

CHAPTER 7 - DEEDS and EVIDENCE OF TITLE

DEEDS

Notes:

GENERAL



In ancient times before the development of our rather complex concept of land ownership, title to real estate was evidenced primarily by possession and the power to defend the claim against others. The earliest method of transferring title to real property was simply by the surrender of possession by one claimant to another.

The history of land tenure that culminates in the present day use of deeds for the **conveyance** of real property is deeply embedded in ancient law and is quite interesting. The transfer of property and **chattels** (*items of personal property*) has always been effected by the passing or the giving or possession of the thing itself. In feudal times, when land was to be transferred, the seller and buyer went upon the land and a clod of dirt from the land was given to the new owner, in the presence of witnesses, to symbolize delivery of the land. Today, the delivery of deed represents the delivery and transfer of the land. A mortgage or trust deed usually begins with the words "This Indenture" which is a survival of an old custom whereby deeds were made for each of the parties upon the same sheet of sheepskin and by cutting or tearing them apart with an uneven line, they were able at a later time to identify them because of the matching of their indentures.

According to our system of land ownership, title to real property can be transferred from one person to another by four general methods:

- (1) by descent;
- (2) by will;
- (3) by involuntary alienation; and
- (4) by voluntary alienation.

A person is said to have died **intestate** when he or she *dies without a will*. In this case, title to property is said to transfer **by descent**. All states have **statutes of descent and distribution** (also called **statutes of intestate succession**) for the purpose of *disposing of the property of the intestate*. The general plan of such statutes is to *distribute property to the nearest relatives*, this presumably being the desire of the deceased. According to the Colorado Probate Code, revised in 1994 and 1995 to conform to uniform standards, the distribution of the largest share of the property of the intestate, which can be no less than half of the estate, descends to the surviving spouse.

C.R.S. 15-11-101. Intestate estate.

(1) Any part of a decedent's estate not effectively disposed of by will or otherwise passes by intestate succession to the decedent's heirs as prescribed in this code, except as modified by the decedent's will.

(2) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his or her intestate share.

C.R.S. 15-11-102. Share of spouse.

The various possible circumstances describing the decedent, his or her surviving spouse, and their surviving descendants, if any, are set forth in this section to be utilized in determining the intestate share of the decedent's surviving spouse. If more than one circumstance is applicable, the circumstance that produces the largest share for the surviving spouse shall be applied.

(1) If:

(a) No descendant or parent of the decedent survives the decedent, then the surviving spouse receives the entire intestate estate; or

(b) All of the decedent's surviving descendants are also descendants of the surviving spouse and there are no other descendants of the surviving spouse who survive the decedent, then the surviving spouse receives the entire intestate estate;

(2) If no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent, then the surviving spouse receives the first two hundred thousand dollars, plus three-fourths of any balance of the intestate estate;

(3) If all of the decedent's surviving descendants are also descendants of the surviving spouse, and the surviving spouse has one or more surviving descendants who are not descendants of the decedent, then the surviving spouse receives the first one hundred fifty thousand dollars, plus one-half of any balance of the intestate estate;

(4) If one or more of the decedent's surviving descendants are not descendants of the decedent's surviving spouse, and all of such surviving descendants who are children of the decedent are adults, then the surviving spouse receives the first one hundred thousand dollars, plus one-half of any balance of the intestate estate;

(5) If one or more of the decedent's surviving descendants are not descendants of the decedent's surviving spouse, and if one or more of such descendants who are children of the decedent are minors, then the surviving spouse receives one-half of the intestate estate.

If there is neither surviving spouse nor children, then there are provisions in the law made for the nearest surviving relatives to inherit the estate. (15-11-102 CRS)

Title to property may be transferred by a **will**. The laws of each state give a person the right, subject to certain limitations, to dispose of property after death. A person is said to have died **testate** when he or she *dies leaving a will*. In no state can the deceased dispose of all his or her property and leave the spouse nothing. According to Colorado Probate Code, the surviving spouse, wife or husband, is entitled to a share of the estate of the deceased regardless of whether or not there is a will to the contrary. (15-11-201 C.R.S.)

Transfer of title by **involuntary alienation** is a *transfer without the owner's volition or consent*. Examples of such involuntary transfers are *tax sales and sales to foreclose mortgages or to enforce mechanics' or other liens*. Another example is loss of title by **adverse possession**. The owner may lose title by adverse possession if the *owner is not making use of the property and an adverse claimant holds possession of the real estate openly and notoriously, hostile to and to the exclusion of the owner for a period of time as required by law, usually 20 years (in Colorado, for 18 years)*.

Transfer of title by **voluntary alienation** is the normal real estate transaction, whereby either all or some of the *owner's rights are voluntarily transferred to another*. Voluntary alienation may occur by *gift or sale*. Examples of such transfers are: a *sale of real estate under a contract consummated by delivery of a deed*; transfer of title by a *deed of trust or mortgage as security for the payment of a note, and a lease*.

One of the important rights of real estate ownership is this right of alienation - the right to transfer ownership of the real property to another. In general, the conveyance of real estate by a person while living is accomplished by the *execution and delivery of a deed*. A **deed** is a *legal instrument in writing, duly executed and delivered, whereby the owner of the land (the grantor) conveys to another (the grantee) some right, title, or interest in or to the real estate*.

TYPES OF DEEDS

There are four major classifications of deeds:

- (1) General warranty deed,
- (2) Special warranty deed,
- (3) Bargain and sale deed,
- (4) Quitclaim deed.



The *difference* between the types of deeds lies solely in the *degree of protection or guarantee that the grantor promises or warrants to the grantee*. *One type of deed does not transfer any greater interest or title than another*. For example, if X owns a fee simple interest in land and conveys that interest to Y by either a general warranty deed or a quitclaim deed, X has effectively transferred the fee simple title to Y.

By using a quitclaim deed, X does not guarantee to stand behind the title and make good any loss that Y may suffer because of a flaw in X's title; by using a general warranty deed, X guarantees to stand behind the title and to defend or reimburse Y for any loss occurring because of a defect in X's title.



1. **General Warranty Deed.**- A general warranty deed is one in which the grantor **warrants** (guarantees) the title against defects existing before the grantor acquired title or arising during the grantor's ownership. It does not warrant against encumbrances or defects arising from the grantee's own acts. The usual covenants or warranties contained in a general warranty deed are commonly classified as follows:

- Covenant of Seizin,
- Covenant Against Encumbrances,
- Covenant of Quiet Enjoyment,
- Covenant of Further Assurance, and
- Covenant of Warranty Forever.

The first two covenants relate to the past; the others relate to the future.

a. **Covenant of Seizin.** By this covenant the *grantor guarantees that the grantor owns the property and has the right to convey it*. The fact that the property is mortgaged or is subject to some restriction is not a breach of the covenant.

b. **Covenant Against Encumbrances.** This covenant guarantees that there exist *no encumbrances or claims against the property, except those that are specially mentioned and excluded* from this warranty.

c. **Covenant of Quiet Enjoyment.** The grantor by this covenant guarantees that the *grantee will not be evicted nor disturbed in the possession of the property*. Threats or claims by outsiders do not constitute a breach; the grantee must be actually dispossessed before recovery can be had against the grantor.

d. **Covenant of Further Assurance.** By this covenant, the *grantor promises to procure and deliver any other instruments that are subsequently necessary to make the title good*.

e. **Covenant of Warranty Forever.** This covenant guarantees that the *grantee shall have title and possession to the property*. (Note that this covenant is distinct from the Covenant of Seizin and the Covenant Against Encumbrances. While those two Covenants deal with the grantor's promises regarding the right to convey in the first place, the Covenant of Warranty Forever guarantees the grantee's - and implicitly, any *future* grantees - protection *in the future*.)

At common law and generally today, the first two covenants do not “**run with the land**” that is, only the grantee may sue the grantor for their breach. The last three covenants are said to run with the land. That is, the *grantee or any subsequent purchaser of the land may sue the grantor for their breach*.

However, according to *Colorado statute*, the Covenants of Seizin and Against Encumbrances also run with the land. "Covenants of seizin, peaceable possession, freedom from encumbrances, and warranty contained in any conveyance of real estate, or of any interest therein, shall run with the premises, and inure to the benefit of all subsequent purchasers and encumbrances." (38-30-121 C.R.S.) (This means that on the Uniform exam, only the Covenants of Quiet Enjoyment, Further Assurance, and Warranty Forever will run with the land. But on the Colorado exam, all five covenants are binding the grantor as to all future grantees.)

2. **Special Warranty Deed.** A Special Warranty Deed is one in which the *grantor warrants or guarantees only against claims asserted by, through or under the grantor*. In other words, the grantor warrants the title against defects arising after the grantor acquired the property and not against defects arising before that time.



3. **Bargain and Sale Deed.** Technically, *any deed that recites a consideration and purports to convey the real estate* is a bargain and sale deed. Thus, many quitclaim and warranty deeds are deeds of bargain and sale. Not uncommon is a bargain and sale deed with a Covenant against the grantor's acts. In such a deed, the grantor warrants only that the grantor has done nothing to harm the title. This covenant does not run with the land. Examples of bargain and sale deeds with a covenant against the grantor's acts are an **Executor's deed**, (a deed from a person appointed by a *Probate court* to represent the interests of a *deceased* person,) an **Administrator's deed**, (a deed from a person duly appointed by a court for *an adult* adjudged to lack the legal capacity to voluntarily convey their property,) and a **Guardian's deed**, (a deed from a person duly appointed by a court for a *minor*.)



4. **Quitclaim Deed.** A quitclaim deed is one in which the grantor *warrants nothing*. It *conveys only the grantor's present interest in the land, if any*. A quitclaim deed is frequently used to *clear up a technical defect* in the **chain of title** (such as the misspelled name of a previous grantee) or to release lien claims against the property. Examples of such deeds are *correction deeds* of release. In some states (not Colorado) a **Grant Deed** is used instead of a Quitclaim Deed to *convey any interest of the grantor's, subject to no covenants or promises as to the condition of title*.)

USUAL ELEMENTS OF DEEDS

In general, the usual elements of a deed follow below. To be valid, a deed *need not contain all* of the elements listed. For example, in Colorado, to be **valid**, (e.g., *to convey the property as intended*,) *only the first seven elements are essential*. (Note that the requirements may vary in other states.)

1. **Written Instrument.** To be effective, the deed must be in writing. The Colorado **Statute of Frauds** requires: “No estate or interest in lands, other than leases for a term not exceeding one year nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.” (Title 38-10-106 C.R.S.) Thus, *no estate or interest in lands may be created or conveyed except by a deed or conveyance in writing*. Two *exceptions* to the requirement of a written instrument are:

- *a lease for a term not exceeding one year, and*
- *where an interest or estate is created by operation of the law itself.*

A deed should not be altered in any manner after its delivery to the grantee, otherwise it may be set aside by the courts. In the case of printed forms, all blanks should lie properly filled in according to the requirements of the law and according to the intention of the parties.

2. **Parties: Grantor and Grantee.** - To be valid a deed must have a grantor who is conveying an interest in the property. The *grantor must be named* or otherwise clearly designated. The name of the grantor should be identical to that appearing in the conveyance by which the grantor received their title. Certain minor discrepancies in name will not invalidate the deed, but to avoid possible litigation or “**clouds on the title**”, it is advisable that care be exercised to avoid any such discrepancies. The grantor, if a natural person should be of legal age and sound mind, otherwise the grantor can, at a later date have the deed set aside and recover the property. A deed is not effective unless it also designates someone to whom title passes. Every deed *must have a grantee*, otherwise it is void. The grantee must be named or indicated with reasonable certainty.



Real estate may also be conveyed by **Deed In Trust**, (as opposed to a “Deed of Trust” discussed in Chapter 5, Financing) which is a deed to a person (individual, partnership, or corporation) as *trustee and for the benefit of a third party*. The **trustee** then *holds legal title* and the *third party holds the equitable title and receives the benefits*. This is called a trusteeship.

3. **Words of Conveyance.** Without words of conveyance, a deed is ineffective. An instrument cannot be construed to be a deed unless it

contains *words that manifest an intent to transfer title* to an interest in real estate. No specific words are required but the commonly used are "sell and convey", "grant, bargain, and sell" and "convey and warrant".

4. **Recital of Consideration.** A deed is valid although there is not consideration but there *must be a statement of consideration even though it is only nominal* (a small amount recited even if no real money exchanged hands, such as "ten dollars and other good and sufficient consideration" or "love and affection.") A person may make a gift of a parcel of real estate and the lack of consideration does not render the conveyance void. But, in general, a **donee** (*receiver of the gift*) cannot enforce covenants of warranty against the **donor** (*grantor*) since said covenants are not supported by consideration.

A gift deed may be set aside on the grounds of fraud. For example, a gift deed given to defraud creditors may be set aside by the grantor's creditors. Accepted standards of conveyancing dictate that a deed contain a recital of consideration. If the deed recites consideration, the burden of proving lack of consideration is on one who attacks the deed.



The practice in *Colorado requires the recital of the true and actual consideration* on the face of the deed. This trend has come about due to the Colorado **documentary fee** on real property conveyances. 39-13-102 C.R.S., obligates the clerk and recorder of each county to collect this fee of *one cent for each one hundred dollars of consideration* (or \$10 per \$100,000 of purchase price) whenever a deed is recorded. 39-14-102 C.R.S., requires that a "declaration" prescribed by the property tax administrator signed by the grantor or grantee accompany all conveyance documents, subject to the documentary fee, when submitted to the county clerk and recorder for recordation. These laws are for the purpose of aiding the assessors in their determination of property values. (Although not technically a *tax*, the documentary fee is similar to the **tax stamp** found in other states, in that it is charge based upon a percentage of the sales price.)

There is a criminal penalty involved when the clerk and recorder is misinformed concerning the actual consideration. The assessor may impose a penalty of \$25 or 0.25% of the sale price, whichever is greater, for failure of the grantee to submit the declaration. Therefore, parties who present the deed for recording on behalf of others will wish to be protected. The Real Estate Commission offers no official policy on this since deeds are valid whether the true and actual consideration is shown on the face of the instrument or if only a nominal consideration is shown

5. **Description of the Property.** A deed is not valid unless it describes the real estate conveyed. Any description that unquestionably identifies the property is sufficient for the deed, but it is *advisable to use the same legal*

description used in the previous deeds, thereby avoiding discrepancies in the records, (and “clouds on the title”). The courts have been liberal in holding rather ambiguous descriptions to be good, but a court action is a high price to pay to correct technical errors when such could have been avoided by care in the drafting of the description. It is usual, following the description, to add words indicating that all the appurtenances go with the land. All improvements to the land go with it as appurtenances, thus, in transferring a house and lot it is necessary only to describe the land upon which the house is situated.

The law also provides that the street address or identifying numbers on buildings appear on the document of title as well as the legal description, although failure to include the street address or identifying numbers will not make the deed invalid. (38-35-122 (1) (a) C.R.S.) It is important to note that in the "legal description" section of a deed, the *street address is the least sufficient legal description*, because of the likelihood of confusion, (such as between Elm St., Way, Cir., etc.)

6. **Signature of Grantor.** The *deed is invalid unless it is signed by the grantor*. If there is more than one grantor, as where the property is owned by joint tenants, each must sign the deed. In a few states, primarily in the east, a seal is necessary for a deed to be valid. *Colorado has abolished the requirement of a seal*. Colorado does not require that the signature of the grantor be witnessed.

7. **Delivery and Acceptance.** A deed is not effective unless it is delivered by the grantor and accepted by the grantee. The delivery of the deed is a question of the intent of the grantor. If the deed is given to the grantee to afford an opportunity to examine it, this does not constitute delivery. For there to be an effective delivery the *grantor must intend to pass title to the grantee*. According to Colorado statute, when a deed is acknowledged and recorded, the law presumes there has been effective delivery.

For delivery of deed to be effective, it generally *must be made during the lifetime of the grantor*. If the grantor executes a deed, retains it and directs that upon the grantor's death it is to be delivered to the grantee, such deed does not pass title. Delivery of the deed may be made to some third person for the benefit of the grantee, but to be effective, the grantor must surrender all right to control or recover the deed.

8. **Date.** A date is not essential for a valid deed, although it is the universal custom to date all deeds. Inclusion of the date might prevent future question or controversy concerning the time of delivery of the deed.

9. **Exceptions and Restrictions.** The grantor is assumed to be conveying the property free and clear of all encumbrances. Therefore, the deed usually contains a provision that the grantor conveys the property free and clear of all encumbrances except... - then follows a specific enumeration of the exception, such as; "subject to a deed of trust (giving complete description)"; "subject to an easement (with a detailed description)"; "subject to all encumbrances and restriction of record".

The use of restrictions - usually called "**deed restrictions**" or "**restrictive covenants**" - is an old practice. With these, the grantor places *restrictions upon the right to use the real estate conveyed*. Such *restrictions must be reasonable and not contrary to public policy*, (such as violations of Fair Housing Laws). The foundation of this practice arises out of the rights of property. The owner has the right of **free alienation**; that is, the *owner may dispose of their estate in any manner that they may elect*. Once the deed restrictions are established they run with the land and are *limitations upon the use of all future grantees*. Deed restrictions are most frequently encountered in the development of subdivisions where in the limitation is for the benefit of all the landowners, (i.e., Planned Unit Developments).

Typical restrictions deal with the minimum size of the house, type of material may be used and exclusion of commercial establishments. Well-formulated deed restrictions have a stabilizing effect upon property values. A homeowner is protected against forbidden uses; the owner can rest in safety knowing that a grocery store will not be a neighbor and that a neighbor's house must conform to certain minimum standards. Violations of deed restrictions can be enjoined through a court action brought by any party for whose benefit the restrictions were imposed.

10. **Warranties and Covenants.** Warranties are not an essential requirement of a valid deed. The grantor may convey their interest in the land by a quitclaim deed, wherein the grantor gives no warranty of any kind, or the grantor may convey by a general warranty deed, wherein the grantor makes numerous warrants to the grantee. In Colorado, and in many other states, a statute has been enacted providing for a short-form warranty deed. The statute provides that *every deed which is in substance similar to the statutory form and that include the words "and warrant the title to the property"*, said deed by implication *contains the usual covenants of general warranty deeds*. (38-30-113 C.R.S.)

11. **Acknowledgment.** An acknowledgment is a *declaration* made by a person (in the case of a deed, by the grantor) *to a notary public*, or other public official authorized to take acknowledgments, *that the instrument was executed by the grantor and that it is a free and voluntary act*. The notary public, or other authorized officer, fills out the certificate of acknowledgment customarily printed on the instrument. Colorado law provides further, "No

officer authorized to take acknowledgments of instruments affecting title to real property shall take or certify such acknowledgments unless the person making the same shall be personally known to such officer to be the identical person he represents himself to be, or shall be proved to be such by at least one credible person known to such officer. It shall not be necessary to state such fact in his certificate or acknowledgment attached to any instrument affecting title to real property." (38-35-101 C.R.S.)

A deed is valid although not acknowledged. Only two states require that the deed must be acknowledged to be good. But a great many states provide that a deed cannot be recorded unless acknowledged. Since an unrecorded title can lead to serious difficulties, it is advisable in such states to have the deed acknowledged so that it can be recorded.

According to *Colorado law, a deed is valid although it is not acknowledged, but most counties will not record it without a valid notarization.* It is always advisable to have the deed acknowledged because according to Colorado statute, an acknowledged and recorded deed is presumed to have been properly executed and delivered. (38-35-101 C.R.S.) Neither an *unrecorded* deed which has been acknowledged, *nor* an unacknowledged deed which has been recorded for at least ten years or more, may be used as evidence of the transaction *until* it is first *proven* - according to the court rules of evidence - that the deed was *properly executed*. (38-35-106 C.R.S.) Since this may be extremely difficult to do, it is very unwise not to have the deed acknowledged.

If any deed has been of record for 20 years the facts recited in the deed may be read in evidence and received as prima facie evidence of these facts. (38-35-107)



12. **Recording.** A deed is valid although not recorded. The wording of the Colorado recording statute is permissive ("may be") rather than mandatory ("must be").

The recording statute has a twofold effect. Recording creates the presumption of knowledge called "**constructive notice**" or "**legal notice**" of another's rights. This presumption *protects an innocent purchaser or encumbrancer who acts in ignorance of an unrecorded instrument* and it *provides a conclusive presumption that all persons have knowledge of recorded instruments.* The grantee should immediately record their deed.

The lack of acknowledgment does not affect this presumption. Even a deed that is not acknowledged will be "constructive notice" or "legal notice" to subsequent purchasers. (38-35-106 C.R.S.)

In addition to such constructive notice, purchaser or encumbrancer may have "**actual notice**" of another's right or claim, by *being told, or having first-hand*

knowledge. For instance, a purchaser is presumed to have actual notice of all rights and claims of parties in possession of the property, so that even if the right or claim of the party in possession is unrecorded, the purchaser cannot defeat it.

13. **Habendum Clause.** Although *not required* in Colorado, deeds typically contain what is known as an habendum clause. An habendum clause is one which starts with the exact words, "*To Have and To Hold*", and *indicates the extent of ownership being transferred*, (such as Fee Simple or Life Estate.)

EVIDENCE OF TITLE

GENERAL

A prudent buyer of real estate will demand that the seller furnish proof of ownership. The fact that the seller can produce a deed to the property naming the seller as grantee is not adequate proof. This deed may be defective or the previous owner's title may be defective. The seller may own a fee simple absolute title or the seller may have some lesser degree of ownership; the title may be technically free and clear or it may be legally unmerchantable; or the title may be heavily encumbered by liens and restrictions. The prudent buyer will want to know the exact state of the seller's title. In addition, the buyer's lender will be greatly concerned with the state of the title, since the lender will accept a mortgage on this property as security for the repayment of the loan the lender makes.

The problem of "evidence of title" is concerned with the proof of ownership of real estate. The three major evidences of title are: (1) title insurance; (2) an abstract and opinion; and (3) a Torrens certificate of title.

TITLE INSURANCE

Title insurance is a *contract that protects the insured against loss occurring through defects in title to real property*. The risk of loss, as in other policies of insurance, is transferred from the property owner to a responsible insurer. A title company will not insure a bad title any more than a life insurance company will insure a dying person.

Basically, a title insurance policy provides that the company will indemnify the owner against any loss that the owner may sustain because of a defect in the title to the real estate, *provided that the defect is not specifically excluded in the policy*. Further, the company agrees to defend, at its own expense, any lawsuit attacking the title where such attack is based on a claimed defect that is covered by the insurance provisions. Examples of typical standard exclusions that the policy does *not* insure against are:

1. Rights or claims of parties in possession not shown of record, including unrecorded easements.

2. Any state of facts an accurate survey would show.
3. Mechanics liens, or any rights thereto, where no notice of such liens or rights appear record.
4. Taxes and assessments not yet due or payable and special assessments not yet certified to the Treasurer's office.

Title policies also list non-standard exclusions of record pertaining to the specific property, such as mortgages, easements and covenants. Exclusions, both standard and non-standard, can sometimes be deleted or insured against if specifically requested.

The date of the title policy is very important. The title insurance company *guarantees against loss occurring because of defects existing at or before the date of the policy*. Defects which come into existence subsequent to the date of insurance of the title policy are not covered.

OWNER'S and MORTGAGEE'S Policies. Title insurance companies will issue policies to both the owner and the mortgagee (lender). The fee or premium for the title policy, unlike other insurance, is *paid only once* and the policy continues in force without further payment. The fee, as with other insurance, is based upon the amount of insurance purchased. Fees charged by title companies must be filed with the Division of Insurance and are available to the public. The *owner's policy is not transferable* to a subsequent grantee. Therefore when the property is resold, the new purchaser should obtain a reissue title policy. If the *lender* sells the loan (note and mortgage or deed of trust) to a new lender, the mortgagee's policy is normally transferable, so the new mortgagee need not obtain a reissue policy. However, if the buyer eventually refinances that loan, they will need to obtain a new mortgagee's policy. Likewise, if the buyer eventually sells the property, the mortgagee's policy is not transferable to the new buyer's loan; the new buyer will have to obtain their own mortgagee's policy.

It should be remembered that a "mortgagee's policy" does *not* protect the *owner's* equitable interest in the property; a mortgagee's policy will *protect only the lender and only to the extent of the lender's interest*, (the amount of the loan). The owner's equity is protected only by an "owner's policy".

Title Insurance Commitments. - Title insurance companies will issue commitments, prior to the closing of a real estate transaction, as to *what matters of record they are willing to insure and under what circumstances*. Title companies will usually issue a commitment free of charge if there is a contract of sale on the property.

The use of title insurance does not relieve the purchaser of the need for legal advice on the title. The title insurance company may be relieved of liability by listing additional exclusions that may or may not affect the future marketability

of the title. The title insurance commitment and copies of items excluded from the commitment should be examined by the purchaser's attorney. Sufficient time should be allowed in the contract for such examination.

Division of Insurance. - Title insurance companies are regulated by the Colorado Division of Insurance, which imposes certain rules on them, such as regarding Affiliated Business Arrangements, which will be discussed in the Colorado Course, Chapter 16, and the "Good Funds" law.

"Good funds" are funds that are immediately available to the title company upon deposit. Per the Colorado Division of Real Estate and Division of Insurance, good funds are required to complete disbursement of real estate transactions. This includes Wire Transfers, Cashier's checks once deposited into the title company's trust account, and sometimes Money Orders.



The Insurance Division also regulates closing practices, such as paying Closing Fees, although it does not take a position on who should pay the closing fees or, for that matter, the title insurance policy fees. These fees are a matter of negotiation and contract between the parties. However, based upon local practice and custom:

- a) The [owner's] title insurance policy fee by the seller.
- b) The mortgagee's/lender's title insurance policy by the buyer - unless prohibited by the terms of an FHA-insured loan. (It is, after all, the buyer/borrower's loan, and *unless otherwise agreed between seller or buyer*, or prohibited by FHA or VA rules, the borrower normally pays for their own loan fees.)
- c) The closing fee for the *sale* – *not* document preparation fee – is *split* by seller and buyer.
- d) The closing fee for the *loan* – is paid by the buyer/borrower
- e) Document preparation/**scrivener fee** by the broker/licensee. (This is a nominal charge, such as \$5, which is paid by the listing broker in order to comply with Commission Rules and Division of Insurance regulations prohibiting a title company from charging for services which could be construed as "preparation of legal documents". This is very uncommon today.)

ABSTRACT AND OPINION

All states provide for the recording, in a public office, of every document by which any estate or interest in land is created, transferred, encumbered, or otherwise affected. In Colorado, that public office is the office of the **county**

clerk and recorder of the county in which the real property is situated. (38-35-109(1)&(3) C.R.S.)

This law also provides that no document affecting the rights in real estate shall be valid or good against any persons who do not have actual knowledge of the rights of the parties unless said document is recorded.

Thus we see that the recording law has a twofold effect. It protects an innocent and unknowing purchaser or encumbrancer who acts in ignorance of an unrecorded instrument and it provides **constructive notice** to the public, which is a conclusive *presumption that all persons have knowledge of recorded instruments*. In addition, the law provides that "...Any person who offers to have recorded or filed in the office of the county clerk and recorder any document purporting to convey, encumber, create a lien against, or otherwise affect the title to real property, knowing or having a reason to know that such document is forged or groundless, contains a material misstatement or false claim, or is otherwise invalid, commits a class I misdemeanor and shall be liable to the owner of such real property for the sum of not less than one thousand dollars or for actual damages, whichever is greater, together with attorney fees. . ."

From the preceding, it becomes apparent that these public records furnish a reliable history of the title or ownership of a tract of land. An **abstract of title** is a *summary of the material parts of every recorded instrument affecting the title to a piece of real estate*, compiled by a duly licensed abstractor. Today more and more abstractors do not summarize the legal instruments but reproduce them verbatim via photocopies.

To the average unskilled purchaser, the receipt of an abstract affords no knowledge of the state of the title to the real estate. In addition, the purchaser needs the **attorney's opinion of abstract** to *inform the purchaser of the nature of the seller's title and of any defects, liens, encumbrances, or other rights which might be disclosed by the abstract*.

Abstractor's and Attorney's Liability. - The abstractor is in no way a guarantor of the title to the real estate. The law imposes only the duty to exercise due care in the preparation of the abstract. If the abstracter negligently omits a document from the abstract or incorrectly summarizes the content of such instrument, the abstractor can be held liable for any loss caused the purchaser. Likewise, an attorney can only be held liable for damages which are caused by the attorney's negligence in the examination of the abstract. As an example, the attorney is liable for any loss caused by failure to discover an existing, recorded lien contained in the abstract.

Some Risks Involved. - It has been said that no evidence of title can completely and conclusively reveal the exact state of the title to real property.

For instance, an abstract may indicate that the seller has clear title, but the chain of title may contain a forged deed. There is no way of knowing from the abstract whether a deed is forged or not and, of course, such a deed passes no title. Also, an abstract will not reveal the rights of parties in possession. The abstract may show title in one person but another may possibly have superior right through adverse possession. Fortunately, such things rarely happen. With an abstract and opinion together with an examination of the property itself, a buyer can be reasonably certain that they will obtain good title.

TORRENS CERTIFICATE OF TITLE

The Torrens system of title registration of real estate was developed by Sir Robert Torrens, a British businessman, who successfully urged in 1857 that the principle of registration of title of ships be applied to land. The registry of ships showed the name of the ship's owner and all liens and encumbrances against it. It revealed briefly and simply the condition of the ship's title. A modern comparison would be the registered title to an automobile, which on one document shows the name of the owner and any existing liens or encumbrances. About a dozen states, including Colorado, have enacted a Torrens Title Registration Act (38-36-101 C.R.S.).

Methods of Registration. - To register title to land under the Torrens system, the owner files a written application with the appropriate court for the county in which the property is located. The court then holds proceedings to inquire into the state of the title. All persons known to have an interest or claim in the property are served personal notice of the registration proceedings. All other persons are given notice through newspaper publication. The registration proceedings are, in essence, a quiet title lawsuit. After the hearing, the court issues its decree of confirmation of title and registration. When the court's decree is filed with the registrar of titles (in Colorado the registrar is the county clerk and recorder). The county clerk and recorder makes an original certificate of title setting forth the court's findings as to the owner, the owner's interest, and all liens, claims, encumbrances and other rights, if any, against the property. The registrar then issues an exact duplicate to the owner, called an "owner's duplicate certificate of ownership". The Colorado law states that after ninety days of the issuance of the decree, no person may maintain any action that challenges the findings set forth in the decree. After that time, the owner of the real estate is conclusively presumed to have title as decreed.

Transfer of Title. - The Colorado law related to the conveying of registered land reads as follows: "An owner of registered land conveying the same, or any portion thereof, in fee, shall execute a deed of conveyance which the grantor shall file with the registrar of titles in the county where the land lies. The owner's duplicate certificate shall be surrendered at the same time, and shall be by the registrar marked "canceled". The original certificate of title shall also be marked "canceled".

The registrar of titles shall thereupon enter in the register of titles a new certificate of title to the grantee, and shall prepare and deliver to such grantee an owner's duplicate certificate. All encumbrances, claims or interests adverse to the title of the registered owner shall be stated upon the new certificate or certificates, except insofar as they may be simultaneously released or discharged. When only a part of the land described in a certificate is transferred, or some estate or interest in the land is to remain in the transferor, a new certificate shall be issued to the transferor for the part, estate, or interest remaining .

CONCLUSION

Title insurance policies are usually the most popular evidence of title in urban areas. Abstracts are physically cumbersome and when large blocks of mortgages or trust deeds are sold to banks or other financial institutions, the investor usually prefers the title policy. Of the three evidences of title discussed above, the ***Torrens certificate is the most uncommon***, however, ***there are parts of eastern Colorado wherein it is prevalent***.