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American Land Law Reform: Modernization of Recording Statutes (Part I)*

Robert N. Cook

assisted by

Frederick M. Lombardi

*There is much evidence that all is not well in the conveyancer's world and that the old recording acts need to be overhauled for service in the last half of the twentieth century.***

A prerequisite of a vigorous private enterprise system and of a vital free society is free alienation of property, particularly land.¹ Recording statutes were enacted to promote free alienation of land by protecting the good faith purchaser.² Owners of land benefit from free alienation because it encourages the improvement of land which enables it to be sold at an increased value. Purchasers benefit from free alienation of land because there is greater opportunity to obtain the land which will be most

profitable for their specific uses.

When land is not freely alienable the owner is not encouraged to expend money in its improvement, and purchasers are discouraged in their efforts to obtain title to specific land. Therefore, all persons who are interested in maintaining and improving the worldwide competitive position of the American free enterprise system and the benefits of free alienation should be interested in making land more freely alienable

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through the modernization of recording statutes.

* This is the second in a series of articles by Professor Cook on American land law reform. The first was published in 1960 *DUKE L.J.* 485 under the title *American Land Law Reform: Legal Co-ownership, Dower, and Curtesy*.

** Report of the Committee on Improvement of Conveyancing and Recording Practices of the Section of Real Property, Probate, and Trust Law, American Bar Association, p. 3 (1962).

1. "[T]he regulation of the fettering of property is socially desirable because it embodies one of the compromises prerequisite to the maintenance of a going society controlled primarily by its living members." *RESTATEMENT, PROPERTY*, Introductory Note at 2129 (1944).

"The main objects of the 1925 amendments [to the Law of Property Act] are to assimilate

There is an increasing demand for large areas of land properly located for industrial, commercial, and agricultural uses. However, serious problems with respect to the sale and purchase of land have arisen because of title defects or the form of ownership, or both, and these problems have seriously interfered with the acquisition of title to either a single large tract or a number of contiguous smaller tracts.³ Large corporations own land in many states and are continuously seeking to acquire land of proper size and suitable location for their needs.⁴ There is also a continuous movement of corporate employees, as well as other persons, within a state and from state to state.⁵ These persons usually find it necessary to sell their residences and to buy other ones in the new location. Since persons move from one place to another on short notice, it is important for their welfare and the welfare of the communities involved that the

the law of real and personal property whenever practicable, and to simplify and improve the practice of conveyancing, without interfering, more than is essential, with beneficial interests. For many years past the ideal of law reformers has been to enable land to be dealt with as readily as stocks and shares, subject to the necessary modifications inherent to the subject-matter." 1 CHERRY, PARRY & MAXWELL, WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES clxiii (12th ed. 1932)

"[T]he test of goodness must be some mean between the concept of the complete dominance of the individual and the idea of the all-importance of the state. It is an assumption of any society based on private property that it is good for the individuals to have liberty of a high order in the use of things they own." 1 POWELL, REAL PROPERTY 33 (1959)

"The old argument about property rights versus individual rights is passe; they are one and the same. Only as the individual has specific, and to a limited extent exclusive, rights over a thing, does he have that liberty of action which is virtually necessary to the preservation of a free society." CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 7 (1962)

2. 4 AMERICAN LAW OF PROPERTY § 17.10 (Casner ed. 1952); 6 POWELL, REAL PROPERTY § 913 (1958)

3. See Cook, *American Land Law Reform: Legal Co-Ownership, Dower, and Curtesy*, 1960 DUKE L.J. 485, 486.

4. General Motors Corporation owns or leases land in almost every state. E.I. duPont de Nemours & Company owns title in fee simple to 75,978 acres in 37 states and leases land in almost every state. Ford Motor Company owns 19,000 acres in 26 states. General Electric Company operates 175 manufacturing facilities in 136 cities located in 30 states, Puerto Rico, and 3 provinces of Canada. Letters from these corporations to the writers dated as follows: General Motors Corporation, March 28, 1962; E.I. duPont de Nemours & Company, April 18, 1962; Ford Motor Company, March 28, 1962; General Electric Company, April 5, 1962.

5. Approximately 1,200 employees of duPont are transferred each year. Letter from E.I. duPont de Nemours & Company to the writers, April 18, 1962.

"Nearly half (47.3 percent) [of] the 159 million Americans, five years of age and older, counted in the 1960 Census of Population, were living in a different house in the United States in 1960 from the one in which they had been living five years earlier.

"Most of the 75 million movers remained in the same county, their number totalling nearly 47.5 million. Almost half (13.6 million) of the 27.7 million who moved to a different county remained in the same state and 14.1 million moved to another State. In addition, about 2 million persons moved into the United States from abroad. Place of prior residence was not reported for about 2.5 million.

"The West had the largest percentage of movers among the four major regions, with 56.5 percent having moved during the 1955-60 period. On the other hand, only 40 percent of residents of the Northeast had moved. In the North Central region, 46 percent, and in the South, 50 percent had moved." 1960 Census Reports on Mobility of U.S. Population, Dept. of Commerce Press Release, Washington, D. C., CB 62-36, March 25, 1962.

sales and purchases of residences be consummated without delay.⁶ General improvement and greater uniformity of the state laws relating to real property would be highly beneficial to corporations and individuals who either own land outside the state of their domicile or who find it desirable to move from one state to another.⁷

In the absence of a recording statute, if A conveyed his land to B, who did not enter into possession, and A subsequently purported to convey the same land to C, who did not know of B's deed and paid full value, C received nothing though he bought in good faith. Similarly, if A prior to his death conveyed his land to B who did not take possession, and after A's death intestate, his heirs believing that they owned the land purported to convey the same land to C, who did not know of B's deed and paid full value, C received nothing.⁸ Certainly, if this were the law, C and others would hesitate to buy land, and those who did buy would be insecure as to the title of the land they purchased. Our free enterprise system will not operate efficiently if persons hesitate to purchase or have difficulty in purchasing land most suitable for their needs, and if purchasers of land are insecure as to their titles.

While the most antiquated of the various recording statutes is better than no statute, this fact does not justify the continuation of out-dated recording statutes, especially when modern recording statutes which take advantage of recent developments in photographic, electronic, and tabulating equipment would greatly facilitate the transferability of land.

6. The following quotation certainly applies to some states and to some counties within a state but hardly to all states and all counties: "The housing market is not only difficult to serve, but every step is surrounded by elaborate legal ceremonials.

"The difficulties and uncertainties in the disposition and ownership of real property are largely traceable to a legal system inherited from a precommercial society. The law of real property matured in a feudal environment, where land was closely held and where the whole social structure depended upon its continuing to be closely held. Changes in ownership were few, and the complex procedure helped to restrict transactions. The fluidity of modern commercial and industrial society has failed to change the legal concepts involved in the ownership of land. Indeed the dispersion of ownership and the frequency of turnover under changed conditions have added to the complexity of the records and the difficulty of assuring valid claims to ownership. The legal system, like the construction system, has stubbornly maintained many vestiges of medievalism." COLEMAN, *AMERICAN HOUSING: PROBLEMS AND PROSPECTS, THE TWENTIETH CENTURY FUND* 211-12 (1944).

7. "[W]e believe it would be safe to say that uniform land laws that would be practical would be very beneficial in real estate operations involving quantity and diversification as is handled by a large company." Letter from C. M. Thayer, Assistant Manager, Real Estate Division, E. I. duPont de Nemours & Company, to the writers, April 18, 1962.

"[A]nything which would make land easier to acquire would be helpful to corporations. The lack of uniformity in state land laws relating to conveyancing, however, has caused us relatively little difficulty compared with the lack of uniformity in laws pertaining to taxes and assessments, zoning, water rights, condemnation, and other matters affecting real property." Letter from R. L. Yowell, Manager, Real Estate and Construction Operation, General Electric Company, to the writers, April 5, 1962.

8. 4 *AMERICAN LAW OF PROPERTY* § 17.1 (Casner ed. 1952).

TYPES OF RECORDING STATUTES

Recording statutes and practices vary from state to state. Although a single statute generally applies to an entire state, recording is by counties.⁹ Consequently, the recording practices may vary from county to county within a state. In addition, the standards of attorneys and others who evaluate titles vary from state to state, from county to county, and within counties.¹⁰ Therefore, when considering any program of modernization with respect to recording statutes, it is important for one to remember that the statutes and practices of some states are substantially more advanced than those of other states and the practices of some counties are substantially more advanced than those of other counties within the same state.

Recording statutes have been classified as race, race-notice, or notice statutes.¹¹ Under a race statute, as between two claimants to the same land under separate deeds from the same grantor, the first grantee who records has the title regardless of the fact that he may have known of the deed to the other and earlier grantee. According to a recent study only two states have a race statute with respect to deeds¹² and only three states, which have either a race-notice or notice statute as to deeds, have a race statute as to mortgages.¹³ Consequently, most states have either a race-notice or a notice recording statute. Under a race-notice recording statute, a subsequent purchaser is entitled to the protection of the statute thereby defeating the title of a prior grantee under an unrecorded deed to the same land provided the subsequent purchaser receives the deed in good faith, pays value, and records prior to the recording of the earlier deed.¹⁴ Under a notice statute, a subsequent purchaser who takes in good faith and for value is protected although he has not recorded.¹⁵

9. In some states there may be a special recording statute for the large counties or cities. For example, in Pennsylvania there is a slight modification of the general recording practices, but this modification applies only to counties with a population of more than 500,000 inhabitants. PA. STAT. ANN. tit. 21 § 321 (1955). Another Pennsylvania statute provides for the keeping of a daybook by the Commissioner of Records in Philadelphia. PA. STAT. ANN. tit. 21, § 329. (Supp. 1961)

10. The section of Real Property, Probate, and Trust Law of the American Bar Association sponsored the preparation and publication in 1960 of a booklet entitled MODEL TITLE STANDARDS by Lewis M. Simes assisted by Clarence B. Taylor. The purpose of this booklet is the adoption of uniform standards for title examination.

11. 6 POWELL, REAL PROPERTY § 913 (1958).

12. Louisiana and North Carolina. 4 AMERICAN LAW OF PROPERTY § 17.5 n.63 (Casner ed. 1952)

13. Arkansas (mortgages), Ohio (mortgages and oil and gas leases), Pennsylvania (mortgages except for purchase money). *Ibid.*

14. 4 AMERICAN LAW OF PROPERTY § 17.5 (Casner ed. 1952) Pennsylvania as to deeds has a race-notice statute. PA. STAT. ANN. tit. 21, § 351 (1955).

15. 4 AMERICAN LAW OF PROPERTY § 17.5 (Casner ed. 1952) Ohio has a notice statute as to deeds. OHIO REV. CODE § 5301.25 (Supp. 1961)

In addition to one of the three types of recording statutes, some states have a system of title registration called the Torren's system.¹⁶ Unfortunately, in some states which do not have title registration, the recorder of deeds is called the register of deeds and the recording of a deed may be described as the registration of a deed. Therefore, it is possible that the recording of a deed may be inaccurately described as the registration of a title.

Not only is there variation in the specific language in the race-notice and notice statutes, but there is also a variation among the states as to the documents which can be recorded¹⁷ and as to the persons who are entitled to the protection of the applicable recording statute.¹⁸ For example, there are probably a few states in which a contract for the sale of land cannot be recorded.¹⁹ In some states judgment creditors are not entitled to the protection of the recording statute.²⁰ Few states extend the protection of the recording statute to general creditors.²¹

Although the index of recorded items is absolutely essential to locate a specific recorded deed, mortgage, or other document, in some states the index is not part of the record.²² For example, if the index is not part of the record, in some states a subsequent purchaser takes with constructive notice of a deed which has been reproduced in the deed book but never indexed,²³ and in other states a subsequent purchaser takes with constructive notice of all deeds received by the recorder of deeds whether or not the deeds after receipt are reproduced in the record in any form or indexed.²⁴

In all states the recorder of deeds is required to keep some form of index, whether or not the index is part of the record.²⁵ Most, if not all, states have a separate index for grantors and a separate index for grantees. In some states mortgages are indexed in the grantor index under the name of the mortgagor and in the grantee index under the name of the

16. 4 AMERICAN LAW OF PROPERTY § 17.39 (Casner ed. 1952); 6 POWELL, REAL PROPERTY § 921 (1958).

17. 4 AMERICAN LAW OF PROPERTY § 17.8 (Casner ed. 1952).

18. *Id.* §§ 17.9-30.

19. 6 POWELL, REAL PROPERTY 279 (1958); Cross, *Weaknesses of the Present Recording System*, 47 IOWA L. REV. 245, 251 (1962). Ohio recently amended its recording statute to specifically authorize the recording of contracts for the purchase of land if they are signed, attested by witnesses, and acknowledged. OHIO REV. CODE § 5301.25 (Supp. 1961).

20. 6 POWELL, REAL PROPERTY 283 (1958).

21. *Ibid.*

22. SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 85 (1960). In Pennsylvania since 1875 the index is part of the record. WOOD, LADNER ON CONVEYANCING IN PENNSYLVANIA § 11.07 (3d ed. 1961). In Ohio the index is not part of the record. 5 HAUSSER, OHIO PRACTICE § 9487 (1959).

23. SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 85 (1960).

24. 5 TIFFANY, REAL PROPERTY § 1273 (3d ed. 1939). 4 AMERICAN LAW OF PROPERTY § 17.31 (Casner ed. 1952).

25. 6 POWELL, REAL PROPERTY 296 (1958).

mortgagee.²⁶ Other states have a separate mortgagor index and a separate mortgagee index.²⁷ Some states may also have a miscellaneous index by grantors and by grantees for easements, powers of attorney, affidavits, and similar documents. There may also be separate indexes for mechanics' liens, ejectment actions, partition actions, and other actions relating to land.²⁸

The transfer of land by descent or devise is usually not entered in the records of the recorder of deeds. Wills are generally probated in a separate county office which also issues letters of administration in case of intestacy. At the intestate death of a landowner it may be difficult to ascertain what land he owned and who were his heirs.²⁹ Furthermore, since wills often dispose of land under a general residuary clause or under a general disposition of all the testator's property, both real and personal, it may be difficult to ascertain the specific land which passed under a will.

The purpose of this article is not to set forth in detail the numerous defects in the usual race-notice or notice recording statute. Serious defects in the recording statutes were recognized early³⁰ However, with

26. Cross, *Weaknesses of the Present Recording System*, 47 IOWA L. REV. 245, 248 (1962)
27. *Ibid.*

28. Idaho has more than twenty-six different indexes almost all of which would be used in checking a title to land. IDAHO CODE ANN. § 31-2404 (1948) A folder entitled Work Involved in a Title Search, The Land Title Guarantee and Trust Company, Cleveland, Ohio, lists sixteen separate offices which have from one to sixteen indexes and records which must be checked. An earlier edition of this folder is reproduced in COOK, LEGAL DRAFTING 314 (1951). With the recent adoption of the Marketable Title Act there is an additional index called the Notice Index to be checked. OHIO REV. CODE §§ 317.201, 5301.51-52 (Supp. 1961) For a general statement on how a lawyer searches a title to land, see 4 AMERICAN LAW OF PROPERTY Part 18 (Casner ed. 1952) For similar information as to Ohio and the Ohio Bar Association Standards, see 5 HAUSSER, OHIO PRACTICE chs. 420-21 (1959) As to the types of title searches in Pennsylvania, see WOOD, LADNER ON CONVEYANCING IN PENNSYLVANIA ch. XVI (3d ed. 1961).

29. SIMES, A HANDBOOK FOR MORE EFFICIENT CONVEYANCING 29 (1961). Ohio provides for the recording of a certificate of transfer as to land which passes by intestate succession or will. OHIO REV. CODE § 2113.61 (1953). Ohio also provides for the recording of a will in counties other than the county where the will is probated but where land owned by the testator is situated. OHIO REV. CODE § 2107.21 (1953) Pennsylvania not only provides for the administration of real property when its owner dies intestate and the heir is not in possession, but also provides for the recording of the names of the distributees as grantees in each county where the real property of the deceased is located. PA. STAT. ANN. tit. 20, §§ 320.104, 320.213, 320.501, 320.542-43, 320.736 (1950), § 320.541 (Supp. 1961).

30. BASYE, CLEARING LAND TITLES v, 1 (1953); 6 POWELL, REAL PROPERTY § 923 (1958); SIMES, A HANDBOOK FOR MORE EFFICIENT CONVEYANCING ch. 4 (1961); SIMES, & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION xi (1960); Aigler, *Clearance of Land Titles — A Statutory Step*, 44 MICH. L. REV. 45 (1945); Basye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097 (1949); Chaplin, *Record Title to Land*, 6 HARV. L. REV. 302 (1893); Cross, *The Record "Chain of Title" Hypocrisy*, 57 COLUM. L. REV. 787 (1957); Cross, *The Weaknesses of the Present Recording System*, 47 IOWA L. REV. 245 (1961); Fairchild, *Improvement in Recording and Indexing Methods for Real Property Instruments*, 28 GEO. L.J. 307 (1939); Hendricks, *Defects in Title to Real Estate and the Remedies*, 20 MARQ. L. REV. 115 (1936); McCormick, *Possible Improvements in the Re-*

the passage of time the burdens of the defects have magnified due to the increased length of the period that has to be searched,³¹ the increase in the number of transfers of land,³² the increased mobility of our population,³³ and other causes such as the deterioration of records from constant examination.³⁴

SCOPE OF PROPOSED MODERNIZATION

The following suggestions for the modernization of recording statutes are based upon an analysis of the statutes, a knowledge of the usual type of title search by attorneys,³⁵ consideration of the operation and function of title companies,³⁶ correspondence with the recorders of deeds in Ohio and Pennsylvania, as well as the recorders of deeds in the large cities throughout the United States, discussions with experts in the operation and possibilities of photographic, electronic, and tabulating equipment,³⁷ and a personal visit accompanied by an electronic data processing (EDP) analyst to the Office of the Recorder of Deeds for Philadelphia.³⁸

Certainly the problems of a county recorder who receives for recording an average of 2,000 documents a day are not the same as those of a recorder who receives only ten a day. Nevertheless, there are certain basic changes which should be made in recording statutes so that even in the county which today receives for recording only ten documents a

Recording Acts, 31 W VA. L. REV. 79 (1925); McDougal, *Title Registration and Land Law Reform: A Reply*, 8 U. CHI. L. REV. 63 (1940); Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245 (1952); White, *The Title Men's Idea of Real Property Reform*, 10 CORNELL L.Q. 181 (1925); Note, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L.J. 1245 (1959).

31. BASYE, *CLEARING LAND TITLES* (1953); SIMES & TAYLOR, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION* xvi (1960).

32. In 1924-25 the recorder of deeds for Los Angeles County, California, received as many as 1,800 instruments a day. McCormick, *Possible Improvements in the Recording Acts*, 31 W VA. L. REV. 79, 81 (1925). In 1949 Los Angeles County recorded during the year 794,306 documents or about 2,644 a day. SIMES & TAYLOR, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 84 (1960). Presently Los Angeles County receives for recording over 4,000 documents a day. Lee, *Microphotographic Recording in the County of Los Angeles*, p. 1, mimeographed memorandum, August 5, 1958.

33. See note 5 *supra*.

34. Lilienfeld, *Records Management Survey*, Registry Division, Department of Records, Philadelphia, Pa., p. 9, January 7, 1957.

35. See note 28 *supra*.

36. 1 FLICK, *ABSTRACT AND TITLE PRACTICE* ch. 4 (1958); 5 HAUSSER, *OHIO PRACTICE* Part 45 (1959); WOOD, *LADNER ON CONVEYANCING IN PENNSYLVANIA* ch. 17 (3d ed. 1961).

37. Jack Belzer, Associate Professor of Library Science, Manager Computation Department, Center for Document and Communication Research, Western Reserve University, and Clifton Apple, RCA Electronic Data Processing Analyst, EDP Administrative Headquarters, Cherry Hill, New Jersey.

38. Mr. Apple (RCA, EDP analyst) and Mr. Cook discussed for several hours with Mr. Jack Lilienfeld, Chief, Forms and Records Analysis, Philadelphia, and Mr. Clarence A. Dock, Deputy Commissioner of Records, Philadelphia, the operation of the Philadelphia recording system and the use of electronic equipment in the Office of the Recorder of Deeds.

day, there will be a sound system of recording if, as is possible, at some later date the number of documents is ten, fifty, or more times the present number. It will be easiest to modernize a recording system when the number of documents is small and the need for modernization is not readily apparent.

The purpose of this article is not to set forth every detail of a modern recording system. However, every effort has been made to point out the major changes which should be made in recording statutes to eliminate present defects. These recommended changes may be divided into those which relate to recording practices and those which relate to basic concepts of recording. They are as follows:

- A. Recording practices.
 1. Tract index and name index.
 2. Statutory or administrative standards as to size, form, and content of recorded documents.
 3. Microfilming of documents.
 4. Security provisions.
- B. Basic concepts of recording.
 1. Tract index as part of the record.
 2. Race-notice statute for deeds.
 3. Race statute for mortgages, judgments, and other liens.
 4. Value.
 5. Contracts to buy land.
 6. Title by adverse possession.

In addition to these recommendations other statutory changes should be made to avoid burdening the title to land through legal co-ownership or future interests.

To avoid burdening the land with co-ownership by numerous and often widely dispersed persons, modern English statutes provide for statutory trusts with the legal fee simple in a trustee or trustees with power to convey the fee simple absolute.³⁹ The interests of the co-owners are thus only equitable and do not interfere with the free alienation of the land.⁴⁰ For the same reason future interests which would be legal interests under the common law are equitable interests under modern English statutes with the fee simple vested in a statutory trustee who has the power to

39. MEGARRY & WADE, *THE LAW OF REAL PROPERTY* 403-34 (2d ed. 1959)

40. "Even if there are clear words of severance, after 1925 the legal estate cannot be held by tenancy in common. A tenancy in common can now exist only in equity; at law the only form of co-ownership possible after 1925 is a joint tenancy. Thus a conveyance today to A, B and C in fee simple as tenants in common (all being of full age) will vest the legal estate in A, B and C as joint tenants, although in equity they will be tenants in common. If any of the co-owners is an infant, it has to be remembered that since 1925 an infant cannot hold a legal estate in land. Therefore if A is an infant, he can be a co-owner in equity but the legal estate will vest in B and C alone." *Id.* at 403.

convey it free of the equitable interests.⁴¹ The English are highly satisfied with the operation of these modern property laws.⁴² By adapting to American laws the modern English system of estates, the objective of free alienation can be attained.⁴³

RECOMMENDED CHANGES IN RECORDING PRACTICES

Tract Index and Name Index

Tract Index

Before the title to a specific lot can be determined, a person must obtain from the available records the applicable information set forth as to the lot in the recorded documents.⁴⁴ In a county without a tract index an initial search for a period of sixty years will be burdensome and will require considerable time.⁴⁵ If the index is not part of the record, there is always the possibility that a recorded document will not be found because it has not been indexed. Furthermore, in some jurisdictions a purchaser takes with notice of a deed given and recorded prior to the time the grantor received title but which passed title to the earlier grantee under the doctrine of estoppel by deed.⁴⁶ For example, prior to the time that A received title to land from O, A by general warranty deed conveyed the land to B who promptly recorded but did not enter into possession. Subsequently, O conveyed the title to this land to A. Under the doctrine of estoppel by deed the legal title immediately vested in B. Consequently, when A subsequently conveyed to C, who paid full consideration and had no actual notice of B's deed, B retained his title because in some jurisdictions C took with constructive notice of B's deed. The writers know of no jurisdiction where attorneys regularly check for deeds out of each grantor for a considerable period of time *before* the respective grantors received title.⁴⁷

Another problem which may arise in some jurisdictions when there is no tract index is that of a deed recorded after a grantor apparently parted

41. *Id.* at 213.

42. "A full critique of the Acts [PROPERTY ACTS OF 1925] would occupy much space, but now that they have stood for over thirty years a few remarks should perhaps be ventured. The Acts as a whole are unquestionably a success, and fully justify the long and heavy work which prepared for them. Conveyancing is an art which tempts its skilled practitioners to strive for an unattainable perfection; yet the framers of the Acts of 1925, who knew the dangers better than anyone, were bold enough to take calculated risks for the sake of their overriding object, practical simplicity." *Id.* at 1065.

43. The problems of legal future interest will be considered in detail in a subsequent article in the series on American land law reform.

44. See note 28 *supra*.

45. *Ibid.*

46. SIMES, A HANDBOOK FOR MORE EFFICIENT CONVEYANCING 24, ill. 8 (1961); Cross, *The Record "Chain of Title" Hypocrisy*, 57 COLUM. L. REV. 787, 796 (1957).

47. See note 28 *supra*.

with title. For example, A deeded land to B who did not promptly record and enter into possession. Prior to A's deed to B, A had executed a will in which he devised the same land to his son S. A died and his will was probated. Ten years after A's death B recorded his deed. Twenty years after A's death S conveyed the land to C who had no actual notice of B's deed and paid full value. In some jurisdictions C took with constructive notice of B's deed because C's attorney was under a duty to check for deeds out of each person in the chain of title up to the time of the title search and not only up to the time each person appeared to have transferred the title.⁴⁸ In this illustration A's son obviously is not a bona fide purchaser, and, therefore, C could not claim title as one who took title from a prior bona fide purchaser.⁴⁹

In each of these examples, although the attorney who searched the record and prepared an abstract of title tried to set forth as to the land searched the information which would appear in a tract index, he failed in each case though many hours were spent in checking the indexes. In counties without a tract index an attorney must search the grantee index to prepare his chain of title; then as to each person in the chain of title he must check, among other things, the grantor index, any mortgagor index, any miscellaneous index under grantors, and the judgment index. If title passed by intestate succession, this fact would not appear in the office of the recorder of deeds in many states. The same is true in many states if title passed by will.

In any large county with many transactions each day, there is either a tract index prepared by the recorder of deeds⁵⁰ or an unofficial tract index prepared by one or more title companies.⁵¹

Since one of the purposes of indexing is to enable interested persons to determine the ownership of a specific tract of land and any liens, easements, restrictions, and other claims with respect to it, the logical index is the tract index.⁵² A tract index is by lot numbers. Every lot in a

48. SIMES, A HANDBOOK FOR MORE EFFICIENT CONVEYANCING 24, ill. 7 (1961); Cross, *The Record "Chain of Title" Hypocrisy*, 57 COLUM. L. REV. 787, 796 (1957).

49. 6 POWELL, REAL PROPERTY 291 (1958).

50. New York City has a block system of recording. NEW YORK, N.Y. LAWS ch. 718 (1887), ch. 349 (1889), ch. 166 (1890) Baltimore City has a block system of recording. Letter from James F. Carney, Clerk of Superior Court, Baltimore, Maryland, to the writers, March 16, 1962. Washington, D. C., has a lot and square system. Letter from Peter S. Ridley, Recorder of Deeds, Washington, D. C., to the writers, March 6, 1962. Detroit (Wayne County, Michigan) has a comprehensive Abstract System. Letter from Charles E. Adams, Director, Tract Index Division, Wayne County Abstract Department, Office of the Register of Deeds, Detroit, Michigan, to the writers, March 16, 1962. Philadelphia has a tract index as to deeds. Letter from Jack Lilienfeld, Chief, Forms and Records Analysis, Department of Records, Philadelphia, Pennsylvania, to the writers, March 13, 1962.

51. One or more private title companies in each of the following cities have unofficial comprehensive tract indexes: Chicago, Cleveland, Los Angeles, and Philadelphia.

52. "The practical importance of alphabetic indices is decreasing due to the growing quantity of privately maintained tract indices, in which the theory of indexing is the parcel affected in

county has a number.⁵³ Most counties are so large or the lots within the county are so numerous that all lots cannot be drawn to a proper scale on a single map. Therefore, there must be a series of maps for each county. Counties in states which have some form of rectangular system⁵⁴ (also called the government system) of survey generally use this system to establish the tract index. Counties in states which do not have some form of rectangular system of survey usually divide each map covering a portion of the county into numbered subdivisions which are sometimes called "blocks." Each numbered subdivision is divided into numbered lots. The number of a specific lot therefore includes the number of the map, the number of its subdivision, and the number of the lot. For example, lot 123 in subdivision 10 of map 15 would be lot 15-10-123. If the subdivision should be changed through urban renewal⁵⁵ and the lots renumbered, the subdivision should logically be given the number 10A. Although the lot numbers in the subdivision might appear, at first glance,

the general framework of governmental surveys. As to each physical area, all relevant instruments are listed, at least by page and volume number of the official books of record. Statutory adoptions of the tract index have begun and are likely to increase with great rapidity." 6 POWELL, REAL PROPERTY 296 (1958). See also Chaplin, *Record Title to Land*, 6 HARV. L. REV. 302 (1893); Cribbet, *Conveyancing Reform*, 35 N.Y.U.L. REV. 1291 (1960); Cross, *The Record "Chain of Title" Hypocrisy*, 57 COLUM. L. REV. 787 (1957); Cross, *Weaknesses of the Present Recording System*, 47 IOWA L. REV. 245 (1962); Fairchild, *Improvements in Recording and Indexing Methods for Real Property Instruments*, 28 GEO. L.J. 307 (1939); McCormick, *Possible Improvements in the Recording Acts*, 31 W. VA. L. REV. 79 (1925); Note, *The Tract and Grantor-Grantee Indices*, 47 IOWA L. REV. 481 (1962); Note, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L.J. 1245 (1959).

The following seven states require the keeping of tract indexes: Nebraska, NEB. REV. STAT. § 23-1513 (1954); North Dakota, N.D. CENT. CODE ANN. tit. 11, § 18-07 (1960); Oklahoma, OKLA. STAT. tit. 19, § 291 (1951); South Dakota, S.D. CODE § 12.0703 (1939); Utah, UTAH CODE ANN. § 17-21-6(6) (1953); Washington, WASH. REV. CODE § 65.12.310 (1958); Wyoming, WYO. STAT. ANN. § 18-127 (1957).

A tract index may be authorized by the county commissioners in four states: Kansas, KAN. GEN. STAT. ANN. § 19-1209 (1949); Minnesota, MINN. STAT. § 386.05 (Supp. 1961); Ohio, OHIO REV. CODE § 5309.33 (1953); Wisconsin, WIS. STAT. § 59.55 (1959).

The counties in Ohio which now have a tract index are set forth at page 652 *infra*. Also, probably all states which have adopted a marketable title act have a special tract index to keep alive claims which would be barred if not recorded.

53. Many counties have already prepared an elaborate and detailed series of maps which show each tract or lot of land in the county. Each separate parcel has been given a number. These maps and numbers are used for the assessment and billing of land taxes.

54. A recent coursebook refers to the rectangular system of surveying as "truly American," being based upon a plan prepared by Thomas Jefferson. CRIBBET, FRITZ, & JOHNSON, CASES ON PROPERTY 633 (1960). But Thomas Jefferson may have learned about the rectangular system from the Romans who may have borrowed it from some earlier mathematically inclined people. See Kish, *Centuriatio: The Roman Rectangular Land Survey*, 22 SURVEYING & MAPPING 233 (1962).

55. When land is subdivided today, it is a general practice to record a plat showing the location, the courses and distances, and the number of each lot. This is done either in accordance with a local ordinance or a state statute or simply because it is the wise and customary thing to do. The plats are filed before any lots are sold. See 6 POWELL, REAL PROPERTY 94 (1958). In cities such as Philadelphia where large urban renewal projects are being undertaken, maps showing the changes in lot and street lines are filed with the Registry Division so that before any new lot is sold, the Registry Division is able to assign it a number and to cross-index each new lot with the proper older lots.

to refer to the same location on the ground, this would not be true because lot 15-10A-123 would probably be in a different location and of a different dimension than lot 15-10-123. Obviously, recorded information with respect to lot 15-10-123 would still be pertinent as to the identical land area under another number. Consequently, if the area of lot 15-10-123 were included in lot 15-10A-119, this fact would be so indicated under each of these numbers.

The usual development of a county is from predominantly rural to urban. Consequently, in the process of changing from farm to city lots, the larger tracts are subdivided into smaller tracts which in turn may be further subdivided. Then too, each of two contiguous lots may be acquired by different owners who later sell to one person. The purchaser of these two lots may then consolidate them into a single unit by erecting a building which covers both lots. Also in the course of transition from farmland to city, one person may buy half of one lot and half of another lot. All of these transactions can be handled by a tract index so that a person who searches the record with respect to any lot on a current map will find all references to this lot regardless of its prior history.

There is currently developing the practice of dividing a building into segments, such as an apartment area. The fee simple to these segments is conveyed to a number of persons. Each segment is taxed separately and mortgaged separately.⁵⁶ Consequently, each segment would have its own number.

It is interesting that many, if not most, counties in the United States have a form of tract index for tax purposes. In fact, an organization which makes aerial photographs is now making, under contract with a county, maps showing every lot in that county.⁵⁷ Each lot is given a number and the ownership is designated. Since the numbered lots are being located in numbered subdivisions which appear on numbered maps, this information could be used to set up a tract index in the recorder's office. It is logical that there should be only one set of official maps for the county.

It is interesting to note that the tract index in Philadelphia was initially prepared by the Street Department for its use. Today it would be

56. See Smith, *The Case for a Condominium Law in Pennsylvania*, 33 PA. B.A.Q. 513 (1962); Note, *Multiple Ownership of Apartment Buildings — Establishment of Horizontal Property Regimes*, 60 MICH. L. REV. 527 (1962).

57. The writers became aware of aerial photography for making maps for taxation purposes from the following statement in 21 SURVEYING & MAPPING 539 (1961) "Aero Service Corporation has been awarded a \$600,000 contract for a property map and records system covering Davidson County, Tennessee. Final products will be some 1,500 map sheets 24" x 36" in size and at scales of 1:600, 1:200, and 1:4800, as well as a set of cross-indexed, property-record cards and alphabetical index cards, to supplement information shown on the maps."

As to the number of separate pieces of property in a large county, there are about 600,000 in Philadelphia. Letter from Jack Lilienfeld, Chief, Forms and Analysis, Department of Records, Philadelphia, to the writers, March 13, 1962.

wise to have a separate set of maps showing the location of everything that is underground, as well as the location of streets and individual lots. Maps of this type would be invaluable for water and sewage departments, telephone, gas, and electric companies, and many other private and governmental organizations.⁵⁸

Under the laws of Ohio, the county commissioners may elect to establish a tract index for their county.⁵⁹ A survey of Ohio counties re-

58. The following statement on the great value of adequate maps to a modern, vital, and growing city is very pertinent: "The 'property survey,' or 'property map,' is designed to assemble and record all information pertaining to the layout and dimensions of properties. It is usually drawn to a scale of 1 in. equals 50 ft. and the boundaries shown on it, at proper intervals, are in agreement with those of the topographic maps. The scale of 50 ft. to the inch is recommended because it permits the showing of all necessary information in sufficient detail. The property survey maps are really base maps for use in all instances where information is shown by figures, as distinguished from the topographic maps which rely upon scale only.

"The data furnished by the maps of the property survey form the basis for recording all information relating to the dimensions and exact location of all underground structures. With populations that are often of great density, the increasing use of convenience utilities, and their progressive removal from above ground for esthetic and economic reasons, such records are of increasing importance. With these maps the city not only can plan its public services better (sewers, water-supply systems, etc.), but will realize savings in their construction cost by supplying contractors with reliable information as to the conditions they will encounter. Each utility planned will ordinarily be shown in fullest detail upon its individual, separate set of maps. In addition to this, a so-called 'underground map' should be prepared showing, as far as possible, all the utility structures.

"Two essential features of the property survey are the marking, by means of suitable monuments, of all the corner, angle, and curve points of the street lines, and the establishment of the coordinate values of these and of other critical points. With this practice each monument becomes a witness for every other monument, and property monuments that become lost or obliterated may be reestablished conveniently and precisely from their known mathematical relations with other marked points.

"The first aim of the property survey is the adequate location and recording of all street lines, which constitute the boundaries of the public's property. This alone will tend to stabilize the boundaries of private properties. It will usually be desirable, however, to complete the work, as rapidly as time and opportunity permit, by establishing authoritative dimensions for these private properties. This is especially advisable in the older sections of the city where the original surveys are generally faulty or incomplete. On the other hand, in the newer sections, it is frequently possible to secure satisfactory property maps at a very low cost through the exercise of platting regulations.

"The property survey also enables the city to fulfill certain of its definite obligations. The public not only directly controls and utilizes the street areas but, under the exercise of police power, increasingly regulates the use and occupation of private property. Zoning and setback rules prescribe the use of private properties abutting on streets, and practical enforcement is dependent, therefore, upon information as to the location of the street lines. This information should certainly be supplied by the city, because it is scarcely fair to tell a citizen that he must use only a certain percentage of his total lot area, or that he must not build within certain distances of the street line, without indicating to him the exact location of these lines. All city planning involves the legal establishment of lines bounding certain districts reserved for certain purposes, and compliance with the plan requires a knowledge of the location of the street lines upon which the entire system is based." TECHNICAL PROCEDURE FOR CITY SURVEYS 3-5 (American Society of Civil Engineers Manuals of Engineering Practice No. 10; 1957).

59. OHIO REV. CODE § 317.20 (Supp. 1961).

"[T]he county recorder, county auditor, and county treasurer, [by majority vote are authorized to purchase, lease, or rent] plots, records, abstracts, books, copies of records, abstracts of records, existing or destroyed by fire or otherwise, or other documents affecting the title of

vealed that the following counties have some form of general tract index: Butler, Champaign, Crawford, Defiance, Jackson, Logan, Medina, Mercer, Miami, Ottawa, Preble, Putnam, Scioto, Williams, and Wood.⁶⁰ Since the customary indexes in Ohio are not part of the record,⁶¹ it would seem that these general tract indexes as to transactions entered prior to the effective date of the recent Ohio Marketable Title Act⁶² are not part of the record. However, since the tract index required in all counties under the Marketable Title Act is the means of preserving claims to real property which would become void if not kept alive by being entered in this special tract index,⁶³ the writers construe the Marketable Title Act as making this tract index part of the record.

In establishing a general tract index in an Ohio county which presently does not have one and in which there are substantial urban renewal projects, it would seem wise and proper to start the general tract index with the urban renewal areas. For example, in Cuyahoga County there are substantial areas for urban renewal which have been acquired by the City of Cleveland. It would be unfortunate if a tract index is not established for these areas by the county commissioners.⁶⁴

With respect to the large counties, the writers presently recommend the establishment of a tract index for documents recorded after this index has become operative. As to the smaller counties where attorneys have become weary of checking records, it should be feasible by the use of mod-

any lands, tenements, or hereditaments within the county. " OHIO REV. CODE § 317.21 (1953)

Other states have similar statutes. For example, the county commissioners for second class counties in Pennsylvania are "empowered to establish, in the office of the county controller, the lot and block system for the registration [recording] of land titles, for the accumulation of county tax liens, and for the enumeration of the parcels of real estate to be assessed. " PA. STAT. ANN. tit. 16, § 371 (1953).

60. Letters from the recorders of deeds from these counties to the writers. All letters stated that the attorneys who used the sectional or tract indexes have informed the recorders that the sectional or tract indexes greatly facilitated the searching of titles in these counties.

61. *Green v. Garrington*, 16 Ohio St. 548 (1866).

62. OHIO REV. CODE §§ 5301.47-56 (Supp. 1961)

63. OHIO REV. CODE § 317.201 (Supp. 1961) It would seem that in Ohio counties which already have a sectional or tract index in which the notice to keep alive a claim to real property which would otherwise be barred by the provisions of the Marketable Title Act may be entered perform a dual function. See OHIO REV. CODE § 317.20 (Supp. 1961). As to ordinary transactions these sectional or tract indexes are not part of the record, but as to transactions entered pursuant to the Marketable Title Act they are part of the record.

64. In establishing a tract index with a number for each lot and the essential maps, which should be protected by plastic covers as is done in Philadelphia to prevent deterioration and soiling, it is important that the boundaries of the lots be clearly and substantially marked by monuments.

"The greatest factor in new subdivisions, to create certainty of location, is the establishment of monuments. If monuments are located at frequent intervals and in indestructible locations, even moderately accurate measurements will insure reasonable certainty of position. Measurement uncertainties are a function of distance, but certainly not directly proportional to distance. Uncertainty of location is created by original monuments being located too far apart. *No matter how good the measurements are, uncertainties in position exist when meas-*

ern electronic or tabulating equipment⁶⁵ to prepare a tract index for a period of thirty or more years previous to the date this index becomes operative.⁶⁶

The writers know of no title companies that have complete records by tract for each county in a particular state. As a general rule, a single title company will have complete records by tract for a specific county. Other companies, without the expense of preparing and keeping up to date such a title plant, will indirectly receive the benefit and profit of this title plant by relying on the fact that the title company with the complete records was willing to issue policies on certain tracts. Furthermore, it is expensive to maintain a title plant. Thus, it is reasonable to believe that if every county in a state established an official tract index covering every lot in each county, the ultimate result as to title companies in that state would be a reduction in the cost of their policies but an increase in their profits. The reason for the probable increase in profits is that the reduction in the cost of individual policies would probably be less than the savings to the title company in not having to maintain its title plant.⁶⁷

urements from distant points are necessary to establish points or lines." (Emphasis added.) Brown, *Uncertainty of Position as Applied to Property Surveys*, 22 SURVEYING & MAPPING 57, 59 (1962).

Obviously, private surveys should be tied in with the monuments placed throughout various states and counties as part of the national geodetic survey. It would be wise to carefully protect these monuments. See TECHNICAL PROCEDURE FOR CITY SURVEYS (American Society of Civil Engineers Manuals of Engineering Practice No. 10, 1957); *Minimum Standard Detail Requirements for Land Title Surveys as Adopted by American Title Association and American Congress on Surveying and Mapping*, 22 SURVEYING & MAPPING 339 (1962).

65. Tabulating equipment uses punched cards. There are two limitations in the use of punched cards which do not apply to electronic data processing equipment. First, only a limited amount of information can be placed on punched cards because of their size. Second, when the number of items being sorted or indexed is large, the large number of cards in itself creates a problem of handling. Electronic data processing equipment which uses magnetic tape may not be suitable for small projects because of its cost. However, on large projects it should be more economical than tabulating equipment.

66. The writers have been informed that certain counties in Pennsylvania are entering into contracts with a private service organization to have their old indexes consolidated into single indexes which will cover a longer period. For example, if there are presently three grantor-grantee indexes and each covers a period of ten years, it is possible to consolidate all three indexes into one grantor-grantee index for the thirty-year period with names arranged in strict alphabetical order.

Lancaster County recently used punched cards to up-date its mortgage index. "The setting up of the New Mortgage Index was done by microfilming the old Index, from which IBM cards were made up listing only the Book & Page of all mortgages marked satisfied, then they were thrown into proper order as to book and pages, two members of the Bar Association were designated to check out all of these satisfactions and if they were proper, these entries were eliminated in the new index, and the remainder were punched on IBM cards or keyed . . . and from these cards" the new mortgage index was printed with the names in strict alphabetical order. Letter from W W Fryberger, Deputy Director of Records, Lancaster County, Pennsylvania, to the writers, April 9, 1962.

67. The premium paid for a title policy includes three basic items: the cost of title examination, the cost of insurance premium, and profit. If the cost of title examination is reduced, there should be some reduction in the charge for this item.

In a minimum price schedule distributed by a title company the charge for title examination is \$50 for allotted property and \$60 for unallotted property. Obviously, this charge as well

Name Index

The second index recommended is the name index.⁶⁸ It is the understanding of the writers that in addition to tract indexes, many title companies have, or are now creating, a single name index.⁶⁹ With the use of modern electronic or tabulating equipment, it is possible to create and to keep up to date a name index with the names listed in strict alphabetical order, as to the same name by lot number, and in the chronological order of their recording.

After discussing with electronic data processing (EDP) experts the problems of indexing by lot number and by names, the writers have reached the following conclusions as to one method of using electronic or tabulating equipment — subject to proof by a pilot operation — to do this indexing.

For discussion purposes it will be assumed that a certain county receives each day an average of 2,000 documents which must be indexed by lot number and name. The index by names is necessary to ascertain what property a specific person owns. Certainly, if a name index had no value, except sentimental to lawyers accustomed to using it, the writers would not hesitate to recommend its discontinuance.

as the charge for insurance includes an item of profit. The premium for a title guarantee, in addition to the examination charge, is quoted as \$1.50 a thousand up to \$50,000. A title guarantee policy in Ohio simply protects against record defects and does not insure marketable title. A title insurance policy is more expensive because of its greater coverage. For rates for title policies in Pennsylvania, see WOOD, LADNER ON CONVEYANCING IN PENNSYLVANIA § 17.03 (3d ed. 1961)

68. The name index would replace the following indexes: grantor-grantee, grantee-grantor, mortgagor-mortgagee, mortgagee-mortgagor, and any others. In addition, items not presently indexed in the office of the recorder of deeds, such as judgment liens as to specific lots, divorce actions, incompetency proceedings, certificates of death, and others, might be entered on the name index.

There is general recognition that the number of indexes should not be greater than the need. The writers believe that a single name index is better than the numerous name indexes which most counties now have. There is no need for an indirect index. For example, a deed to a lot 123-68-10 dated and recorded June 7, 1946, from A to B, and a deed to this same lot from B to C, dated July 12, 1962, and recorded July 13, 1962, would be indexed in the name index as follows:

- A, grantor, B, grantee, deed, dated June 7, 1946, recorded June 7, 1946, lot 123-68-10.
 - B, grantee, A, grantor, deed, dated June 7, 1946, recorded June 7, 1946, lot 123-68-10.
 - B, grantor, C, grantee, deed, dated July 12, 1962, recorded July 13, 1962, lot 123-68-10.
 - C, grantee, B, grantor, deed, dated July 12, 1962, recorded July 13, 1962, lot 123-68-10.
- In addition, these transfers would be indexed under lot 123-68-10 as follows:
- 123-68-10 A, grantor, B, grantee, deed, dated June 7, 1946, recorded June 7, 1946.
 - 123-68-10 B, grantor, C, grantee, deed, dated July 12, 1962, recorded July 13, 1962.

The writers do not believe that it is wise to specify the type of deed, such as general warranty, because there are too many so-called general warranty deeds with many specifically excluded risks.

69. Although certain title companies are considering expanding the use of electronic data processing equipment, which they have recently acquired, to include tract indexing, they are presently using this equipment primarily to index a variety of information by name. Title Insurance & Trust Company, Los Angeles, California, recently acquired a Model H-800 computer from Minneapolis-Honeywell Regulator Company. Chicago Title & Trust Company, Chicago, Illinois, recently acquired an IBM 1401 computer and IBM 1403 line printer.

Upon receipt of a document in the the office of the recorder of deeds, it is stamped as to the date and the exact time it was received. Next, the following essential data as to the document is typed in the daybook: name of grantor, mortgagor, etc., name of grantee, mortgagee, etc.; type of document; date of document; date and hour recorded; and lot number. There will be no need to list the volume and page of a deed, mortgage, miscellaneous, or other book because a microfilm copy of the document will be filed by lot number which also necessarily includes the map and subdivision (block) numbers, for example, lot 15-23-116. At the same time that this information is typed into the daybook the same information is punched on a paper tape by means of a special attachment to the typewriter. At the end of the day in a large county, the information on the paper tape can be placed on magnetic tape, and the various items can then be electronically arranged and placed on other magnetic tapes for printing automatically on paper the tract index in numerical order by lot numbers and the name index in strict alphabetical order. The writers believe that since there will often be more than one grantor and more than one grantee, the total number of items to be indexed for each document will average four for the name index plus one for the tract index or a total of five. Each of these items for index purposes will contain the full data entered in the daybook but rearranged. For example, in one item the lot number will appear first, in another the name of the grantor will appear first, and in another the name of the grantee will appear first.⁷⁰ Thus, the same information as to each of the 2,000 documents received in one day will on the average be printed automatically five times in different order of arrangement. The total number of items for the tract index would be 2,000 unless one document related to more than one lot, in which case the number of items for the tract index would necessarily exceed the number of documents recorded. Based on the average of four items for the name index for each document recorded, the total items for this index would be 8,000.

With respect to burdening the system by excessive indexing, which could occur when a person dies intestate and leaves thirty or more heirs, the writers strongly recommend that the law be amended to provide that title in case of intestacy goes to the probate court or an equivalent court until the appointment of an administrator.⁷¹ Upon appointment of an administrator title would vest in him automatically, and if there were two or more heirs it would be his duty to sell the land subject to certain exceptions and then divide the proceeds among the heirs. Any heir might be authorized to buy the land at its appraised value. If two heirs wish to buy the same land, then it should be put up for public sale with the

70. See note 68 *supra*.

71. See MEGARRY & WADE, *THE LAW OF REAL PROPERTY* 533 (2d ed. 1959)

first bid automatically entered at the appraised value on behalf of the heir who first formally filed with the administrator an offer to buy the land. If only one heir files with the administrator an offer to buy the land, but another heir objects to a private sale at the appraised value, the heir so objecting should have the right to demand a public sale of the land.⁷² If the land of the intestate were sold, it would not be necessary to index the title under the name of each of the thirty or more heirs. Another solution, until a more satisfactory one can be put into operation, would be to charge a stated amount, such as fifty cents or one dollar, for each item that has to be indexed.

If all the heirs or devisees, who under present law would receive the legal title to the deceased's land in fee simple as tenants in common, wished to be the beneficial owners of the land, the law should provide that with the formal consent of all heirs or all devisees a statutory trust will be established so that the powers of alienation and management will be concentrated.

Any index system which does not require the recording of either a deed or a certificate of transfer of title⁷³ from the personal representative to the heir, devisee, or any statutory trustee upon the death either intestate or testate of the owner would be inadequate. Of course, if the personal representative sells the land in accordance with a specific direction in the will, in connection with the administration of the estate, or to pay debts, the deed to be recorded would be from the personal representative to the purchaser. Assuming that there is no such sale and that there is a sole heir or a sole devisee and that the heir or devisee has not requested the personal representative to sell the land in connection with the administration of the deceased owner's estate, then the transfer of title from the personal representative to either the heir or the devisee should be entered in the tract index as well as in the name index.⁷⁴

When there is a will which creates a life estate in a named person and a remainder in either a named person, persons, or class, the personal representative might be made by statute a trustee of the legal fee simple title with power to alienate the fee simple absolute free and clear of the equitable interests.⁷⁵ The statutory trustee should also be authorized to

72. The powers of the personal representative in Pennsylvania under the Fiduciaries Act of 1949, effective January 1, 1950, are almost as broad as those set forth in this article. "Under this Act, personal representatives (i.e., executors and administrators), unless the will provides otherwise, may sell at public or private sale decedent's real estate not specifically devised. " WOOD, LADNER ON CONVEYANCING IN PENNSYLVANIA § 4.14 (3d ed. 1961) See also Cook, *American Land Law Reform: Legal Co-ownership, Dower, and Curtesy*, 1960 DUKE L.J. 485, 510.

73. See note 29 *supra*.

74. Obviously, the name of the deceased owner should appear in the index item to maintain the chain of title.

75. MEGARRY & WADE, *THE LAW OF REAL PROPERTY* 136, 213 (2d ed. 1959) Statutes in some of the states which provide a form of judicial sale of land held by a life tenant or

convey his legal title to a court approved trustee. If the life beneficiary receives the legal title to the land in fee simple as trustee, he would also have an equitable life interest. Whenever the legal title to a deceased's land is transferred to a statutory trustee, it would only be necessary to index this type of transaction under the name of the statutory trustee as grantee and under the name of the deceased owner as grantor. The fact that the word "trustee" appears in the index would not prevent a subsequent purchaser from dealing with the trustee because by statute the trustee would have power to convey the fee simple absolute to a bona fide purchaser for value even though the beneficiaries might later prove that the transfer was unwise and the trustee may be personally liable to the beneficiaries.

What has been recommended with respect to wills, which in the absence of a special statute would create legal future interests, should also apply to deeds which purport to create legal future interests. However, with respect to deeds, since there is no personal representative, the person who receives the present estate should be the statutory trustee and receive the legal fee simple estate in trust for himself and the owners of the future interests. Of course, the owner of the present estate as statutory trustee would always be subject to removal under the general powers of the proper court.

A grantee may fail to record his deed. As a result a deed will be presented for recording by a grantee whose grantor is not the record owner. Without the aid of modern electronic equipment it would not be easy to detect this fact. However, after a certain person's name has been indexed as the owner of a specific lot, a transfer of that lot either by another person or by the record owner under a different name can be detected electronically. This point will be considered in connection with the general plan of the recommended index system.

As previously stated, it will be assumed for discussion purposes that the county under consideration receives 2,000 documents each day for recording. Also, as previously stated, this number of documents will probably result in the indexing of 10,000 items, 8,000 in the name index, and at least 2,000 in the tract index. The 8,000 items for the name index can quickly be electronically arranged in strict alphabetical order and printed in this order at the rate of up to 1,000 lines per minute. Likewise, the 2,000 or more items for the tract index can be arranged in numerical order and printed in that order. If the same name appears more than once, for example, as grantor in separate transactions, the index items will be printed consecutively under the grantor's name in numerical order by lot number and in the order in which they were re-

subject to legal future interests are too cumbersome to achieve their purpose of making the land more freely alienable.

corded. Separate transactions as to the same lot number will likewise be printed consecutively in the order in which they were recorded.

Up to this point no substantial problems are foreseen. However, the writers do not consider it feasible to print at the end of each day cumulative indexes by name and by lot number. A little reflection will reveal that at the end of ten business days the number of items for the name index would be at least 80,000 and for the tract index 20,000. A substantial portion of the 80,000 items, about 70,000, would be the same items being reprinted to make the index cumulative.

A possible solution would be to print daily indexes by name and by lot number for a period such as fifteen days and then print a cumulative index for the fifteen day period, starting another daily series for a second period of fifteen days.⁷⁶ At the end of thirty days, the first fifteen day period and the second fifteen day period could be consolidated in cumulative indexes by name and by tract. The cumulative indexes for the thirty day period could then be consolidated into a cumulative index at the end of three months. The three-month cumulative indexes could then be consolidated every three months. Apparently, this is the system in operation in Los Angeles as to the grantor index and the grantee index, using tabulating rather than electronic equipment.⁷⁷ The writers believe that so many separate indexes would be undesirable and would defeat the objectives of modernization, that is, ready availability of up-to-date information as to a specific lot.

The writers presently have insufficient information as to the operation of the Office of the Recorder of Deeds in Los Angeles. However, based upon information available, it is their belief that almost all the title work in Los Angeles is done by title companies which have their own systems of tract indexes. Consequently, there may be little use of the official current indexes.

There are several possible solutions to the problem of maintaining cumulative indexes by name and by tract in a large county. Electronic data processing experts believe that it may be unnecessary to print a cumulative index. The cumulative index can easily be kept on a magnetic tape or series of magnetic tapes. Whenever a request for specific information by name or lot number is received, this information can quickly be printed and given to the person making the request. During our visit to the Office of the Recorder of Deeds in Philadelphia it was apparent from observation and from what was said that the principal

76. Printers are now available which print from a magnetic tape at the rate of 1,000 lines a minute. Therefore, the time factor in printing is not a problem.

77. "Tabulating machine equipment has been used since 1946 to compile the grantor and grantee indexes. Listings made daily, semi-monthly, quarterly, and annually alphabetize the names of all parties contained in documents realized for recording." Letter from Ray E. Lee, County Recorder, Los Angeles, California, to the writers, March 23, 1962.

users of the Office were employees of title and credit companies. If each person who desired information filled out a request for the information by lot number, by name, or by both, even though a large number of requests were received at the same time, all could be processed in a matter of hours. The writers do not reject this method of indexing and retrieval, assuming that it has been authorized by the statute, but for the present, they believe that it would be well to consider a more conventional method for maintaining comprehensive cumulative indexes.

With respect to the name index and the lot index, the items can be printed on perforated strips of paper which can be easily separated. If these strips of paper for the respective indexes were mounted on metal filing units, which permit the insertion of additional strips at any place, a cumulative index could be maintained without reprinting any item. For example, on the second day the 8,000 items for the name index would be printed on the perforated slips of paper in strict alphabetical order and in the order of their recording where there are two or more transactions to be indexed under the same name. These perforated strips could then be divided among several employees so that each employee would insert in strict alphabetical order the strips covering a portion of the alphabet. Since a carbon copy of the names in alphabetical order may be made simultaneously with the automatic printing of the perforated strips, this carbon copy of the documents filed on the previous day could be made available in book form for reference when the office of the recorder of deeds opened and while the strips were being added by the employees to the cumulative index. This type of indexing is available in units which are behind glass panels so that the user can read them but can not remove or soil any of the slips.⁷⁸ Also this type of index may be used while strips are being added. It may be possible for the employees who add the strips to start work before the office of the recorder is open to the public in order that all strips may be inserted in the proper places before the office opens.

The glass panels used with the cumulative index are one aspect of the general security which is essential for a safe and modern recording system. Other security procedures are discussed later in this article.

Since one of the cumulative indexes would be in alphabetical order and the other in numerical order, and since additional metal holders for the strips of paper could be easily added, the cumulative index might continue for more than the usual five or ten years. The proper period of its duration can always be determined in the light of facts as they develop, which includes the number of items indexed.

When it has been decided to close a cumulative index and to start a

78. Various companies market this type of equipment. Remington Rand markets the equipment "select-a-matic visible index."

new one, there are two ways that this can be done. Since the index has been closed, the individual items may be moved from one frame to another so that each frame will be filled. All the items on each frame can then be photographed on microfilm. The index can then be printed photographically on each side of a single sheet of the best quality paper, and the metal frames used for the new index.

The second way to close a cumulative index would be to print out automatically the index by use of the magnetic tape upon which it is electronically recorded. The cumulative index printed in this manner would probably not be the same as one made by photographing the individual frames of the index. The reason for any variation would be errors made by the persons in inserting the paper slips. The machines have a higher degree of accuracy than human beings.

There has recently been developed for commercial use electronic equipment for placing on magnetic tape, more specifically called video tape, the image of a document and then reproducing this image electronically.⁷⁹ If this type of equipment is more readily available than microfilming equipment, it might be feasible to use this process instead of microfilming. Each system has certain advantages which it is not desirable nor possible to evaluate at this time. When the image of a page is placed on magnetic (video) tape, the reproduction of this image is done electronically, but when a cumulative index is made by printing from the magnetic tape of the cumulative index, the printing is done mechanically. There may be certain advantages in printing electronically the strips as they appear in the index frames which would outweigh the possibility that printing mechanically from the magnetic tape would produce a more accurate cumulative index.

Whenever a cumulative index is used so infrequently that there is little need to keep it in printed form, the printed index may be destroyed. The same material will be either on microfilm and magnetic tape, or if the printed copy was made directly from the magnetic tape, it will be only on the magnetic tape. In either case desired portions of the index may be printed out when needed. Of course, a duplicate of the magnetic tape should be safely stored as a security measure.

Some counties may find it more economical to use punched cards and tabulating equipment which are not as expensive as electronic data processing equipment. Norfolk, Massachusetts, has been using tabulating equipment and punch cards with substantial savings. Its system is best described in the language of a System Survey prepared by Moore Business Forms.

79. The writers obtained information about this new process from RCA which issued a folder on its operation in November 1961 under the title AFAFC Video File.

Deeds and other instruments are recorded and entered on the Daily Entry Sheets. Photocopies are made of the completed Entry Sheets and the instruments which are forwarded to the Tabulating Department. There, Index Code numbers are assigned to these source documents used in preparing Master Index Cards on an Electric Typewriter with a cable-connected Card Punch. The Card Punch simultaneously punches Grantor, Grantee, and Description Entry Cards.

The Master Code File Cards (surname only) are used to tabulate the Yearly Current Index, leaving blank spaces throughout the run to allow for handwritten entries during the balance of the year. The source documents for these entries are the Master Index Cards. In this way, an alphabetic breakdown is structured each year by the machine method, so that subsequent hand entries can be alphabetically entered in the Yearly Index. This technique provides an immediate alphabetic listing.

At the end of each year, the accumulated Entry Cards are sorted, alphabetically, by date, by book and page number in two categories Grantor and Grantee to produce the Classified Index Books for the entire year in complete alphabetic listing.

The Consolidated Classified Index Books are compiled in the same manner by merging the first five-years' entry cards. The ten-year index is prepared by merging the first five-year consolidated cards with the succeeding five-year cards. Each succeeding five-year grouping of cards are handled in the same manner, thereby providing a continuing consolidated index.

Two passes are made through the tabulating machine in preparing the Classified and Consolidated Index Books. The Entry Cards are used to print thirty entries on page one and all odd-numbered pages; the cards for page two and all even-numbered pages are reserved for the reverse side of page one and other odd-numbered sheets. At the end of each alphabetical letter, the paper is reversed and the sheets for the even-numbered pages are then printed.

All of the continuous forms printed on the typewriters and tabulators are detached into single sheets on a Detacher which also removes the punched margins from the Master Index Cards.

Norfolk County, Massachusetts, which records approximately 50,000 documents a year, shares its machines with two other Massachusetts counties, Plymouth and Worcester, on a 50-25-25 basis.⁸⁰

The writers believe that when the number of deeds is large and several counties can use the same equipment, the difficulties involved in handling a large number of punched cards make it advisable to seriously consider the use of electronic data processing equipment.

80. See IBM, Application Brief, Norfolk County, Massachusetts, Registry of Deeds (K20-1020). The Register of Deeds in Norfolk County is L. Thomas Shine.

Several counties can use the same electronic data processing equipment by sending their data by telephone to a central location. When the data has been arranged in proper order it can then be returned by telephone and printed in the individual counties.

The writers have received information that tabulating equipment is being used in the following counties in addition to those which have been mentioned previously: San Diego and Orange Counties in California; Harrison and Jefferson Counties in Texas; Denver County, Colorado; Cook County, Illinois; Bergen County, New Jersey; and Hartford County, Connecticut. Letter from Albert B. Wolfe, member of the Council, Section of Real Property, Probate, and Trust Law, American Bar Association, July 12, 1962.

Obviously, a tract index will best perform its function if there is a consistency between the lots as they are described on maps and in deeds with their location on the ground. Conversations with persons engaged in locating on maps made by aerial survey the boundaries of each lot in a county for tax purposes have disclosed that in the average county there are relatively few lots which overlap one another. Furthermore, whenever an overlap was discovered and this fact was then called to the attention of the owners, the owners generally settled the boundary by agreement.⁸¹ The writers believe that there is a sufficient number of competent surveyors to enable each county to create, if necessary, and to maintain adequate official maps to obtain the maximum benefits from the tract index.

The index item for each deed or mortgage will include, in addition to other information, the lot number and the names of the grantor and grantee or the mortgagor and mortgagee. If a person purports to convey a certain lot but his name does not appear in the tract index of this lot as the current owner, this fact can be detected by electronic data processing equipment. The fact that a deed or other document is not consistent with the record title according to the tract index should be detected the day after the deed or other inconsistent document is left for recording. The recorder should promptly notify the parties to the deed or other document of the inconsistency. If the inconsistency cannot be removed within a reasonable period of time, such as three months after notice, the recorder should have authority to expunge the deed or other document from the record. Thus, all persons who are entitled to the protection of the recording act would necessarily take free of any claims by any person under the expunged document.⁸² The time to correct problems of this type is when it is easiest to obtain the missing information, that is, the earlier the better.

*Statutory or Administrative Standards as to Size, Form,
and Content of Recorded Documents*

It has been customary in some states to set forth statutory forms for a deed and a mortgage. For this reason and because it is easier for the average attorney to find a statute rather than an administrative regulation, there is some merit in the use of statutes to prescribe the size, form, and content of recorded documents. However, in opposition to the statu-

81. Interview with Allan S. Davis, Director of Planning Services, and Harry Trevena, both of Aero Service Corporation, Philadelphia, Pennsylvania, June 29, 1962.

82. This suggestion should meet the criticism of the tract index that it enables any stranger to place a cloud on title to a specific lot by simply recording a deed purporting to convey the lot. SIMES, A HANDBOOK FOR MORE EFFICIENT CONVEYANCING 93 (1961)

tory form is the fact that the recorder of deeds will always have a copy of any administrative regulations as to the size, form, and content of deeds, and, therefore, the regulations will be readily available to attorneys. Furthermore, an administrative regulation may be modified more quickly and easily to meet specific problems which were not anticipated at the time of the adoption of a statute.

Since the purposes of a modern system of recording are to reduce the time necessary to search a title and to keep to a minimum the cost of maintaining the records, it would seem obvious that the use of the verbose and unnecessarily long common-law form of deed, typed or printed on legal size paper, would not be consistent with modern recording practices. Experience has disclosed that a deed typed or printed on legal size paper cannot be properly photographed crosswise on 16 mm. microfilm and be readable with ordinary commercially produced microfilm readers.⁸³ Furthermore, when photographed in this manner, it does not make a satisfactory print. If the deed is microfilmed in a horizontal position, it will be readable and satisfactory prints can be made from it. However, additional film is used without any real justification. The Recorder of Deeds in Philadelphia solved this problem with the cooperation of attorneys who now draft on 8½ by 11 inch paper the documents to be recorded. However, the usual deed in Philadelphia is four 8½ by 11 inch pages because it is typed or printed on folded 8½ by 11 inch paper. The writers believe that the usual deed can be drafted on both sides of a single piece of 8½ by 11 inch paper.⁸⁴ This would result in substantial saving in film, storage space, and labor.

To encourage attorneys to use the single piece of 8½ by 11 inch paper, the current fee for filing a deed should be charged for recording it, and the same amount should be charged for each additional page which must be photographed.

A requirement that all documents required to be recorded must be on 8½ by 11 inch paper would not necessarily attain the desired objectives if the size of the type or printing were reduced beyond the point where it could be photographed satisfactorily. Furthermore, the typing or printing must have sufficient contrast. For this reason the size of type and contrast should be prescribed.

To enable the essential information needed for the daybook, the name index, and the tract index to be copied accurately and rapidly from the deed or other document, the form of the deed or other document should

83. Lee, *Microphotographic Recording in the County of Los Angeles*, August 5, 1958.

84. The short form of deed used in the District of Columbia is written on both sides of a single piece of legal size paper. From an examination of a completed District of Columbia deed, there is no doubt that an 8½ by 11 inch paper could have been used.

be prescribed so that this information will be set forth at the top of the first page in a manner that will be easiest to copy.⁸⁵

In addition to meeting the requirements as to the size of the page, type, and contrast, documents submitted for recording should be legible⁸⁶ and written in English, or accompanied by an English translation. The names of all persons signing the document should be clearly typed or printed beneath their respective signatures.⁸⁷ Since these matters would be prescribed by statute or regulation, it would be the duty of the recorder to refuse to accept any document which did not meet these standards.

With respect to the lot number, a law should require it to be set forth on every document relative to a specific piece of land, including the entry of a judgment as a lien. As to names, serious consideration should be given to requiring the addition of social security numbers to avoid problems of identification. Although good drafting practices require the use of full names, full names may not be sufficient for identification.

To keep information of a private nature off the record and to keep down the size of the public record, the recording of a memorandum of a lease in lieu of the full lease should be authorized.⁸⁸ Also, to reduce the size of the record, mortgagees should be authorized to record the general terms and conditions of their mortgages so that they may be incorporated by reference in specific recorded mortgages.⁸⁹ An additional advantage of incorporating by reference the general terms and conditions in a mortgage would be the elimination of the need for interested persons to read the same general terms and conditions each time a mortgage is checked to be sure of their precise meaning.

Microfilming of Documents

Many counties are using photography to eliminate the need of typing the recorded documents into the record books. The photocopies are bound in books. Unfortunately, some counties may not have used proper

85. IBM recently announced a new machine which can read letters and numbers and place them on magnetic tape. This machine may be used by magazine publishers to handle their subscription lists. *Wall Street Journal*, July 11, 1962, p. 9, col. 2 (midwest ed.).

If the documents to be recorded are prepared in a way that would permit automatic transcription for index purposes, this would decrease the time required to prepare the index and increase its accuracy.

86. Apparently under an Ohio statute only the signatures need to be legible. See OHIO REV. CODE § 317.11 (1953).

87. *Ibid.*

88. For Model Memorandum of Lease Recording Act, see SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 81 (1960); PA. STAT. ANN. tit. 21, §§ 405-10 (Supp. 1961).

89. For Model Master Mortgage Recording Act, see SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 79 (1960); PA. STAT. ANN. tit. 21 §§ 629-33 (Supp. 1961).

procedures when photostating, and the photostat copies may therefore be materially and seriously faded to the point where they either are or almost are illegible. The prints should be legible and durable when proper procedures are used for photocopying. However, copying documents does not solve the space problem. Therefore, many counties in various parts of the United States pursuant to state statutes are recording documents on microfilm from which a print may be made when needed. Some counties simply use microfilm reels which are numbered similar to deed books. Other counties place strips of microfilm in jackets or by a special process of fusing make the slips of microfilm into a single sheet.

The following detailed explanation on the use of jackets for microfilm is reproduced from the mimeographed statement *Microphotographic Recording in the County of Los Angeles*.⁹⁰

For convenience of processing and reference by the public, we arbitrarily segregated the Official Records into five series of films (books) known as 'D', 'M', 'R', 'S', and 'T'. Each book in each series contains 999 pages. For facility in indexing and quick reference, fifty pages or film images are placed in a 5½" by 9" plastic jacket in five strips of ten images each. The contents of twenty jackets make a book of 1,000 pages but in order to have each chamber contain ten images ending in 9, 19, 29, etc., the first space or zero page in each book is left blank. By this method any page number can be quickly located because identical page numbers in each 100 pages will be in the same spot in the jacket. For example, page 137 will always be in the same location in the jacket as page 337 or page 687.

All references to Official Records on microfilm are by book and page. Each page 8½" by 14" or smaller is numbered as a page. However, where we previously placed several portions of pages together to make one recorded page, we now give each rider a separate page number and make a separate 'shot' because it is easier.

A machine has been developed that will impregnate a copy of the original reel film into a film sheet thereby eliminating the need for jacket stuffing. Film sheet copies may then be quickly and inexpensively made from the master sheet.

In Philadelphia, deeds are microfilmed; then a duplicate reel is made to enable the film to be cut so that each deed relating to a specific tract will be on a single strip. This strip of film is then placed in a jacket 5 by 1⅞ inches with two channels. These jackets are filed by lot number so that it is a simple matter to locate the deeds with respect to a specific lot. Some consideration should be given in Philadelphia to the possible use of a larger jacket so that all documents relating to a specific lot may be inserted.

When the records are kept on microfilm, it is not practical to make entries on the margins as is done in some counties with respect to assign-

90. See note 83 *supra*.

ments and satisfactions of mortgages. Therefore, an assignment or satisfaction of a mortgage must be a separate document.⁹¹

The writers recommend the use of the larger jackets for holding the strips of microfilm and, further, that the jackets be filed by lot number. The microfilm copies of all documents relating to a specific lot should be filed in the jacket for that lot. This method of filing would simply be an up-dating of the method used by some title companies; photocopies of deeds and other documents relating to a specific tract are placed into an individual file folder for that tract.

Security Provisions

Every system of public records needs some form of security in case all or part of the records are destroyed, lost, or stolen. If the cumulative name index and the cumulative tract index are on magnetic tape, it is a simple matter to make a duplicate magnetic tape, which will last indefinitely, to be stored in a safe place. Microfilm of public and private records is now being stored in this manner. For example, duplicate microfilm reels of the land records of Philadelphia are stored in a mine which is so located as to be safe from atomic or hydrogen blasts. If for any reason a jacket for a certain lot should be lost or stolen, or a portion removed, this fact would be obvious from the tract index in printed form. If the tract index in printed form were destroyed, it could be quickly reproduced automatically from the magnetic tape which is kept in the safe of the recorder's office. If the entire courthouse is destroyed by fire or explosion resulting in the total destruction of all records in every form, then the records could be reproduced from the microfilm and the magnetic tape stored in the mine or other similar location outside the courthouse.

The writers believe that all the many advantages of modernization may be available at less cost than the present methods of recording. However, since there will be substantial improvements, if these improvements do increase the costs of recording, which may be true initially, particularly in the preparation of maps, these increased costs can be paid for quickly by increasing the fee for filing documents. In discussing this possibility with attorneys, the writers found not a single objection to improving recording by increasing the recording fees. Furthermore, it is not proper accounting to charge to a recording system the total cost of pre-

91. "In Philadelphia only, a mortgage may now be satisfied of record only by filing with the Commissioner of Records a satisfaction piece in substantially the form set forth in the statute authorizing this method accompanied by the mortgage itself." WOOD, LADNER ON CONVEYANCING IN PENNSYLVANIA 301 (3d ed. 1961) PA. STAT. ANN. tit. 21, §§ 715-17 (Supp. 1961) It is significant that as to the other counties, while the use of a satisfaction piece is not mandatory, it does not have to be accompanied by the original mortgage. PA. STAT. ANN. tit. 21, §§ 720-22 (Supp. 1961)

paring maps which will be of great benefit to numerous governmental units and to private companies. In this connection, representatives of a company which prepares detailed maps for tax purposes informed the writers that generally sufficient property is added to the tax records to pay within three years the total cost of preparing the maps.⁹² Obviously, from time to time as part of the general security program, the maps with all changes should be placed on microfilm so that they can be reproduced if destroyed. Otherwise, the cost of reproducing the maps would be very substantial.

RECOMMENDED CHANGES IN BASIC CONCEPTS OF RECORDING

Tract Index as Part of the Record

If a particular document is not indexed in the tract index, purchasers for value and without notice should not take subject to it. If for some reason a document is not entered in the daybook, obviously it would not be indexed and, therefore, would not be completely recorded though a microfilm copy of the document appeared in the jacket for the specific lot to which it related. Making the tract index part of the record is not an innovation, since the tract index provided for in the Marketable Title Acts, as previously stated, is certainly part of the record.

Race-Notice Statute for Deeds

Since one of the objectives of a modern recording statute is to have recorded all documents relating to land, it seems only logical that a subsequent grantee should take title as against an earlier grantee under an unrecorded deed only if the subsequent grantee records and does not know of the earlier unrecorded deed. In urban counties it is fairly commonplace to record deeds, and, therefore, a change from a notice statute to a race-notice statute as to deeds should not be opposed. Rural counties are adopting the recording customs of urban counties.

Race Statute for Mortgages, Judgments, and Other Liens

In many states a judgment, when entered, is automatically a lien against any property owned by the judgment debtor which is located in the county where the judgment is entered. This type of statute places a great burden on persons checking title because it is difficult to know whether a certain judgment is against the owner of the property to which title is being searched. In any large urban community there are many identical names. Therefore, these statutes should be changed to provide

92. Interview with Allan S. Davis, Director of Planning Services, Aero Service Corporation, Philadelphia, Pennsylvania, June 29, 1962.

that a judgment is a lien only against the specific property owned by the judgment debtor and against which the lien has been asserted by filing a proper document with the recorder of deeds. The document should contain the basic facts about the judgment and indicate that it is being made a lien on specific property described by lot number. There should be no need to use more than one side of a single sheet of 8½ by 11 inch paper so that the document can be microfilmed in a single frame.

If the judgment is entered as a lien against more than one lot, this fact should be clearly set forth so that sufficient microfilm copies of the document can be made for filing in the jacket for each lot.

There are times when several mortgages are executed by the mortgagor on the same lot. Also a judgment may be made a lien as to a specific lot as to which there is an unrecorded mortgage. In a notice or race-notice jurisdiction, if subsequent mortgagees or judgment creditors know or should know of an unrecorded mortgage, they take subject to it. This type of statute requires a determination of whether a subsequent mortgagee or judgment creditor did, or did not, know, or should have known from the facts which he did know, that there was an unrecorded mortgage on the lot. It is not too much to expect creditors to perfect their liens by recording them, and, therefore, the difficult factual issue of notice can be eliminated. Consequently, there should be no objection to the recommended change to a race statute as to private liens in jurisdictions which have either a race-notice or a notice statute as to mortgages and other liens.⁹³

Public liens for taxes or special assessments should not have to be entered on the record initially to be a lien. The ordinary public lien for land taxes usually attaches on a date which is several months prior to the day the taxes are due. The writers see no objection to this and believe that the lien for taxes should continue for a period of six months after the taxes are due without having the lien recorded. After the expiration of this six month period, the tax lien would be the same as any other lien, and if not recorded against the specific property, any purchasers and subsequent mortgagees of the property who record with or without notice but prior to the recording of the tax lien would take free of it. The same situation would exist with respect to special assessments.

The public official (tax collector or auditor) in a large county will probably use electronic equipment to prepare his tax statements and to keep a record of tax payments.⁹⁴ If this is done, then prior to the expira-

93. Ohio and Pennsylvania both have race statutes as to mortgages. Ohio Rev. Code § 5301.23 (1953); PA. STAT. ANN. tit. 21, § 622 (1955), tit. 68, § 601 (Supp. 1961). The Pennsylvania statute has a special provision for purchase-money mortgages.

94. The County Assessor and the County Tax Collector, Los Angeles County, California, use a Honeywell 1000 Computer to maintain the assessment rolls and prepare annual tax

tion of the six month period, the tax collector will send to the office of the recorder of deeds a reel of magnetic tape containing the official lot numbers and names of the delinquent taxpayers and the amount due. This information can then be entered electronically on the tract index. Later, as taxes so entered are paid, the tax collector can remove the lien of the tax by supplying to the recorder of deeds, either on electronic tape or in writing, the lot numbers, the names of the taxpayers, and the amount of taxes paid.

Whenever property is sold and a deed is left for recording, the recorder of deeds should send the tax collector on a reel of magnetic tape the changes in ownership by lot numbers so that this information may be entered electronically on the tax collector's records. It is possible that the tax collector may keep his records on cards and may wish to have changes printed on cards of the type he uses. These matters are merely details which can be worked out in a number of ways.

Of course, the same basic procedure can be used by any public official responsible for the collection of stated amounts from owners of property, such as payments for water, sewage, and special assessments.

Value

In many jurisdictions a promise to pay a substantial amount for land and delivery of the deed to the promisor (grantee) does not make him a purchaser for value.⁹⁵ For example, C receives a deed from A which he promptly records. C pays A only a small down payment and for the balance gives A a promissory note secured by a purchase-money mortgage which A records. A does not negotiate the note nor assign the mortgage. C learns of an earlier unrecorded deed to the same property which A delivered to B. Since C has paid only a small amount, it is usually assumed that C relied very little, and, therefore, C should not be entitled to the land as against B. This type of reasoning is based upon an unwarranted assumption as to C's reliance. Certainly C may have relied in many ways, such as moving onto the land or not buying other land.⁹⁶ Furthermore, since the purpose of the recording statute is to protect the subsequent bona fide purchaser, C should be protected.

The same problem arises when C contracts to buy land from A and records his contract.⁹⁷ Before C receives a deed from A, he learns of a

bills. Letter from Ray E. Lee, County Recorder, Los Angeles County, to the writers, March 23, 1962.

95. 4 AMERICAN LAW OF PROPERTY § 17.10 (Casner ed. 1952); 6 POWELL, REAL PROPERTY 281 (1958).

96. See 4 AMERICAN LAW OF PROPERTY § 17.10 (Casner ed. 1952).

97. Ohio recently amended its statutes to specifically authorize the recording of contracts for the sale of land which have been duly acknowledged and attested to by two witnesses. OHIO REV. CODE §§ 317.08, 5301.25 (Supp. 1961). To avoid a cloud on a title to land which

prior unrecorded deed from A to B. It is possible that the deed to B may have been a gift. Since C merely promised to pay for the land, it is assumed that C has not relied sufficiently to be entitled to the protection of the recording statute. Again, this is an unwarranted assumption. C should be protected by the recording statute because C has obviously relied by executing the contract and recording it. After a contract to purchase commercial property is executed, the purchaser normally assumes that he will receive title and immediately either takes possession after completing proper escrow arrangements as to the purchase price or prepares to take possession. In either case there will be substantial reliance, often including the ceasing of looking for other suitable property. The same factors are present when a person contracts to buy residential property. Therefore, a promise to buy land which is set forth in a document that is executed in accordance with the statutory formalities and which is accepted in writing by the vendor should be considered value under the recording statutes.

Contracts to Buy Land

In addition to the problem of whether a promise to pay an amount that is more than nominal or to do a substantial act is value, there is the further problem of specifically including a purchaser of land within the protection of the recording statute when the contract to buy is recorded. In the light of what has already been set forth with respect to the factor of reliance in determining what is value, the logical conclusion is that a purchaser of land under a properly executed contract which has been recorded should receive under the recording act the same protection as a grantee for value who records.⁹⁸ Grantees, mortgagees, judgment creditors, and persons who contract to buy land, providing they have recorded the documents under which they claim, should be entitled to the protec-

would result from a default of a purchaser, whose whereabouts are unknown or who refuses to agree to a cancellation, and a failure to cancel a recorded contract by foreclosure proceeding, some vendors are deliberately executing contracts for the sale of land in a form which makes them ineligible for recording. For a general discussion of land contracts, see Note, *Land Contracts in Ohio — The Need for Reform*, 13 W. RES. L. REV. 554 (1962)

98. Although the Ohio recording act as amended specifically authorizes the recording of duly executed land contracts, it grants the protection of the act only to "a subsequent bona fide purchaser having at the time of purchase, no knowledge of the existence of such former deed or land contract or instrument." OHIO REV. CODE § 5301.25 (Supp. 1961) The definition of "person dealing with land" in the Ohio Marketable Title Act states that this phrase "includes a purchaser of any estate or interest therein, a mortgagee, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon." OHIO REV. CODE § 5301.47(D) (Supp. 1961) Obviously, in this definition the word "purchaser" does not include a mortgagee nor a land contract vendee. However, "subsequent bona fide purchaser" in section 5301.25 of the Ohio Revised Code has been held to include a mortgagee. *Hibbs v. Insurance Co.*, 40 Ohio St. 543 (1884) However, a purchaser under a land contract will probably not be considered by Ohio courts to be a "subsequent bona fide purchaser" and certainly not one for value so long as more than a promise to pay is required.

tion of the recording statute as to prior unrecorded deeds, of which they have no knowledge and no cause to know, unrecorded public liens which have not been recorded after the expiration of a stated period of time from the date they became a lien, and unrecorded private liens although the existence of these public and private liens may be known. By recording, the writers mean entry in the tract index against a specific lot. The priority of public liens which are kept alive by recording is generally based upon special statutes and is usually much higher than private liens. For example, public liens are usually prior to certain recorded interests such as leases and contracts to buy.

Title by Adverse Possession

It would seem logical that no one should acquire title to land by adverse possession without paying the taxes on the land for the statutory period. It is incongruous to permit a person who may not even have a deed to the land to take possession of the land, claim the land as his own, remain in possession for the statutory period, become the indefeasible owner in fee simple absolute, but not pay any taxes imposed against the land.⁹⁹ Furthermore, it is not consistent with a recording statute to permit persons to acquire title by adverse possession, enter nothing on the record, move off the property, and defeat the claim of a bona fide purchaser for value who has recorded. There should be a provision to the effect that one who claims title by adverse possession and who is not in possession cannot assert his claim in any court unless it has been recorded.¹⁰⁰

The recording of a title obtained by adverse possession also involves some problems. The entry of such a title would obviously be outside the chain of record title. This fact would be readily detected by the electronic data processing equipment. Certainly, it is a definite cloud on the title of the person who is the record owner at the time of the entry on the record of claim of title by adverse possession. All of these problems may be avoided by providing a modern quiet title action in which the rights of the adverse possessor can be quickly determined.¹⁰¹ The instituting of

99. 6 POWELL, REAL PROPERTY 720, 734 (1958).

100. See PA. STAT. ANN. tit. 68, §§ 81-88 (1931).

101. See Note, *Enhancing the Marketability of Land: The Suit To Quiet Title*, 68 YALE L.J. 1245 (1959). To make proof of title by adverse possession more practical, all special provisions for persons under any disability or owning any future interests should be deleted from statutes of limitations so that adverse possession, including payment of taxes, for a stated period such as ten or fifteen years will give the adverse possessor an indefeasible title in fee simple. SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 41, 44 (1960) Under the Model Real Property Limitations Act, *id.* at 44, the basic period of ten years is extended only "on the ground of minority or of mental incompetency, and, in either case, only when such disability exists at the time the cause of action first occurs. Even then the period is not extended when the owner is in the custody of or represented by a guardian, trustee, conservator or committee, or is in the custody of a parent. In the absence of such

the quiet title action by the adverse possessor would be indexed in the tract index and would give the adverse possessor the protection to which he is entitled until the issue of his title has been decided. If the decision in this action is in favor of the adverse possessor, he would then have not only a title entitled to be entered on the record, but also a marketable title.

The suggestion of Professor Richard R. Powell in his concluding remarks on title registration in his multi-volume work on real property deserves serious consideration. It is as follows:

It has occurred to this author [Professor Powell] that it would be possible to establish, in an American state, a system of compulsory registration of 'possessory title,' in which the required proof would concern only boundaries and the easily proved (or disproved) fact of possession. No extensive search into past conveyances would be needed to satisfy American stress on due process. This could then be coupled with a ten year statute of limitations, which would permit the registration of possessory title to become transformed into a registration of ownership, by the mere presentation of evidence of continuous possession for the interval of ten years. Such a procedure would eliminate the present costliness of initial registrations, and, after a decade of transition, would result in the attainment of all the merits of the registration system. It is hoped that consideration of the possibilities of this plan may be given in an atmosphere free from the selfish arguments of those seeking merely to preserve the status quo ante.¹⁰²

REGISTERED TITLE

Counties located in states which have title registration necessarily keep separate indexes for the registered titles. One of the indexes is a tract index. Although title to a certain lot is registered and the registration is indexed in the general grantor index, persons dealing with this lot are not always aware of the fact that it is registered.¹⁰³ As a result of this oversight, a mortgage on registered land will be simply recorded instead of being entered against the registered title to the land. A purchaser of the registered land will take free of the recorded mortgage. For this reason the tract index should clearly state that the title to a specific lot is registered. If desired, it would be possible and easy to keep a separate cumulative index of registered land which would have the same items also included with respect to the land as appear in the general indexes. The writers seriously question the need for such a separate index.

representation or custody, the period cannot be extended beyond twenty years after the cause of action first occurred. Thus, cases where the period is extended at all for disabilities will be rare, and, in any event, at the end of twenty years it will be certain that the period has ended." SIMES, A HANDBOOK FOR MORE EFFICIENT CONVEYANCING 62 (1961)

102. 6 POWELL, REAL PROPERTY 319 (1958).

103. Maher, *Registered Land Revisited*, 8 W. RES. L. REV. 162 (1957).

MARKETABLE TITLE ACTS

A number of states have already adopted marketable title acts which have as their objective eliminating claims based upon old documents which were recorded a stated period prior to the determination of title to specific land.¹⁰⁴ The need for this type of legislation will continue after a general tract index has been in operation for forty to fifty years because the tract index alone does not bar old claims. However, the tract index should make purchasers and owners more aware of defects. When the defects in title are known, they will probably be corrected.

[The writers plan to write Part II of this article after various counties have used electronic data processing and tabulating equipment in the office of the recorder of deeds for a reasonable time and after substantial changes have been made in the recording statutes.]

104. SIMES & TAYLOR, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 3-16, 293-361 (1960).