisdictions.⁷⁵ The American cases make some point of saying that the attorney is not a guarantor of the accuracy of his title certificate and is liable only for errors so serious as to violate the standard of care and skill expressed in *Hodges*.⁷⁶

It thus seems likely that an attorney will not be held liable for an off-record title defect regardless of whether or not his title certificate contains such exculpatory language as "based on the public records." For even without such a phrase, the attorney may well argue that, because attorneys in his state or community⁷⁷ generally do not check for off-record defects

⁷² See *Citizens Loan, Fund & Savings Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075 (1889).

⁷³ See Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771 (1968).

⁷⁴ 239 N.C. 517, 519, 80 S.E.2d 144, 145-46 (1954).

⁷⁵ See *Palmer v. Nissen*, 256 F. Supp. 497 (D. Me. 1966); *Hill v. Cloud*, 48 Ga. App. 506, 173 S.E. 190 (1934); *Wlodarek v. Thrift*, 178 Md. 453, 13 A.2d 774 (1940); *Sullivan v. Stout*, 120 N.J.L. 304, 199 A. 1 (1938); *Zurich Gen. Acc. & Life Ins. Co. v. Klein*, 181 Pa. Super. 48, 121 A.2d 893 (1956). See generally Annot., 5 A.L.R. 1389 (1920).

⁷⁶ See, e.g., *Sullivan v. Stout*, 120 N.J.L. 304, 199 A. 1 (1938).

⁷⁷ In medical malpractice cases the relevance of local practice is clearly established, but in legal malpractice the geographic extent of the "community" of practitioners against whom the defendant's conduct will be gauged is not so narrowly defined. See Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 772, 781

(and indeed in many cases there is no practical way to do so), his personal search methods are not less adequate than those of the legal fraternity in general, and thus he cannot be held to have violated the standard of professional care. It appears fairly common in other jurisdictions for defendant attorneys in malpractice actions to offer as witnesses other attorneys from their communities who will testify that the defendant's handling of the matter is no different than that which could have been expected from any good attorney under the circumstances.⁷⁸ The admissibility of such testimony seems unobjectionable, and it is clearly relevant to the issue of negligence, but hardly dispositive.

For example, in *Gleason v. Title Guarantee Co.*,⁷⁹ the attorney submitted an application to the title company for insurance, representing that he had made a search of the public records. Because of the unusual amount of land sales activity in the county, the attorney had in fact not searched the public records but had relied upon the tract book of a local abstract company which was, to the attorney's knowledge, six weeks out of date, a fact of which the title insurance company was never adequately apprised. The attorney's report omitted an outstanding mortgage which the title insurance company was later obliged to satisfy. The company then filed an action for malpractice against the attorney. In defense, the attorney raised the custom among lawyers in the community during the period in question of conducting their title searches in precisely the way involved in this case. The court was not impressed. It held the attorney liable despite his conformity to the custom of his peers, observing that if the negligence is clear, it is no defense that a whole group of lawyers is guilty of it.

But this case is surely an extreme example; what result would be reached if the custom of reliance upon six-week-old abstract books were of long standing and statewide usage in Florida? *Gleason* offers only a slim ray of hope for the North Carolina realty buyer who finds himself subject to an off-record title defect his attorney's search did not cover. In *Gleason* the certificate was a fairly clear misrepresentation of the search performed; by contrast, the certificates used in North Carolina mis-

(1968), which argues that a more rigid locality standard should be enforced against attorneys than physicians. See generally Cohen, *Confronting Myth in the American Legal Profession: A Territorial Perspective*, 22 ALA. L. REV. 513 (1970).

⁷⁸ See, e.g., *Rhine v. Haley*, 238 Ark. 72, 378 S.W.2d 655 (1964); *Olson v. North*, 276 Ill. App. 457 (1934).

⁷⁹ 300 F.2d 813 (5th Cir. 1952), *damages modified on rehearing*, 317 F.2d 56 (1963).

represent the scope of the search performed only subtly, if at all.⁸⁰ The bar's practice of omitting search of non-record defects, while simultaneously failing to discuss the omission with the buyer, is probably too widespread and well-ingrained to be successfully attacked.

Heavy reliance upon custom as an exculpating factor is also suggested by the fact that the title certificates submitted by attorneys to the author uniformly omitted any mention of the period of search. Perhaps the omission is motivated by a desire to avoid explaining to the client why the attorney chose forty years, rather than sixty or two hundred, as the appropriate search period. Most laymen probably assume, in the absence of a contrary statement, that the search has extended back to the original title in the state. Since neither statute nor any published bar title standard fixes a search period in North Carolina, prudence would seem to dictate the mention of the search period on the face of the certificate; but the attorneys are probably correct in believing that, if their practice is close to that of their peers, they will be safe from liability.

A further problem with recovery for malpractice in title searches is the tort statute of limitations,⁸¹ which is universally held to begin to run when the title opinion is delivered rather than when the title defect is later discovered.⁸² Although the majority of defects probably turn up within a few years after transfer of title,⁸³ the statute will insulate the attorney from those which do not. In this respect, the attorney's personal liability is hardly an ideal title assurance vehicle.

As indicated above, a large proportion of attorneys do not include

⁸⁰ On the other hand, the typical home-buyer is much less likely to be wary of the attorney's guile than was the title insurer in *Gleason*. Arguably this fact justifies closer scrutiny by the court.

⁸¹ Rather surprisingly, no North Carolina case appears to discuss the limitation of actions for legal malpractice. Evidently applicable is the three-year statute "for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." N.C. GEN. STAT. § 1-52(5) (1969). See *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957): "The period prescribed for the commencement of an action for malpractice based on negligence is three years from the time the cause of action accrues." *Shearin* involved medical malpractice and thus is not direct authority for the present problem.

⁸² *Sullivan v. Stout*, 120 N.J.L. 304, 199 A. 1 (1938); Annot., 118 A.L.R. 215 (1939).

⁸³ See Deatly, *One Man Looks at Public Regulation*, 42 TITLE NEWS 5, 9 (No. 3, 1963):

The experience of my company . . . is that over eighty percent of our losses arise within five years of the policy date and 90% within ten years but that we occasionally have losses which arise more than 25 years after the assumption of the risk.

If this experience is representative, a three-year statute of limitations will cut off a significant proportion of all claims.

the single-family home buyer as an addressee of the title certificate. It seems likely that many buyers in such cases assume (though the assumption is unjustified) that even though they have received no formal certificate from the attorney, nevertheless he has searched the title for the buyer's benefit and has found no problem with it. Our questionnaire therefore asked the attorneys whether, if their title certificates were addressed only to the lenders, they customarily advised buyers that they had no title opinions addressed to them. Only thirty-five per cent of the respondents in this category said they pointed out to the buyer his lack of a title opinion, although eighty-six per cent said they would willingly provide a certificate for the buyer if he requested one. Of course, such a request is unlikely if the buyer is unsophisticated and does not realize that a written opinion is necessary to protect him. Moreover, of those attorneys responding to the questionnaire who did not customarily send a certificate to the buyer, thirty-six per cent said they would make an extra charge for supplying a certificate to the buyer; typical charges ranged from ten dollars to thirty-five dollars. Title attorneys would probably explain the additional charge by pointing out that a certificate to the buyer as well as the lender generates a somewhat greater risk to the attorney than a certificate to the lender alone. Yet it is precisely this risk that the layman buyer frequently (but erroneously) supposes has already been assumed by "his" attorney.

Malpractice Insurance as Title Protection

Attorneys have frequently cited to the author the prevalence of liability or malpractice insurance as a justification for confidence in the present North Carolina method of title assurance. Yet the existence of malpractice insurance has only a minor impact on the adequacy of title assurance for two reasons: first, because liability insurance is not universally carried in adequate amounts and, second, because its protection becomes operative only when the attorney's personal liability can be established. In the questionnaire respondents were asked about their professional liability insurance; eighty-five per cent replied that they carried such insurance, but only seventy-nine per cent had coverage for errors and omissions in real estate title searches.⁸⁴ This discrepancy is explained

⁸⁴ These figures offered by real estate lawyers are much higher than those for the profession as a whole. The Insurance Rating Board has recently estimated that about half of the 214,000 American lawyers in private practice today carry malpractice insurance; this figure indicated that a major increase has occurred within the past fifteen years. *Lawyers Face More Suits from Clients*, Los Angeles Times, Dec. 10, 1970, Part X, at 7, col. 1.

by the fact that some of the companies writing such insurance exclude the coverage of title searches unless the insured attorney purchases a rider to the policy at an additional premium; apparently, some attorneys who do real estate work (hopefully, those who do only a little of it) have concluded that the additional coverage for title searches is not worthwhile. Thus, more than twenty per cent of our respondents have no insurance to cover title search errors.

Also interesting is the breakdown of coverage limits. The most popular coverage among the insured attorneys responding to the questionnaire was one hundred thousand dollars, selected by forty-three per cent of the insured attorneys. Eighteen per cent of the insured attorneys had coverages of one million dollars or more, while twenty per cent had coverages of fifty thousand dollars or less. This last category seems most significant since real estate transactions involving an excess of fifty thousand dollars in value are common, even in the single-family home area. Indeed, the popular one-hundred-thousand-dollar policy is totally inadequate coverage for many commercial transactions.

A more pervasive limitation on the usefulness of the liability policy as a title assurance device is illustrated by the following language, typical of policies in use in North Carolina:

Coverage. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages resulting from any claim made against the insured arising out of the performance of professional services for others in the insured's capacity as a lawyer. . . .⁸⁵

Obviously the malpractice insurer is liable only if the attorney is liable; thus, the policy adds not one whit to the buyer's protection against those off-record defects for which the attorney himself will be free of liability. The same is true of on-record defects appearing in the record at so early a date that they fall outside the normal time-period of title search coverage, of those discovered so late that the statute of limitations bars a malpractice claim, and of all defects asserted against a buyer to whom a title certificate never ran. No criticism of the insurers is intended here; nevertheless, the nature of the malpractice policy is such that its only benefit

⁸⁵ Pilot Fire and Casualty Co., Lawyers Professional Liability Policy. This company has policies outstanding which insure between eight hundred and nine hundred North Carolina lawyers. Letter from A. A. Ramont, Second Vice President of Pilot Fire and Casualty Co., to author, Nov. 5, 1970.

to the buyer is as a hedge against the possible insolvency or unavailability of the lawyer.

Title Insurance—Usage and Attitudes

A title insurance policy is a contract by which the insurer agrees to indemnify the insured if the title to real estate is not as stated on the face of the policy and if the insured suffers loss as a result of the discrepancy.⁸⁶ Two types of policies are in common use: the owner's policy, by which the owner of the real estate is insured, and the lender's or mortgagee's policy, which insures the party holding a lien on real estate to secure a debt.

It has been suggested that title insurance companies might write policies on a "casualty" basis; that is, the company might take few pains, or none at all, to examine or verify the state of the title before writing the policy and might charge sufficiently large premiums to enable it to cover the substantial claims which the company might expect as a result of such an operating policy.⁸⁷ In reality, the author knows of no title insurance company writing such policies, and any such company might incur serious opposition to this procedure in those states, such as North Carolina, where the power to regulate the insurance industry is taken seriously by state governments.⁸⁸ Certainly, the vast preponderance of title insurance companies make careful investigation of the title to land on which a policy is to be written.⁸⁹

Several diverse procedures are used by American title insurance companies to determine whether the state of title to a particular property is an acceptable underwriting risk. In California, several other western states, New York City, Chicago, and Cleveland, for example, the larger title insurance companies maintain their own "plants"—sets of abstracts,

⁸⁶ See generally F. ROBERTS, PUBLIC REGULATION OF TITLE INSURANCE COMPANIES AND ABSTRACTERS 4-13 (1961); Johnstone, *Title Insurance*, 66 YALE L.J. 492 (1957).

⁸⁷ See Note, *Title Insurance: The Duty to Search*, 71 YALE L.J. 1161 (1962).

⁸⁸ See generally ROBERTS, *supra* note 86.

⁸⁹ Indeed, the efforts of title insurers to investigate and except from coverage every discoverable risk have led some to charge that no insurance is actually involved since no risk remains. The charge is overdrawn, see ROBERTS, *supra* note 86, at 6, but it is undeniable that losses through payment of claims are quite small. See Jensen, *1969 Profit Average Again at 13 Per Cent*, 49 TITLE NEWS 6 (No. 12, 1970) (losses of a group of reporting companies were 4.2 per cent of premium income); Johnstone, *supra* note 86, at 501, 518-20 (losses generally in two per cent range). On the other hand, operating expenses tend to run much higher than in other types of insurance firms. See Jensen, *supra* (operating expenses in 1969 were 82.8 per cent of operating income).

indices, and maps which essentially reproduce in the title company's offices the data that would be found in the public records.⁹⁰ These title plants are usually indexed by tract rather than grantor and grantee, a method which allows a very rapid and efficient search. The information contained in these title plants makes them extremely valuable, and many title companies have recently been involved in computerization and microfilming programs to safeguard and make more efficient their title-plant operations.⁹¹

A second method by which title insurance companies determine the state of titles they insure is the abstract system.⁹² This method, used predominantly in the midwestern states, depends on the existence of private abstract companies which, for a fee, will produce an abstract of title to a particular piece of property. The abstract is simply a collection of summaries of the recorded documents which affect the property's title. A title insurance company might rely directly on an abstract furnished by such a company, or it might prefer to act instead on an attorney's opinion, which in turn would be based upon the attorney's review of the abstract. In states in which the abstract system is used, it is a common custom for the seller of real estate to be obligated to furnish a current abstract to the buyer prior to closing. The abstract to a particular property will be passed on from owner to owner and updated by the abstract company each time a new sale of the property occurs.

Neither of the foregoing methods is used in North Carolina by title insurance companies. Indeed, many believe that the preparation of abstracts or the maintenance of a title plant by anyone other than a licensed attorney would constitute the unauthorized practice of law in this state.⁹³ There is, of course, the possibility that a title company wishing to commence a title plant operation would hire salaried attorneys to do this work, thereby

⁹⁰ See Zerwick, *Creation and Maintenance of a Title Plant*, 46 TITLE NEWS 2 (No. 3, 1967).

⁹¹ Several articles on electronic data processing of title information appear in 48 TITLE NEWS (No. 7, 1969). See also Lowry, *Modern Machinery for the Small Office*, 48 TITLE NEWS 102 (No. 1, 1968).

⁹² See generally 1 FLICK, ABSTRACT AND TITLE PRACTICE (2d ed. 1958).

⁹³ This belief is apparently based on N.C. GEN. STAT. § 84-2.1 (1965), which defines the practice of law as including "performing any legal service for any other person, firm, or corporation specifically including . . . abstracting or passing upon titles." But presently all title insurers "[pass] upon titles" with impunity, and their abstracting is hardly a greater violation of the statute. Arguably, such activities are not "for any other person." Indeed, N.C. GEN. STAT. § 58-134.1 (Supp. 1969) expressly authorizes title insurers to "invest . . . in abstract or title plants." Surely insurers may use plants they may buy or build.

presumably avoiding the statute's prohibition, but the title insurance companies operating in North Carolina have so far made no move in this direction. Instead, the customary *modus operandi* in North Carolina is a conventional title search of the public records by a private attorney, following which the attorney files an application for insurance with the desired title company.⁹⁴ The application is in reality a certificate of title (and, in fact, a more carefully drawn one than is used by many attorneys in certifying title in non-insured transactions). The title company's employees examine the attorney's application, and if it appears satisfactory, a preliminary binder is issued. This document serves as a commitment on the company's part to write a policy if, following the closing of the transaction, the title is verified to be as stated in the application. The attorney conducts the closing, down-dates his title search to the moment of recording the closing documents, and files with the title company a verification that the application's information is valid. The company then mails the actual title policy to the insured parties.

The above narrative makes clear the attorney's preeminent role in title assurance in North Carolina, even in cases where title insurance is also obtained. It should be carefully noted that this is not a universally applicable principle. In other locales where title insurers operate their own title plants, the companies place no reliance on attorneys' certificates. In such states, it has been common to use title insurance, not as a supplement to the attorney's work, but as a substitute for it. It has been estimated, for example, that in southern California ninety per cent of all real estate transactions are closed, and title insurance issued, without the intervention of an attorney for any party.⁹⁵ In such a setting, the title company's policy serves in lieu of the attorney's certificate, and a commercial escrow company (often the title insurance company itself) performs the function of supervising the closing, which in North Carolina is in the attorney's hands.

If North Carolina attorneys are aware of the use of such techniques in other states, it might not be surprising to find among them some level of suspicion or even animosity toward title insurers. Although the data collected in the survey do not suggest that real estate transactions form

⁹⁴ Each company maintains a list of attorneys which it regards as sufficiently competent to be relied upon; it will accept applications only from these lawyers. The method is thus sometimes called the "approved attorney system." Young attorneys who do not enter established firms have sometimes complained about the difficulty of getting onto the approved list.

⁹⁵ Brown, *The Lawyer's Prescription*, 30 UNAUTH. PRAC. NEWS 1, 7 n.3 (1964).

an extraordinarily profitable segment of most attorneys' practices,⁹⁶ the income is nonetheless fairly consistent and stable, and one can well imagine the reluctance of the average attorney to yield up that segment of his practice to the title insurance companies.

On the other hand, title insurance can do for the attorney's client what no other method of title assurance discussed above can accomplish: it can protect against non-record defects. Forgery, faulty recording or indexing, lack of a grantor's capacity, rights of surviving spouses—all these defects and many others are insured against by the title company. In fact, the only types of defects we have mentioned in this article which are excluded from the 1970 policy form of the American Land Title Association⁹⁷ are those created by the police power—that is, the exercise by governmental entities of zoning powers, subdivision control, building-and-housing-code prerogatives, and the like—and by eminent domain.⁹⁸

The real estate attorney is thus placed in a position of divided loyalties, if not outright conflict of interest. If he does not recommend an owner's

⁹⁶ About three out of five lawyers felt single-family home transactions were less profitable than other legal work, but three out of four felt that non-single-family real estate work was at least as profitable as other phases of law practice.

⁹⁷ The 1970 ALTA form contains the latest in a series of changes broadening coverage. These changes appear to have resulted principally from pressure brought by large financial institutions which purchase mortgages on the secondary market—primarily life insurance companies and the Federal National Mortgage Association. See Roberts, *Urban Conveyancing Techniques in America: The Story Behind Title Insurance*, 27 CONVEY. & PROP. LAW 240 (1963). From the viewpoint of these institutions, a broad, uniform mortgagee's title policy is essential to the fungibility and liquidity of mortgage investments. No such pressures have come from the beneficiaries of owners' policies, but the ALTA has for the sake of simplicity made similar changes in the owner's policy form. See Baughman, *FNMA and the Title Insurance Industry*, 43 TITLE NEWS 112 (No. 1, 1964); Howlett, *Report of the Standard Title Insurance Forms Committee*, 49 TITLE NEWS 22 (No. 1, 1970).

⁹⁸ It is, of course, possible that some title insurers will continue to use older, more narrow forms or will add exclusions which the 1970 ALTA form does not contain. For example, by excluding coverage of unfiled mechanics' liens, matters of survey, rights of those in possession, or the like from the forms, insurers may cause such terms to become negotiable points—if the attorney for the buyer or lender is willing to negotiate with the insurance company. An additional problem area, which the 1970 form does not solve, grows out of the policy's exclusion of "[d]efects . . . not known to the company and not shown by the public records, but known to the insured claimant . . ." Suppose the insured knows certain facts (e.g., the existence of a ditch along the rear property line) but does not realize that they have title significance (e.g., that the ditch may be a prescriptive easement). See also Annot., 98 A.L.R.2d 537 (1964) (construction of exclusion for rights of parties in possession); Annot., 98 A.L.R.2d 527 (1964) (exclusion for defects created or suffered by the insured). A full listing of the old exclusions, many of which no longer appear in most policies, is given in Putnam, *What Your Title Policy Does Not Protect Against*, 37 TITLE NEWS 25 (No. 6, 1958).

policy to his client purchasing real estate, he is leaving the client unprotected in significant ways, while the client probably supposes that the attorney's record title search provides full assurance of title. But if the attorney, acting out of loyalty to his client's best interests, recommends a title insurance policy, he may be strengthening the hand of the very entity that will someday try to replace him in the conduct of real estate transactions. A major goal of our questionnaire survey was to investigate the attitudes and behavior of attorneys faced with these competing interests.

We must note initially that in many transactions, some contact with title insurance companies is unavoidable since certain lenders require that mortgagee's policies be issued on every real estate loan they make. Our respondent attorneys were asked what percentage of lenders in their localities customarily required a mortgagee's title policy. On single-family home loans, the average estimate for savings and loan associations was twenty-five per cent; for banks and mortgage companies, seventy per cent. This difference is principally explained by the fact that banks and mortgage companies resell their loans on the secondary mortgage market to the Federal National Mortgage Association or other institutional investors, such as insurance companies, much more frequently than do savings and loan associations. Secondary purchasers of mortgages almost invariably require a title policy on every loan they purchase; indeed, the presence of wide title insurance has been an essential ingredient in the development of a national secondary mortgage market.⁹⁹ Savings and loan associations, on the other hand, usually retain their mortgage loans in their own portfolios. Some of these associations have concluded that title insurance is a worthwhile protection, while others have not seen fit to require it, a decision probably encouraged by their private counsel. The average figures given by our respondent attorneys suggest that lenders are somewhat more likely to require mortgagee's policies in connection with loans on commercial or income-producing property. The average estimates given by our respondents on such transactions were thirty-one per cent for savings and loan associations and seventy-three per cent for banks and mortgage companies.

Perhaps the most serious problem raised by the presence of a mortgagee's policy in the transaction is the probability that the purchaser of the real estate will assume the policy protects him, an assumption sometimes fostered by attorneys. No one who seriously analyzed the situation

⁹⁹ See Baughman, *supra* note 97.

would suppose that the buyer's equity in the property is protected by a lender's policy.¹⁰⁰ But there is at least a surface plausibility in the belief that the lender's policy will discharge the indebtedness in the event of a title failure, thereby preventing any loss to the buyer beyond his equity. Yet on closer analysis, even this apparent protection is vitiated by the subrogation clause in the title policy,¹⁰¹ at least if the buyer is personally liable on the mortgage debt (as he usually will be in North Carolina).¹⁰² For if the title failure is sufficiently serious to cause the buyer to cease payment on the loan, the title company will discharge the debt or purchase the mortgage for the amount remaining to be paid on it and may then proceed to enforce it personally against the buyer.¹⁰³ The deed of trust form signed by the buyer will doubtless contain covenants of title running to the trustee and beneficiary,¹⁰⁴ thus appearing to inculcate the buyer for

¹⁰⁰ The face amount of the lender's policy will be the amount of the debt, not the price of the property. The title company's liability declines steadily as payments on the loan reduce its principal balance.

¹⁰¹ The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued. . . . ALTA Loan Policy—1970, Conditions and Stipulations, Article 10, Subrogation Upon Payment or Settlement. The general concept of subrogation, in a context unrelated to title insurance, is recognized in North Carolina. See *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 86 S.E.2d 745 (1955).

¹⁰² The North Carolina anti-deficiency legislation, N.C. GEN. STAT. § 45-21.38 (Supp. 1969), bars deficiencies only on mortgages or trust deeds given "to secure to the seller the payment of the balance of the purchase price of real property" (emphasis added). Deficiency judgments are permitted on loans by third-party lenders. Thus, unless the note and trust deed stipulate against personal liability (an uncommon arrangement except in certain transactions involving income-producing property), the buyer's liability will survive a foreclosure that does not bring an amount sufficient to satisfy the debt.

¹⁰³ No case has been found involving precisely these facts. In *St. Paul Title Ins. & Trust Co. v. Johnson*, 64 Minn. 492, 67 N.W. 543 (1896), a builder obtained a construction loan and covenanted not to allow mechanics' liens to arise which would be superior to the construction mortgage. When mechanics' liens were filed, the lender's title insurer discharged them and was then permitted to recover that amount from the builder. The case seems distinguishable from the present situation on the ground that the builder was at fault in *Johnson*, while in the context discussed in the text, the title failure is beyond the owner's control. Where the title company purchases the note and trust deed from the lender, the company's right to recover from the house-buyer seems clear even without reference to a subrogation theory.

¹⁰⁴ For example, the habendum clause of the FHA trust-deed form in use in North Carolina contains the following title covenants:

[the trustor covenants] that he is seized of the premises in fee and has the right to convey the same in fee; that the same are free and clear of all encumbrances and that he will warrant and forever defend the premises unto the . . . [trustee] . . . from and against the lawful claims of all persons whomsoever.

the title failure. In cases where the buyer has been evicted by the holder of paramount title, personal enforcement of the debt against him by the title company seems harsh indeed, and perhaps some companies would elect not to enforce in order to avoid bad publicity or because the buyer's assets were too meager to justify the effort. But from a strictly legal viewpoint, there seems to be no impediment to the recoument of the title company's loss from the buyer.

Unless he is warned by counsel, it seems most unlikely that the typical home-buyer will suspect this risk. He has paid for a title insurance policy (assuming his lender requires one) and quite naturally expects to be covered by it. In such a case, involving a single-family home purchaser and a mortgagee's policy, it is especially crucial that the attorney point out the availability and cost of an owner's policy and the fact that a lender's policy does not cover the owner. Yet only sixty per cent of our respondent attorneys said that they customarily explained this situation to the buyer. Without such an explanation, only a tiny fraction of buyers is likely to recognize the need for a separate owner's policy.

A considerably smaller portion of the real estate bar actually *encourages* the purchase of owner's title insurance. Only nine per cent of our respondents customarily encouraged single-family home buyers to obtain such policies; another nine per cent encouraged their purchase if a lender's policy were already being required. The attorneys were much more active in encouraging the purchase of owner's policies on commercial or income-producing property. In these cases, twenty-six per cent encouraged the purchase in all events; an additional thirteen per cent encouraged the purchase if a lender's policy were required. The attorney's willingness to push title insurance harder in commercial transactions is understandable in light of the greater loss to be incurred as a result of title failure; yet it is again ironic that the clients who are most likely to have a sophisticated understanding of the risks involved are the very clients the attorney is most solicitous to protect.

The respondent attorneys who did not customarily encourage the purchase of owner's title insurance were asked their reason for not doing so. The questionnaire contained a list of possible reasons, with the attorney given the option of writing in a reason not mentioned on the list. The most common reason, given by fifty per cent of the attorneys, was that insurance "adds so little to the protection already afforded by my title search and certificate." The second most popular reason, checked by

thirty-six per cent of the responding attorneys, was "it is not my role to sell title insurance." A related reason, checked by twelve per cent of the attorneys responding, was that the "cost is too high."

Whether the title policy in reality adds "so little" to the protection afforded by the attorney's search is, in the ultimate analysis, a matter of individual judgment. Scant published data exist on the relative frequency of various types of title claims and defects, and since many such claims are settled without litigation and thus do not become matters of public record, it is difficult to see how such data could be readily generated without full disclosure by the title companies.¹⁰⁵ Nonetheless, we have previously suggested a long list of possible title defects and claims which the attorney's search will not disclose but which are covered by an owner's title policy.¹⁰⁶ Based on this list, it seems a reasonable estimate that the additional protection afforded by the title insurance beyond that given by the attorney's record search is of roughly the same order of magnitude as the increment of protection afforded by the attorney's search over and above mere reliance upon a warranty deed with no search or insurance involved. If this assumption about the incremental value of title insurance is sound, the title policy, far from being too costly, is quite a bargain; for its cost in the usual single-family home purchase is only about one-fourth of the attorney's fee. That fee covers other legal services in addition to title search, but the search comprises well over half of the attorney's time spent in the typical home-purchase transaction.¹⁰⁷ Viewed in this light, the title insurance premium appears to buy a material amount of protection at quite a modest cost.¹⁰⁸ And this is especially true when a lender's

¹⁰⁵ Officials of two major west coast title insurers have told the author that several of the larger companies have in recent years begun to collect such data internally, but that it could not be disclosed to non-employees. A committee of the ALTA has attempted to assemble industry-wide claims data by category by claim, but has made little progress because of the diverse procedures used by individual companies in reporting data. An official of a large California company told the author that the three largest categories of claims paid in a recent year (in order of decreasing total size) were (1) mechanic's liens, (2) erroneous insurance of lien priority resulting from an incorrect interpretation of the law of subordination agreements, and (3) search errors.

¹⁰⁶ See text accompanying notes 55-69 *supra*.

¹⁰⁷ See text at note 16 *supra*.

¹⁰⁸ This is not to suggest that title premiums should not be reduced. In only a few states is there public regulation of rates. See ROBERTS, *supra* note 86, at 249. While the companies do not seem to make outrageous profits, see Jensen, *supra* note 89, the experience of the Florida bar-related company indicates that premiums could be reduced substantially without impairing profitability. See Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 465 n.135 (1969). But differences in accounting procedures, overhead costs,

policy is required to be purchased in any event because the additional cost of procuring the simultaneous issuance of an owner's policy is extremely small, and in the case of at least one major North Carolina company, there is no additional cost.¹⁰⁹ It seems almost incredible that, even in cases where a lender's policy was being required, less than twenty per cent of our respondent attorneys encouraged home buyers to obtain owner's policies.

The second most frequent reason given by our respondent attorneys why they did not encourage the purchase of owner's title insurance was that "it is not my role to sell title insurance." It might be observed that one's perception of his role may be heavily influenced by self-interest and, further, that the attorneys of Florida, who operate their own bar-related title insurance company, take a greatly different view of the attorney's role as a title insurance salesman.¹¹⁰ Of more importance is the fact that, even in North Carolina, it is indisputably clear that the attorney's role is to protect the interests of the client who is purchasing real property, and particularly is this true in regard to the state of the property's title. If the attorney pretends, or permits his client to assume, that a record search accomplishes full title assurance, he has in effect made a misrepresentation to a person to whom he owes a fiduciary duty—a grave matter, to say the least. If the attorney does not wish to sell title insurance, he should at a minimum explain comprehensively and clearly the costs and the benefits of procuring insurance and the risks the buyer is assuming by electing to go uninsured.

Several of the reasons suggested by the questionnaire for not encouraging the purchase of title insurance turned out to be insignificant in the judgment of the attorneys. For example, only half of one per cent of the respondents felt that title insurance companies were too unwilling to pay claims—a response which suggests either that the companies are in fact highly cooperative or that most of the respondents had had so little

and tax treatment may weaken any comparison between commercial and bar-related companies. This point needs further detailed study.

¹⁰⁹ Letter to approved attorneys of First Title Insurance Co. (undated; issued in Spring 1970). This company now makes no additional charge for a lender's policy when an owner's policy is purchased at the usual premium rate for lender's insurance—basically two dollars and fifty cents per thousand.

¹¹⁰ See generally Yelen, *Lawyers' Title Guaranty Fund: The Florida Experience*, 51 A.B.A.J. 1070 (1965). The Florida bar has been resoundingly criticized in title insurance circles for the obvious conflict of interest inherent in the selling by the lawyers of a product in which they have a financial interest. See, e.g., Rosenberg, *The Lawyer's Role in a Real Estate Transaction*, 46 TITLE NEWS 64 (No. 1, 1967).

experience with claim procedures that they have no ground for objecting to them. Only one per cent stated "I regard it (title insurance) as an affront to my competence as an attorney"; perhaps our respondent attorneys passed over that answer simply because it seemed too venal when read on the printed page. The author has heard the sort of sentiment it embodies expressed by a good number of North Carolina lawyers in personal conversation.

Only three per cent of the attorneys responding indicated that "the application papers require too much time and attention." Whether this objection to title insurance is justified is difficult to assess since the companies' forms and papers vary substantially in their complexity and detail. Perhaps one reason the attorneys did not find the paperwork objectionable is that a good many of them charge an additional fee for doing it. Twenty-nine per cent of our respondents indicated they made an extra charge for applying for a lender's policy, and thirty-one per cent charged an additional fee for procuring an owner's policy. In both cases, the amount of the extra fee most frequently mentioned was twenty-five dollars, an amount which would seem more than adequate to compensate for the time of the attorney's secretary consumed by the drudgery of filling out almost any imaginable form.

One possible reason for the unwillingness of attorneys to encourage the purchase of owner's insurance was not listed on the questionnaire, primarily because it was felt that no attorney would admit to being influenced by it: a fear of being sued for malpractice by a title insurance company. It is interesting to speculate about whether the attorney's risk of a negligence suit is more or less serious when title insurance has been procured. If the attorney has carelessly failed to inform the title company of a particular defect and the company must later respond to a claim by the insured and pay off the defect, it obviously has a subrogation claim back against the attorney. What are the probabilities of the attorney actually having to make good on this claim, as contrasted with the situation in which there is no title insurance and the owner or mortgagee makes a claim against the attorney directly? There are no concrete data, but it seems quite probable that the attorney's position is better with the title insurance company in the picture. A company that has a continuing and profitable relationship with the attorney is much less likely to proceed against him than is the buyer whose only contact with the lawyer may have been this particular transaction and who does not understand the risks and peculiarities of title defects in any event. Of course, if the company

has paid a sufficiently large claim and the attorney appears able to stand the loss, the company may sue him. But under the approved-attorney system, the goodwill of attorneys is an immensely valuable asset of the title insurance companies, and a company may well conclude that it is wiser to absorb a loss of a few hundred, or even a few thousand, dollars than to pass that loss on to the attorney at the cost of large numbers of referrals from him in the future. Subrogation actions by title companies against attorneys are not common, but, on the other hand, they are not unheard of.¹¹¹ Not one of the nearly two hundred attorneys responding to our questionnaire had himself been subjected to a claim by a title company, but twenty-four per cent stated they had heard of a claim asserted against another attorney in the county.

The discussion in the paragraph above assumes that the attorney has considerable power to select the particular title company that will get a specific piece of insurance business. The data collected from the attorneys responding to our questionnaire bear out this assumption. The average estimate of those attorneys was that the buyer chooses the particular title insurance company in only 1.7 per cent of the cases. This result is hardly surprising since the vast majority of buyers probably have not the slightest knowledge of which companies write title insurance within the state. The responses to our questionnaire estimate that the attorney selects the particular title company to write the insurance in about thirty-four per cent of the cases, and the lender chooses the company in the remaining sixty-four per cent of cases. A number of the respondents commented that whether the choice would be made by the attorney or the lender would frequently depend upon whether the particular lender involved in a transaction had a title insurance company as an affiliate or subsidiary.

In cases where such a relationship between lender and insurer exists, it appears common for the lender to specify that its affiliated insurance company be used. Such a practice raises severe ethical problems for the attorney, as well as issues of fairness regardless of the attorney's position. If only a lender's policy is to be issued and the underwriter is an affiliate of the lender itself, it is strongly arguable that the title insurance premium is nothing more than a subtle mechanism to increase the lender's yield on the loan. In the event of a title failure, the position of neither the borrower nor the lender (disregarding the subtleties of its corporate structure) is improved in the slightest by the presence of the so-called

¹¹¹ See, *e.g.*, *Gleason v. Title Guarantee Co.*, 300 F.2d 813 (5th Cir. 1952), *damages modified on rehearing*, 317 F.2d 56 (1963).

title insurance. In reality, the lender has elected to become a self-insurer, and the borrower has paid a premium for which he has received no consideration whatever except the granting of the loan itself. The situation may thus raise issues of usury.

Although in situations where no lender-operated title company is involved the attorney clearly has great opportunities for pushing business toward one title insurance company or another, there appears to be little actual corruption in this system. Only 2.6 per cent of our respondent attorneys stated that they ever received rebates or fees from title insurance companies in return for sending policy applications. Such rebates would raise ethical questions of grave dimensions and might be analogized to the cases of physicians who also operate pharmacies.¹¹²

A fair summary of the impact of title insurance on the title bar is that, far from being corrupted by the title insurance system, attorneys have failed to become educated as to its advantages to their clients and themselves, a condition which has unfortunate consequences for the protection of the buyers of real estate within this state.

Other Title Assurance Means

There are several other methods of title assurance that are theoretically operable in North Carolina, although none of them have major significance. It is customary to use a "full" warranty deed—one containing all possible covenants of title. But because recovery on such covenants depends upon the continued availability and solvency of past grantors in the chain of title, deed covenants form an uncertain and unsatisfactory mode of title assurance that is likely to be asserted only as a last resort.

The law of adverse possession also forms a bulwark of title assurance in certain cases. But adverse possession does not solve a long list of title problems,¹¹³ and when one considers the difficulties frequently encountered in adducing the necessary evidence of possession for the statutory period, the inevitable conclusion is that adverse possession is at best a limited and specialized form of title assurance.

There is one further mode of title assurance which, if widely adopted, would probably go far toward squeezing out both the lawyers and the title insurance companies in the conveyancing field. This is the

¹¹² See articles cited at note 110 *supra*.

¹¹³ See text accompanying notes 22-26 *supra*.

Torrens registration system under which the title to land is represented by a certificate similar to those currently used for motor vehicles. The state of the title as it appears on the face of the certificate is conclusive for most purposes, and conveyancing is handled by endorsement of the certificate by the grantor.¹¹⁴ During the 1930's the Torrens system was widely heralded by commentators as a panacea to conveyancing problems,¹¹⁵ but it never really caught on and is virtually a dead issue today. North Carolina is one of twelve states which still authorize Torrens registration of land titles,¹¹⁶ but the system is not widely used. Only five per cent of the attorneys responding to our questionnaire stated that they had ever registered title to land under the Torrens system, and only one attorney had registered as many as eight titles. The state-wide applicability of this response may be questionable on grounds of geographic bias; the author has learned from personal conversations with attorneys in the eastern portion of the state that a number of large timber and mineral firms do procure Torrens registration of their holdings, presumably because adverse possession cannot run against a Torrenized title.¹¹⁷

The most important reason for the unpopularity of the Torrens system in North Carolina is probably the initial cost of registration, which requires a thorough title search by a court-appointed examiner and a judicial proceeding comparable to a quiet title action.¹¹⁸ Not many private purchasers of land are interested in spending the extra fee for this proceeding, which would likely run to several hundred dollars and which does the registrant himself very little immediate good. Other reasons for the system's lack of wide usage include the paucity of North Carolina appellate decisions interpreting the Torrens statute, its unfamiliarity to lenders, and the obvious reluctance of attorneys and title companies to promote a system which seems ultimately to be against their interests.

¹¹⁴ See generally R. POWELL, REAL PROPERTY ¶¶ 919-23 (abr. ed. 1968); Patton, *The Torrens System of Land Title Registration*, 19 MINN. L. REV. 519 (1935).

¹¹⁵ See, e.g., McDougal & Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125 (1939); McDougal, *Title Registration and Land Law Reform: A Reply*, 8 U. CHI. L. REV. 63 (1940).

¹¹⁶ N.C. GEN. STAT. ch. 43 (1966); R. POWELL, REAL PROPERTY ¶ 921 (abr. ed. 1968). An exasperating feature of the North Carolina terminology is that both Torrenization and conventional recordation are called "registration." See N.C. GEN. STAT. § 47-20 (1966).

¹¹⁷ N.C. GEN. STAT. § 43-21 (1966).

¹¹⁸ N.C. GEN. STAT. § 43-11 (1966).

Handling the Closing

Upon completion of his preliminary title search, the attorney prepares to superintend the closing. If there is existing indebtedness on the property, the holder of the debt is contacted for information regarding its principal balance and interest. The amounts of such prepaid items as rents, taxes, and hazard insurance premiums must be learned so that they may be prorated between buyer and seller. When this information has been accumulated, a closing statement is prepared by the attorney or by the lender in cases where a new loan is being made. Then the closing is held and attended by the attorney, the parties, the broker or salesman, and a representative of the new lender. The necessary instruments and checks are signed and endorsed, and the proceeds of the sale are disbursed, as appropriate, to the seller, previous lender, and broker. Following the closing, the attorney takes the new deed and deed of trust to the courthouse for recordation.

Although this brief explanation makes the procedure seem straightforward, it actually raises at least two problems that may be exceedingly serious. The first involves the discharge of a pre-existing debt with the proceeds of sale of the property. Assume the simple case in which one owner-occupant is transferring his house to another. Suppose that the existing debt represents a loan originally made to the present seller of the house by a local mortgage company. Assume further that that mortgage company has sold the loan to an out-of-state institutional lender, a Virginia life insurance company, for example. The borrower has been given no notice of the assignment of the note and deed of trust and has continued to make his payments regularly to the mortgage company believing that it continues to be his creditor. The mortgage company is in reality acting now as collection agent for the insurance company and has remitted the borrower's payments to it after deducting some agreed-upon servicing fee. The situation thus described is entirely typical.

When the property is sold, the attorney disburses to the local mortgage company the amount necessary to discharge the existing indebtedness; he, like the other parties, has no knowledge of the assignment of the note and deed of trust since that assignment is unrecorded. The mortgage company happens to be in serious financial difficulty and does not remit the loan payoff to the insurance company; rather it uses the money in a last-ditch effort to stave off insolvency—an effort which unfortunately fails. The insurance company, as actual holder of the

note, now notifies the seller of a default in payment and ultimately proceeds to foreclose on the realty.

In defending against the insurance company's action, the attorney for the buyer may argue that the agency relationship between the mortgage company and the insurance company was so close that the payment to the mortgage company should be attributed to the holder of the note, thus discharging the debt. One North Carolina case supports this argument,¹¹⁹ but in future cases the precise facts involved are likely to be crucial in judging the argument's continuing validity. Issues likely to arise include the exact relationship of mortgage broker to holder,¹²⁰ the negotiability of the note,¹²¹ and the depth of inquiry made by the attorney.¹²² The present point, however, is that the attorney has, in effect, invited this litigation and is probably going to have to defend it.

The closing attorney could have readily avoided the problem by requiring the delivery of the existing note to him for cancellation before disbursing the funds to pay off that note.¹²³ The law is quite clear that the attorney may not rely on the public records in determining the identity of the present holder of the note; the mortgage company's assignment may be fully effective despite of lack of recordation.¹²⁴ The questionnaire asked the attorneys whether they required delivery of the existing note for cancellation before disbursing funds; about one-third replied that they always did so, another one-third said that this was their usual practice, and the final one-third stated that they did so only if convenient. A number of attorneys commented that their practice would vary depending on their estimate of the apparent holder's trustworthiness and solvency; if the record holder were a large and reputable firm, the attorney would be more inclined to disburse funds before delivery

¹¹⁹ *Equitable Life Assurance Soc'y of the United States v. Lazarus*, 207 N.C. 63, 175 S.E. 705 (1934).

¹²⁰ *Cf. American Sec. & Trust Co. v. John J. Juliano, Inc.*, 203 Va. 827, 127 S.E.2d 348 (1962) (no agency relationship).

¹²¹ See G. OSBORNE, *MORTGAGES* §§ 233-34, 236-38 (1951).

¹²² See *Clinton Loan Ass'n v. Merritt*, 112 N.C. 243, 17 S.E. 296 (1893) (where note is non-negotiable, only a reasonable inquiry into the identity of the present holder is required). See also *First Nat'l Bank v. Sauls*, 183 N.C. 165, 110 S.E. 865 (1922) (where non-negotiable note assigned, but mortgage is not, payment to original mortgagee is sufficient to discharge debt).

¹²³ A similar situation exists if payment is made to the trustee of a trust deed rather than the beneficiary. The payment is insufficient (in the event of defalcation by the trustee) unless he was expressly authorized by the beneficiary to receive payment. *Monteith v. Welch*, 244 N.C. 415, 94 S.E.2d 345 (1956); *Wynn v. Grant*, 166 N.C. 39, 81 S.E. 949 (1914).

¹²⁴ See G. OSBORNE, *MORTGAGES* §§ 236-38 (1951).

of the note. Perhaps this is an appropriate area for the making of a professional judgment by the attorney, but it seems more strongly arguable that, in light of the enormity of the loss which might be suffered in the situation we have described, the better practice would be invariably to require delivery of the note for cancellation before disbursing funds. It seems probable that a good many attorneys handling real estate closings are not aware of the risks created by this situation.

Another serious problem is created by the time lapse between the attorney's preliminary title search and the recordation of the closing documents. Suppose that, following the closing, the attorney takes the new deed and deed of trust to the Register of Deeds for recordation. Before handing the documents to the clerk, he makes a quick update of the title and discovers that on the previous day a one-thousand-dollar judgment lien was docketed against the seller of the property.¹²⁵ What course of action should he follow?

Precisely this question was asked to the attorneys receiving the survey questionnaire. Many of them seemed quite at a loss; the most frequent answer ran something like the following: "I would stop payment on all checks until the matter had been resolved." This seems at least a good starting point, but unfortunately it will be impossible in many such transactions. In another portion of the questionnaire, we asked the attorneys in what order they disbursed funds and recorded new documents. Sixty-three per cent replied that they customarily made disbursement of funds to the seller and previous lender before making that fateful trip to the courthouse. If the seller is aware of the judgment lien and the trouble it will cause, he is likely to cash his check for the sale proceeds very quickly after the closing is completed, quite probably before the attorney has discovered the lien. Stopping payment would thus prove ineffectual.

If the seller has given a deed with full covenants of title, his position is probably indefensible in litigation; the existence of the judgment lien would violate a covenant against encumbrances, and the seller, if he has sufficient assets and remains available in the jurisdiction, will be liable to discharge the lien. But it is not hard to envision the seller, as he cashes his check, deciding that this is a propitious moment to take that

¹²⁵ A number of lawyers (clearly not a majority) try to avoid the problem by making a final down-date of title within a few hours *before* closing. This procedure reduces the risk of intervening title defects, but does not eliminate it, and the inconvenience of the extra trip to the courthouse is obvious.

long-awaited extended vacation in Mexico. And even if the seller is available for suit, it appears that a damage action for breach of title covenants is the only remedy available to the buyer. In the absence of fraud, rescission and other conventional contract remedies are not open here¹²⁶ because of the infamous doctrine that the title covenants of the contract of sale are merged into the deed.¹²⁷ Title, it would seem, *has* passed to the buyer at the time of delivery of the deed subject to whatever defects may have arisen between the time of the attorney's initial search and the closing. The list of possible defects is impressive: to name a few—mechanics' liens, federal tax liens, easements, and the like incurred by the seller during those last few days before closing; and if we are willing to imagine a really evil seller, the list could include a sale to another purchaser made the day before the closing of our transaction or perhaps a mortgage made to a cooperative lender for one hundred per cent of the property's value.¹²⁸ There is no suggestion in the North Carolina law that the attorney may be treated in this situation as an escrowee or that title does not truly pass until the final search is made and the deed recorded. On the contrary, it seems perfectly clear that title passes and the contract is merged into the deed when the closing is held.

At a minimum, then, North Carolina attorneys ought to do what nearly two-thirds of them are not now doing: they ought to withhold disbursement of all sale proceeds until the final check of title has been made.

¹²⁶ See R. POWELL, REAL PROPERTY ¶902 (abr. ed. 1968); 7 S. WILLISTON, CONTRACTS §929 (Jaeger ed. 1963).

¹²⁷ If defendants did not mean to be bound by their covenants, they should not have included them in their deed. Execution and delivery of the deed containing full covenants established the extent of their obligations thereunder. It is presumed that the prior sales contract and all prior negotiations leading up to closing of the sale, insofar as they related to any matters covered by the covenants in defendants' deed, became merged in the deed itself.

Gerdes v. Shaw, 4 N.C. App. 144, 150-51, 166 S.E.2d 519, 524 (1969). See also *St. Clair v. City Bank & Trust Co.*, 175 So. 2d 791 (Fla. App. 1964); *Holihan v. Rabenius Builders, Inc.*, 355 Mass. 639, 246 N.E.2d 638 (1969); Annot., 38 A.L.R.2d 1310 (1954).

¹²⁸ Under the Connor Act, North Carolina's "race" recording statute, N.C. GEN. STAT. §47-20 (1966), such a purchaser or mortgagee who pays value and records first will prevail despite actual knowledge that the property is subject to an executory contract of sale. *New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 131 S.E.2d 425 (1963); *Lawson v. Key*, 199 N.C. 664, 155 S.E. 570 (1930); *Duncan v. Gulley*, 199 N.C. 552, 155 S.E. 244 (1930). The contract buyer's only mode of protection would be to have his contract acknowledged and recorded, a rare practice and one many legitimate sellers would find objectionable because of its effect of clouding title in the event the sale is not consummated.

Even this procedure will not avoid untidy litigation nearly as well as does an escrow, a concept with which most North Carolina attorneys appear to be unfamiliar. In a true escrow, the parties deliver all documents and checks to a stake-holder with instructions that title is to pass only when certain conditions have been fulfilled—typically, the delivery to the escrowee of the other party's papers or money; the approval by the buyer of the state of title; and the computation of prorations, closing charges, and payoffs of existing indebtedness.¹²⁹ When all conditions have been fulfilled, the escrowee "closes" the escrow by recording the appropriate documents and disbursing the proceeds. Title does not pass until the last condition is fulfilled,¹³⁰ so it is possible to defer the passage of title until the final down-date of the attorney's search with recordation taking place immediately thereafter. Since both of these activities occur in the Register of Deeds office, there need be no time gap at all between them.

Although the escrow concept sounds foreign and cumbersome to many North Carolina attorneys,¹³¹ it is in fact a great simplification of present procedures, primarily because it removes the necessity for having a formal closing with the parties physically in attendance. The depositing of the documents and money with the escrowee may take place at any time after the "opening" of the escrow and prior to the date set in the escrowee's instructions for closing; the items need not be deposited with the escrowee simultaneously. If the parties have entered into a mutually enforceable contract of sale, the escrow has a further advantage: once a party has deposited his papers or money with the escrowee, neither his unwillingness to proceed with the transaction, nor his incompetence, nor even his death will prevent the escrow from closing and a valid transfer

¹²⁹ See generally Comment, *The Independent Escrow Agent: The Law and The Licensee*, 38 S. CAL. L. REV. 289 (1965). In California virtually every real estate sale is closed through escrow, and the escrowees are regulated by statute. Escrow case law is more fully developed in California than any other jurisdiction. Escrows are also widely used in the Chicago area. See Bukoll, *Practical Aspects of Escrow*, 33 CHI. B. REC. 355 (1952); Mann, *Escrows—Their Use and Value*, 1949 U. ILL. L.F. 398.

¹³⁰ Board of Educ. v. Union Dev. Co., 159 N.C. 162, 74 S.E. 1015 (1912).

¹³¹ A number of North Carolina cases recognize and approve the escrow concept. See, e.g., Vinson, Jones & Finch v. Pugh, 172 N.C. 843, 90 S.E. 122 (1916); Board of Educ. v. Union Dev. Co., 159 N.C. 162, 74 S.E. 1015 (1912); Sutton v. Davis, 143 N.C. 474, 55 S.E. 844 (1906); Craddock v. Barnes, 142 N.C. 89, 54 S.E. 1003 (1906). See also American Serv. Co. v. Henderson, 120 F.2d 525 (4th Cir. 1941) (escrow of personal property); Bond v. Wilson, 129 N.C. 325, 40 S.E. 179 (1901) (held no evidence that depository was intended to be an escrowee).

of title taking place.¹³² There is thus a strong incentive for the parties to comply in good faith with the contractual obligations they have assumed.

The escrow device is not the only way to solve the time-lapse dilemma. In some states it is customary to actually hold real estate closings in the courthouse. A down-dating of the title can be accomplished by the lawyer and the documents delivered and submitted for recordation immediately thereafter. Such a procedure is safe but obviously inconvenient in many cases, especially in counties in which there are major towns in addition to the county seat. Our questionnaire responses suggest that courthouse closings are rarely held in North Carolina. Instead, the lender's office is the usual place of closing when a new loan is being made by a savings and loan association. Where a bank or mortgage company is making a new loan, about two-thirds of the closings are held in the attorney's office and the other one-third in the lender's office. A shift to courthouse closings is neither probable nor desirable; it comes off a rather poor third when compared with the escrow device and the present practice.

CONCLUSION

The whole tenor of the data adduced by our survey is that the buyer is the forgotten man in the typical real estate conveyance.¹³³ Although the attorney usually purports to represent him, the buyer is neglected in virtually every phase of the transaction: in negotiation with sellers and lenders, in having the complexities of the transfer explained to him, in receiving adequate assurance of title (or even a cogent explanation of the ways in which his title assurance could be fortified), and in the

¹³² This result is based on a fictional "relation back"; when the last condition is fulfilled, the passage of title is said to relate back to the time the documents were originally deposited with the escrowee. Incapacity or change of intent by any party after that time is immaterial. See *Law v. Title Guar. & Trust Co.*, 91 Cal. App. 621, 267 P. 565 (1928); *Craddock v. Barnes*, 142 N.C. 89, 54 S.E. 1003 (1906) (dicta). This result follows only if the escrow is based on an enforceable contract of sale. See *House v. Lada*, 180 Cal. App. 2d 412, 4 Cal. Rptr. 366 (1960); *Aigler, Is a Contract Necessary to Create an Effective Escrow?*, 16 MICH. L. REV. 569 (1918). But the escrow instructions themselves, if in writing, may constitute the necessary memorandum of contract. *Wood Bldg. Corp. v. Griffiths*, 164 Cal. App. 2d 559, 330 P.2d 847 (1958).

¹³³ Other scholars, using different methodologies, have reached the same conclusion in other jurisdictions. See *Hammer, Title Insurance Companies and the Practice of Law*, 14 BAYLOR L. REV. 384 (1962); *Payne, 101 Home Buyers: The Consumer, The Conveyancing Process, and Some Questions of Professional Conduct*, 16 ALA. L. REV. 275 (1964).

manner in which the actual transmission of title is handled. It is fatuous to suppose that property buyers will organize and lobby for changes in the system. They are, almost by definition, unorganized. The average buyer is likely to be involved in only two or three realty transactions in a lifetime. Thus, the imposition of the "system" upon him is sporadic, and unless he is involved in a purchase at a given moment, he is not likely to become excited about reform. Indeed, only the more sophisticated buyers or those who are actually stung by title defects are ever likely to recognize the sorry nature of the "representation" they have been given. Yet buyers *do* recognize that the costs of realty title assurance and transfer greatly exceed the analogous costs in personalty transactions, and they *will* patronize alternative providers of title and transfer services if they seem to be less expensive than the lawyer's methods.

Who, then, will press for reform? In North Carolina, the answer must inevitably be the organized bar. Unlike the situation in many other states, the bar here is involved in nearly every real estate transfer; its position is pre-eminent and its expertise widely accepted. Moreover, the present system raises serious ethical problems for attorneys, and members of the bar have become increasingly concerned about them. Ideal reform of the conveyancing system ought to resolve these problems and, at the same time, regain for the consumer some of the protection he expects and deserves. These matters will be the subject of the second part of this article, to appear in the next issue of this volume of the *Review*.