Two Perspectives on the Real Estate Title System: How to Examine a Title in Virginia

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TWO PERSPECTIVES ON THE REAL ESTATE TITLE SYSTEM

HOW TO EXAMINE A TITLE IN VIRGINIA

William Mazel*

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I. INTRODUCTION

This article seeks to explain the mechanics of an examination of title to real property in Virginia. It addresses the procedural aspects of this process, and does not attempt to examine the substantive body of law which underlies the title examination procedure. Other published works are available for that purpose.¹

The purpose of this article is to provide a reference guide to an area of the law usually neglected by law school professors, and often never learned completely by the practitioner in Virginia. In addition, it is hoped that this article may be of assistance to attorneys from other states who must infrequently examine title to real property in Virginia.

II. THE TITLE EXAMINATION: WHERE TO BEGIN

The purpose of a real estate title examination is to determine who is the record fee simple owner of the property on the particular day that title is examined. To do this, the examiner must locate the latest recorded instruments affecting title. By use of these instruments, he can then go back in time through the records to determine who owned the real estate. Thereafter, he brings the title of the property up to date according to the latest recorded instrument.

The title examiner’s first task is to determine who is “supposed” to be the owner of the property and then to use this latest recorded instrument as a point of reference to begin examination. It is customary in the examination of title to have a proposed deed to the

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property forwarded by the seller to the buyer or his attorney. Once the last recorded instrument is identified (i.e., the deed into the seller), the title examiner, through the use of the deed books\(^2\) and grantee index\(^3\) in the clerk's office, is able to trace the title back in time and thereby construct a chain of title to the property. When the examiner cannot locate a source of title (often referred to as a “link” in the chain of title), it may be necessary to search the grantee index, through which the title examiner can locate all property conveyed to a particular grantee during a specified period of time.

When the examiner has completed his examination of title by chaining the title back, he brings the title forward by tracing the chain up to the current date through the use of the grantor index.\(^4\) This chaining process enables the examiner to determine what conveyances or liens, if any, are recorded against the property.

Usually title is examined for a minimum of sixty years. While this sixty-year period does not guarantee marketable title in the current owner, most defects in title will be cured by the lapse of this period of time. These defects may include adverse possession of the property,\(^5\) judgments as liens on property,\(^6\) unreleased deeds of trust on property\(^7\) and mechanic's liens \(^8\) on which no suit has been brought for enforcement. However, if it is necessary, a knowledgeable title examiner will go past the sixty-year period to determine easements or other possible title defects. These “defects” may have been granted or become vested more than sixty years prior to the title.

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3. The grantor and grantee index books contain the names, alphabetically by year, of all persons conveying property (grantors) and all persons obtaining title to property (grantees). Separate volumes are maintained for grantors and grantees.

4. This process is commonly referred to as “adversing.”


6. Id. § 8-396 (Cum. Supp. 1976) provides that execution may be had on a judgment or an action may be brought within twenty years after the date of the judgment.

7. Id. § 8-11 (Repl. Vol. 1957) imposes a twenty year limitation on enforcement of deeds of trust, mortgages and liens for unpaid purchase money.

examination date. In other instances, the title examiner might terminate his title examination in less than sixty years if it appears that the record title is clear and going back more than sixty years would serve no purpose. For instance, examination of title to a single-family residence in a developed subdivision where all of the other residences are covered by title insurance and have been lived in for a number of years would be superfluous beyond the title to the undeveloped parcel as acquired by the developer.

It is frequently said that if you examine the title to property for the last forty years by a microscope, you may examine the balance of the sixty-year period through the use of a telescope. Consequently, it is recommended that title be examined very closely for at least a forty-year period. One reason for this length of time is to allow any possible deeds of trust on the property to terminate. As FHA and VA loans are usually for thirty years, an examination of title going back a minimum of forty years will show whether or not there is an outstanding FHA or VA loan on the property.

III. Abstracts of Title

An abstract of title is the compilation of all recorded instruments in the chain of title. Each instrument is called a “link,” while the links put together going back in time constitute a chain of title. The title examiner should set out on separate sheets of paper, either by using preprinted forms or by the use of legal-size note paper, each document that is to be abstracted. The abstract of title is a written memorandum of the title examiner’s review of the recorded documents in the clerk’s office. These documents vary and, necessarily, the abstracted information will vary depending on the document. A deed of bargain and sale will contain different information than a deed of trust. Although the instruments may be similar, all deeds are somewhat different. Deeds of bargain and sale,9 deeds of gift, deeds of trust,10 release deeds,11 and other similar instruments contain common elements but are used for different purposes. In this article an explanation will be made as to the abstract of each title instrument.

10. Id. § 55-58 (form of a deed of trust to secure debts).
11. Id. § 55-75.
IV. DEEDS

Fundamental terminology relating to a conveyance of property must be understood at the outset in the abstracting of the title. The party conveying title is commonly termed the grantor, and the party receiving title is termed the grantee. This is true whether or not the grantor or the grantee is a corporation, an individual, a partnership, a trustee, the Commonwealth or a political subdivision.

A deed to property may be executed as a deed of bargain and sale whereby the parties bargain for the property, and the grantor sells the property to the grantee. A deed of partition between coparceners\textsuperscript{12} is similar to a deed of bargain and sale. A deed transferring title to property may be a deed of gift for which there is no consideration passing between the grantor and the grantee, but instead a gift of the property is made. At common law, a lease and release\textsuperscript{13} was another method of transferring title to real property. However, this method is not used in modern practice.

In a deed of bargain and sale, reference should be made to the deed book and page number where the deed is recorded. Thereafter, abstracted on the side of the page should be the date of the deed; whether or not the warranty given is a general warranty,\textsuperscript{14} a special warranty,\textsuperscript{15} or no warranty whatsoever; the consideration paid for the property; the English covenants of title;\textsuperscript{16} the signature of the grantor comporting with the grantor’s name as shown in the deed; if it is a corporation, whether or not the corporate seal has been affixed;\textsuperscript{17} the acknowledgement and the validity of the acknowledgement as to the grantor;\textsuperscript{18} the date of acknowledgement and lastly the date of recordation of the deed.

\textsuperscript{12} Id. § 8-690 (Cum. Supp. 1976); id. § 55-2 (Repl. Vol. 1974).
\textsuperscript{13} Id. § 55-18 (Repl. Vol. 1974). See also id. § 55-75.
\textsuperscript{14} Id. § 55-68.
\textsuperscript{15} Id. § 55-69.
\textsuperscript{16} Id. §§ 55-70 to -74. The English covenants of title include covenants of “right to convey,” for “quiet possession” and “free from encumberances,” for “further assurances,” and of “no act to encumber.”
\textsuperscript{17} Prior to 1975, all deeds made by a corporation required the seal of the corporation to be affixed and attested to. This requirement was eliminated by a 1975 amendment to the statute. Id. § 55-119 (Cum. Supp. 1976). In any event, a curative statute would take care of corporate deeds to which the corporate seal was not affixed or not attested. Id. § 55-136.
\textsuperscript{18} Uniform Recognition of Acknowledgements Act, VA. CODE ANN. §§ 55-118.1 to -118.9 (Repl. Vol. 1974), sets forth the minimum requirements for a valid acknowledgement.
In the center of the page would appear the name of the grantor and the grantor's spouse. If the grantor is an individual and there is no spouse, then the marital status of the grantor should be noted. If it is a corporation, the correct name of the corporation and whether the corporation is domestic or foreign should be specified. The same would apply to the name of the grantee and whether the conveyance is to the grantee singularly or in the plural. In addition, a recital should appear after the grantee's name indicating the estate to be conveyed. Thus, if the estate is to two individuals as tenants in common, nothing further need be shown. However, if the estate is conveyed to joint tenants with the right of survivorship or to a husband and wife as tenants by the entirety with the right of survivorship, this should be so indicated. This indication is extremely important under our current laws whereby spouses have contingent rights of dower or curtesy in property. In addition, a subsequent conveyance by one spouse and a recital that the conveyance is by a surviving spouse is important to show transfer of title by operation of law rather than by descent and distribution or by will.

Thereafter, the deed should indicate with reasonable accuracy a description of the property. It is not necessary to write out a full description of the property. Title examiners, through long experience, have devised methods of writing out the legal description of property through the use of their own shorthand. This enables a competent title examiner to reconstruct the description without spending long periods of time on verbatim descriptions. For instance, property shown as Lot 10, Block 9, Pleasant Acres, Section 5E, Ocean Beach, Virginia, Map Book 30, Page 45, is as accurate a description as writing out "all that certain lot, piece or parcel of land, etc." In the case of a metes and bounds description, the same can be done by use of shorthand methods and likewise for courses

19. The spouse's signature is to release any contingent rights. See id. § 55-42 (release of dower or curtesy by infant spouse). See also id. § 8-688 (Repl. Vol. 1957) (passing of dower and curtesy to insane spouse); id. §§ 64.1-19 to -44 (Repl. Vol. 1973).


22. A failure to bound accurately the property may require a correction deed. Where the description is inadequate to describe the property, a boundary line agreement may be required. See VA. CODE ANN. § 8-836 (Repl. Vol. 1957).
and distances whereby an abbreviation is used for the compass directions.

A well-drawn deed should contain a source (or "being") clause indicating when and from whom the current grantor received his title. Note of this should be made in the abstract since it will be extremely important for tracing title and may provide verification that the same property is being conveyed now as was conveyed by a previous title instrument.

Virginia statutes permit a reference to "the English covenants of title" in the deed without a specific enumeration. In the older deeds, the covenants of title are set forth in a separate paragraph. Note should be made if the covenants of title are given or if they are omitted. This is particularly important in the case of covenants running with the land.

The signature element and the acknowledgement should comport with the body of the deed. Any change in the signature element from the name of the grantor or grantee in the deed should be indicated. The acknowledgement should not be dated prior to the date of the deed, since it would be legally impossible to acknowledge an instrument not yet in existence. Reference should also be made to the date that the notary's commission expires since a notary cannot acknowledge a deed after that date. Curative statutes, however, frequently take care of this error. Review the acknowledgement to show the venue, names of the parties, marital status, acknowledgement of the instrument, notary's signature and expiration date of the notary's commission.

V. Deeds of Bargain and Sale by the Commonwealth

Frequently, the Commonwealth of Virginia will convey property. This conveyance can be made in a number of ways. It may be a conveyance by the Virginia Commissioner of Highways and Transportation in which event he conveys as if he were a private individual. The examination of title to this property and the abstract of

23. See note 16 supra.
26. Id. §§ 55-118.5 to -118.6 (Repl. Vol. 1974).
27. Id. § 33.1-89 (Repl. Vol. 1976) (conveyance to municipality after acquisition by com-
this deed would be done in the same way as with any other deed of bargain and sale. The same requisites for validity of the deed as required in a deed of bargain and sale by a private individual are required by the Commissioner of Highways and Transportation. In a few instances, the Governor of the Commonwealth will convey property in the name of the Commonwealth. In this manner, the deed takes on a different form, and the signature of the Governor is verified through the seal of the Commonwealth and an acknowledgment. Thus, the conveyance is by the Commonwealth itself and not by a department of the Commonwealth.

VI. CORPORATE DEEDS

Corporate deeds of bargain and sale will indicate the name of the corporation and whether the corporation is foreign or domestic. The conveyance is executed by the president, vice president or someone else having authority to convey.\textsuperscript{28} Such individual may convey title to the real estate in the corporate name by his sole act. The signature of the officer must be acknowledged, and his position in the company acknowledged as well. Under previous law it was necessary that the secretary affix the seal of the corporation and attest that it is the seal of the corporation. However, this requirement was eliminated in 1975.\textsuperscript{29} It is customary when taking title from a corporation to require a copy of the corporate resolution authorizing conveyance of the property. This is usually done when the corporation does not, as a matter of business, convey real estate. A few careful title examiners require an abstract of the resolution authorizing the sale to be recorded with the deed of bargain and sale. However, as a matter of general practice, such resolutions are not recorded since the doctrine of ultra vires under modern corporate law does not prohibit the conveyance of the property thereby allowing good title to pass.\textsuperscript{30}

VII. SPECIAL COMMISSIONER'S DEEDS

Property may be the subject of a chancery suit for partition if

\textsuperscript{28} Id. § 33.1-93 (use and disposition of residue parcels of land by commissioner); id. § 33.1-154 (conveying in the name of the Commonwealth sections of roads or other property no longer necessary). See also id. § 33.1-165.


cotenants,31 persons under disability such as infants or insane persons,32 tax sales,33 a mechanic’s lien,34 or some other good cause35 such as a creditor’s bill in equity for payment of a judgment are involved.36 The special commissioner may be appointed by the court for numerous reasons in such suits for the sale of real property. In examining a deed made by a special commissioner,37 the examiner must determine the validity of the deed itself and must also determine that the chancery court had the proper jurisdiction to order such a conveyance.

Where a special commissioner conveys title, he conveys only with the authority granted him by decree of the court. Consequently, in abstracting a special commissioner’s deed, the examiner must be certain that the decree appointing the special commissioner authorized him to convey the property and that he posted a bond.38 Where the purchaser at a judicial sale pays the purchase money to a commissioner who has not given the bond required by law, the payment will be invalid and the purchaser will not be discharged.39 The special commissioner’s deed is usually made with special warranty as the conveyance is in a representative capacity rather than in the special commissioner’s own right. These deeds do not contain the English covenants of title. The special commissioner is required to list in the deed on whose behalf the conveyance is made.40 The title examiner should verify that the listing in the deed of the parties for whom the special commissioner conveys is the same as those shown in the decree authorizing the sale of the property.

The essentials of any chancery suit are twofold. First, the court

32. Id. § 8-675 (Repl. Vol. 1957).
34. Id. § 43-22 (Repl. Vol. 1976).
37. Id. § 8-655 (Repl. Vol. 1957). A decree of sale in a judicial proceeding may be set aside within one year of its confirmation, subject to certain limitations. Id. § 8-673 (Repl. Vol. 1957).
38. Id. § 8-658.
must have jurisdiction over the subject matter involved in the suit and, secondly, the court must have jurisdiction over the persons involved in the suit. In the event that the court does not have potential and active jurisdiction, then any decree entered by the court is a nullity, and any deed conveying property by a special commissioner also is a nullity. When examining the chancery suit papers referred to in a special commissioner's deed, it is absolutely essential that the examiner determine that all the parties having any interest in the real estate are either made parties complainant or parties defendant in the bill of complaint; that a guardian ad litem be appointed and answer, when required; that service of process, either personal or constructive, be had on all parties in accordance with the bill of complaint; and that the court decreed the sale of the property and confirmed title to the property in the purchasers. It is not essential that the title examiner determine that the funds received by the special commissioner be properly apportioned among the parties entitled thereto, nor is it essential that the title examiner determine the final outcome of the case. Once the court has proper jurisdiction, a sale has been properly ordered and a deed properly conveying title to the property has been executed, delivered and recorded, no further action need be taken by him.

VIII. Receiver's Deeds

A receiver for a corporation whose existence has terminated has no authority to act except as authorized by the court. His deed should be abstracted and the court papers reviewed in the same manner as a special commissioner's deed.

42. This jurisdiction may be obtained by service of process, order of publication or consent. Va. Code Ann. §§ 8-51, -69, -71 (Repl. Vol. 1957).
45. Id. § 8-660 (Repl. Vol. 1957).
46. Id. § 8-659.
IX. Correction Deed

Where there is an error in the conveyance of property, the error may be corrected by the use of a correction deed. This deed is recorded and transfers title to the property. The correction deed should be abstracted like a deed of bargain and sale; however, reference should be made to the erroneous deed and the correct deed for purposes of a chain of title. Care should be taken that no other interests have attached to the property between the time of the original deed and the time of the correction deed.

X. Adverse Conveyances

After all links in the chain of title have been examined, the examiner has to determine whether or not title to the property has been previously conveyed; whether or not there is a deed of trust on the property; and whether or not there is a lis pendens, mechanic's lien or some other claim to the property. These claims may include easements that have been granted or restrictions or other encumbrances that were on the property after the grantor acquired title and that may affect marketability. To determine whether the grantor had title to the property at the time of his conveyance, you must examine his adverse conveyances. Caution should be exercised in examining adverse conveyances in order to assure that the subject property has not been conveyed to another grantee. In examining adverse conveyances, care should also be taken that there will be an overlap in the search. Adverse examinations should be performed from the date of the deed into the grantor until the date of recordation of the deed out of the grantor into a new grantee. This will take care of after-acquired title and will verify that the deed as recorded is the first deed recorded conveying the property.

Adverse conveyances are found through the use of the grantor index book through which title can be traced back to the Commonwealth. When reviewing these conveyances, a notation should be made of the deed book and page number of the conveyance, the name of the grantee and a brief description of the property conveyed. Where easements or restrictions are shown, the deed containing the easements or the restrictions should be abstracted.

The daily index book for the grantor must also be searched. This book will frequently cover approximately two weeks to a month before being typed or imprinted in the regular grantor index. In lieu of advertising the name of the trustee under a deed of trust, search only the name of the grantor-trustor as all conveyances by the trustee are also indexed in the name of the grantor-trustor.

XI. DEEDS OF TRUST

In abstracting a deed of trust, obtain the same information as for a deed of bargain and sale. However, it should be kept in mind that a deed of trust is a conveyance to a trustee of legal title while the grantor retains equitable title. Consequently, the deed of trust should show the names of the grantor and any spouses, if necessary; the date of the deed of trust; the deed book and page number for recordation of the deed of trust; the type of warranty given, if any; a description of the property and the general terms of the deed of trust. These terms should include under what circumstances the trustee should have a right to foreclose on the property as well as an adequate description of the debt secured by the deed of trust. A trustee has no right to foreclose on property or to convey title to property unless it is done in conformity with the deed of trust and state law. The signature of the grantor, also known as the trustor, should be checked against the body of the instrument and the acknowledgement. If the deed of trust is to be assumed or title taken subject to it, abstract additional data on taxes, insurance, escrow, penalties and any limitations on sale.

XII. DEED OF BARGAIN AND SALE BY TRUSTEE

The trustee under a deed of trust has no right to convey title to property except in conformity with the deed of trust. Consequently, the title examiner should be certain to review the recitals contained

49. Id. § 7-79(7).
51. Id. § 55-59 (Cum. Supp. 1976) (statutory construction of the terms and duties of the parties); id. § 55-60 ("short form" provisions which may be included in the deed by reference); id. § 55-62 (Repl. Vol. 1974) (statutory advertisement form for notice of sale under deed of trust).
52. Id. §§ 8-11, -12 (Repl. Vol. 1957) (twenty-year statute of limitations on enforcement of deeds of trust).
in the trustee's deed of bargain and sale to assure that they conform with the rights of the trustee in the original deed of trust.\(^5\)

In addition thereto, not only must the trustee advertise the property as required in a deed of trust,\(^6\) he must also give notice to the current owner of the property of the request to foreclose and the date when this foreclosure will take place.\(^7\) While failure to give the proper notice does not result in an invalid deed of bargain and sale, a careful examiner will verify that proper notice was given and proper advertisement was made for sale of the property. In addition thereto, careful title examiners will frequently examine the trustee's reports with the commissioner of accounts to verify that the foreclosure was made in accordance with the recitals contained in the trustee's deed.\(^8\) These reports of the commissioner of accounts may be found with other fiduciary reports and are valuable tools to determine valid foreclosure procedure on deeds of trust.\(^9\) Virginia law provides for a real estate investment trust\(^10\) and further provides for a bare real estate trust in which there is no recorded trust instrument.\(^11\) Title examiners should be careful to check these statutes when one of these recorded instruments appears in the chain of title.

XIII. Release Deeds and Marginal Releases

When property has been encumbered by use of a deed of trust, the encumbrance may be terminated by a marginal release\(^12\) or through a release deed.\(^13\) The marginal release stamped on the mar-

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53. *Id.* §§ 55-61, -61.1 (Repl. Vol. 1974) provide curative provisions for sales under deeds of trust which contain no provisions authorizing the trustee to sell the property which is the subject of the deed of trust. Section 55-61.1 validates such a conveyance after a period of thirty years after the date of the conveyance, provided there have been no adverse claims in the interim.

54. *Id.* § 55-62.


56. Under section 55-59 of the Code, however, a purchaser for value may rely on a recital in the trustee's deed that the notice provisions have been complied with.


58. *Id.* §§ 6.1-343 to -351.


In addition to the release of the lien of a deed of trust through the marginal release and the release deed, the circuit court may release the lien pursuant to section 55-66.5 of the Code. A certificate of satisfaction may be recorded by the lien creditor under section 55-66.3, thus
gin where the deed of trust is recorded is most often utilized as it gives an immediate notice to the title examiner that the lien created by the deed of trust has been released. The marginal release contains the signature of the current holder of the note or his assignee and a certification by the clerk of court that the note was produced before the clerk, paid and released. Where the note cannot be found, the law provides for a marginal release through use of an affidavit for a lost note.

A second method of release of a deed of trust is the release deed. In this deed the trustee releases his legal title in the property unto the original trustor in the deed of trust or to the current owner of the property. Where a release deed is utilized to release the lien of a deed of trust, the release deed should contain the necessary information as to the date of the deed of trust, its place of recordation, description of the property, and that the trustee releases unto the current owner or trustor the described property. Usually, the noteholder joins with the trustee in executing the release deed. This practice has been formulated to verify that the trustee does not execute the release deed in his own right without permission of the noteholder. However, it is legal for the trustee to release the lien of the deed of trust without the noteholder's consent although the trustee may become personally liable for this breach of trust. Release deeds are recorded in the deed books and are indexed in the general index for grantors.

XIV. PARTIAL RELEASES

Statutes of the Commonwealth of Virginia provide that when several parcels of land are in a single deed of trust, the trustee may release some of the land from the lien on the deed of trust and yet retain the lien on the balance of the property. In examining a
release deed, be certain that all of the land has been released or that the property which the title examination involves has been specifically released.

It is also possible, though rarely used under Virginia law, to release one of several notes under a deed of trust. Where a deed of trust has been given to secure payment of a series of notes, release deeds or marginal releases may be executed to release a portion of the indebtedness while retaining the lien on the entire property.65

In addition to release of deeds of trust in the release deed book, releases of reverters or reversionary interests are also recorded in the release deed book.

XV. Substitution of Trustees

In a deed of trust, when a trustee dies, moves out of the state or declines to act for any reason, there are two methods for substituting a new trustee for the purposes of foreclosure. The first method is through a court order.67 In this method, the noteholder files a petition in court and gives notice to the trustor and/or the current owner that he will move for appointment of a substitute trustee at a designated time and place.68 At this time, if there is no objection, the court appoints a substitute trustee. A copy of this decree is recorded in the clerk's office where deeds are recorded, and a notation is made on the margin of the deed of trust showing the recordation of the decree appointing a substitute trustee. The substitute trustee then has a right to act as if he had been appointed originally.

The second method of appointment of a substitute trustee is by power granted in the deed of trust.69 Current deeds of trust contain a provision that should a trustee fail to act for any reason, the beneficiary may, by a recorded instrument, appoint a substitute trustee without the prior consent of the owner-trustor. This appointment is made in the form of a deed and is recorded in the deed books. The appointment is then indexed in the general indices for grantors, and a notation is made on the margin of the deed of trust

66. Id. § 55-66.3.
68. Id. § 26-50.
69. Id. § 26-49.
indicating the appointment of the substitute trustee. In either event, where the appointment is proper, the substitute trustee will have full power to act.\(^7\)

**XVI. **Lis Pendens

When suit is pending involving title to real estate, the plaintiff may file in the jurisdiction wherein real estate is located notice of a lis pendens.\(^1\) The lis pendens, which is recorded in the deed books, is a notice to subsequent purchasers\(^2\) and creditors that the property is subject to a judicial dispute, and any person taking title to the property takes subject to that dispute.\(^3\) When finding a title subject to a lis pendens, the examiner should abstract the suit data, the caption of the case and the docket number. Subsequently, he should examine the suit papers. It frequently occurs that suit may be pending or has been dismissed, and no final judgment has been entered. In the event that the suit has been terminated and the lis pendens is no longer valid, it is possible to obtain a release of the lis pendens through petition to the court wherein suit was pending for a decree directing the clerk to mark the lis pendens released.\(^4\)

**XVII. Mechanics’ Liens**

Where property has been improved or repaired, a mechanic or materialman may file a lien against the property. This lien must be filed in the deed book within ninety days of the time the work was done or the structure completed,\(^5\) and suit must be brought within

\(^70\). *See also* id. § 57-8 (Repl. Vol. 1974) (appointment of trustees for religious congregations); § 57-15 (Cum. Supp. 1976) (sale or encumbrance of land by religious congregations).

\(^71\). *Id.* § 8-142 (Cum. Supp. 1976) sets out when and how the notice of lis pendens may be docketed and indexed.

\(^72\). *Id.* Section 8-142 further provides that no lis pendens or attachment shall bind or affect a subsequent bona fide purchaser without actual notice of such lis pendens or attachment until a memorandum of such is admitted to record in the clerk’s office.

\(^73\). The lis pendens may evidence such suits as action for attachment, specific performance for the conveyance of land, mechanic’s lien sales, or ejectment. *See id.* § 8-520 (Repl. Vol. 1957) (grounds for attachment).

\(^74\). *Id.* § 8-143 (Cum. Supp. 1976) (upon termination of suit, the clerk shall enter a release in the margin of the page of the book in which the lis pendens is recorded. If the debt for which the lis pendens is recorded is satisfied, the creditor has the duty, within ten days, to note such satisfaction in the margin of the appropriate deed book.

\(^75\). *Id.* § 43-4 (Repl. Vol. 1976).
six months of the filing of the lien or sixty days after the structure was completed. A mechanic’s lien gives notice that there is an adverse claim against the property. Where a mechanic’s lien has been filed against the property and it is known that the property has recently been improved, the title examiner is on notice that any sale of the property within the statutory period of time will be subject to the mechanic’s lien. In addition, the title examiner should suspect that other mechanic’s liens may also be filed on the property if the property is under new construction. When more than six months have expired since the mechanic’s lien was filed and no suit has been instituted, or the work has been completed for a substantial length of time (ninety days or more) and no lien has been filed, no action need be taken regarding a possible mechanic’s lien since the statute of limitations, by Virginia law, will terminate its validity. Where a mechanic’s lien has been bonded out, it is necessary for the title examiner to examine the bond and to verify that the lien of the mechanic has now been transferred from the property to the bond. In such an instance, the title can be passed as if the mechanic’s lien is no longer a lien on the property.

XVIII. WILLS

In certain instances, the property under examination may not have passed by deed but by will, in which case the will books in the clerk’s office must be consulted. Wills recognized in Virginia for purposes of transferring title are both attested wills and holographic wills. Attested wills require the signature of the testator to be witnessed by at least two witnesses and then validly probated.

Holographic wills require the handwriting of the testator to be verified prior to probate by two witnesses. In either instance, the title examiner must determine that the will as probated is a valid will.

76. Id. § 43-17 (limitation on suit to enforce lien).
77. Id.
78. Id. § 17-79(7) (Repl. Vol. 1975) (indexing of will books). Recorded in will books are attested wills, holographic wills, lists of heirs, appointment of administrators and executors, qualification of administrators and executors, devises and testamentary trusts.
80. Id.
81. Id.
82. Id.
83. See also id. § 64.1-87.1 (self-proving wills).
He cannot rely upon the clerk's probate of the will for its validity since the will itself may not be valid. In abstracting a will involving real estate, the title examiner should note the date of the will, the name of the testator, and the proper execution of the formalities necessary to validate the will and to probate the same. The title examiner should further abstract the date of death of the testator and that portion of the will dealing with the transfer of the property. The transfer of the real property may be by a specific devise or it may be in a residuary devise. In either instance, notes should be made of the method of transferring title to the property. The will must be read in its entirety for property may be specifically devised in one paragraph and subsequently there may be a qualifying clause limiting the devise to a life estate rather than a fee simple estate.

XIX. LIST OF HEIRS

When a will is probated or when an administrator is qualified in the event of intestacy, the executor or the party offering the will for probate files with the clerk a list of heirs of the decedent. The examiner should verify that the list of heirs was sworn to after the death of the decedent, that it is complete and that there are no pretermitted heirs. In abstracting a list of heirs, note the names of the heirs, their ages and their relationship to the decedent. Determination should be made of the relationship of the heirs when they are neither parents, children nor spouse of the decedent. If an heir is a niece, determine the relationship of the heir's parent to the decedent. If necessary, draw a small family tree to clarify the heir's relationship to the decedent. For instance, where the closest heirs...
are cousins, a decedent has both maternal and paternal cousins. It is essential to eliminate any surviving relative in a closer class to the decedent. If a list of heirs cannot be found in the will book, one may locate a list of heirs in the deed books by searching the deceased grantor's name in the grantor index.  

XX. JUDGMENT DOCKET INDEX

While a lis pendens notes those actions pending against property, the judgment docket index contains a listing of all the judgments obtained against defendants in the jurisdiction of the real property. There is a plaintiff judgment docket index showing the names of the plaintiffs obtaining judgment, and there is a defendant judgment docket index. It is not usually necessary to examine the plaintiff index, but it is necessary to examine the judgment docket index for defendants. In Virginia, a judgment docketed (including indexing) in the courthouse of the jurisdiction wherein the land lies is a lien on the property for twenty years from the date of docketing and may be renewed for an additional period of twenty years. The lien expires after the twenty-year period unless it is renewed. The lien also expires ten years after the property has been conveyed to a bona fide purchaser for value without notice. The judgment docket index should be reviewed for the previous twenty years for anyone having title to the property within the last ten years. As to anyone who had conveyed title more than ten years previously, the judgment docket index need not be examined as the statute will act as a statute of limitations. Once a judgment is shown in a judgment docket index, the judgment docket books must be reviewed to obtain the name of the plaintiff, the name of the defendant, the address of the defendant, the court rendering judgment, the date of recordation of the judgment, the amount of the judgment and whether or not the

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90. See note 86 supra. See also section 64.1-183, which establishes a one-year statute of limitations for purchasers from the heirs or devisees.
92. Id. §§ 8-393, -396. But cf. id. § 8-397 (situations in which the statute of limitations could be tolled).
93. Id. § 8-393.
94. Id. §§ 8-393, -396.
95. When searching the judgment docket index, corporate names should be searched in their complete name and individual names as spelled and as phonetically spelled. Reference may also be made to the partnership and fictitious name books. See page 495 infra.
judgment has been paid or partial payments made. A review of the judgment docket index may also show tax liens filed by the Internal Revenue Commissioner, or it may show city or county assessment liens on the property such as for sidewalks, sewer or nuisance abatement. A nuisance abatement lien, which can be located in the city clerk's office, will indicate the amount of the abatement and whether or not it has been released. A lien shown on the property in any fashion should be reviewed to determine whether or not it is still applicable to the particular property in question and to the particular parties. When in doubt, the lien should be shown as an exception to title. In reviewing judgments, care should be taken because a judgment may be released as to a specific piece of property but retained on other property.

Where there is a lien on property of a person having a similar name to that of the owner of the property, frequently an affidavit is executed by the owner, who verifies under oath that he is not the party against whom judgment was obtained and docketed. This affidavit should contain sufficient identifying data to show that the party conveying title and the party against whom a judgment has been obtained are not one and the same. This can be done by showing the spouse of the party, the addresses of the parties, the court where the judgment was obtained and such other information as will lead a reasonable person to believe that the parties are not one and the same.

XXI. Uniform Commercial Code Index Book

Under the Uniform Commercial Code, fixtures that become part of the real estate may be subject to a lien although not shown in the general index of grantors. Under these provisions, the lien was

96. VA. CODE ANN. § 8-375 (Repl. Vol. 1957). This section permits judgments and decrees of federal courts within Virginia to be docketed and indexed in the clerk's office.
99. Sidewalk, sewer, nuisance abatement and water assessment liens expire twenty years after docketing and ten years after conveyance to a bona fide purchaser. Id. §§ 8-10.1, -10.2 (Cum. Supp. 1976).
100. Id. § 8.9-313 (fixture filing is the filing of financing statements in the office where a mortgage on real estate would be recorded). See also id. §§ 8.9-402, -403 for the requisites of filing a financing statement.
found through a search of the Uniform Commercial Code Index to financing statements in the name of the debtor. The 1976 Session of the General Assembly has, however, amended sections 8.9-402 and 8.9-403 of the Virginia Code to require filing of financial statements for fixtures, crops, etc., in the real estate records. These recent amendments provide:

[If a financing statement covers collateral which is crops or goods which are or are to become fixtures . . . and the party desires the same to be recorded against the record owner of the real estate and so indicates on the financing statement, the filing officer shall also index the statement according to the name of the record owner of the real estate together with a notation on the index that clearly indicates that the same affects real estate.]

This amendment is significant since it provides that “[n]o financing statement shall affect real estate unless so indexed.” Thus, beginning with the effective date of this legislation, the title examiner will be able to discover any such liens on real estate based on his search of the real estate indices. However, any liens recorded prior to this time will still be indexed in the Commercial Code Index, which must then be searched as well.

Where a deed of trust is given on property and it includes fixtures, the deed of trust may constitute the financing statement and security agreement; its recordation is sufficient recordation in accordance with the Uniform Commercial Code. The lien is good for a

101. From the Commercial Code Index Book, reference is made to the filing of the financing statement which is indexed numerically by year in the clerk’s office. The Commercial Code Index Book also contains a statement of the termination of the notice or a continuance statement beyond the five-year period.


103. Id. J. EDMONDS, REPORT ON LEGISLATION AFFECTING BANKING ENACTED BY THE 1976 SESSION OF THE VIRGINIA GENERAL ASSEMBLY 9 (1976), notes severe consequences of failure to file:

Failure to indicate that the secured party desires the statement to be recorded against the real estate does not render the financing statement defective as to lien creditors, but the security interest in such a case would be invalid as to subsequent purchasers and mortgagees of real estate who became such without knowledge of the security interest in such [fixtures, crops, etc.] . . . .

Id.

period of five years and renewable for additional periods by filing renewal statements. Once the indices reveal a possible lien, the original financing statement must be reviewed and a determination made if the property in question is involved.

XXII. Land Books

The land books contain the record of tax assessments on the property. The clerk's office contains copies of all previous land books, and the city hall will have both previous and current land books. The current land book should be reviewed to determine if the real estate taxes have been paid, and each land book prior thereto must also be examined for the previous three years. After three years, the clerk's office or the delinquent tax collector, depending on the political subdivision, will contain a master index file of delinquent taxes. These delinquent tax files should be examined in the name of all persons owning property during the previous twenty years. After twenty years, the tax lien is no longer enforceable by the city or county. In examining the land books, be certain that the tax as shown in the land book is on the subject property. In many instances the description is so vague in a land book that you cannot determine that the property in question has actually been assessed for taxes. If this is the case, it is important to review with the commissioner of the revenue exactly what property is being assessed. The land books will also indicate partial assessments. Where you have newly constructed property, frequently the commissioner of the revenue will impose a partial assessment on the property. This will not be readily available from the current land book but should be determined by an examination of the commissioner of the revenue's records specifically.

Land books may also be used as a guide for locating title to property. If the examiner has no information as to the deed book and page number on a parcel of property, but knows that it was obtained between 1935 and 1945, he can examine the land books. By leapfrogging through the land books, he can pinpoint the year in which

105. Id. § 8.9-403(2) (upon lapse of the five-year period, the security interest becomes unperfected, unless it is perfected without filing).
106. Id. § 8.9-403(3).
the taxes were changed from one owner to the new owner. One can then examine the indices for the particular year or two in question and locate the transfer of title. This method will also be useful in determining when title was transferred by will.

Land books are indexed alphabetically by year. Where there is co-ownership, usually the land book is indexed only in the first grantee’s name. Land books are printed once a year at the beginning of the fiscal year. Transfers of ownership are not shown on the land books until the following fiscal year.

XXIII. COMMISSIONER OF THE REVENUE RECORDS/TAX ASSESSOR’S OFFICE

In some instances, where the source of title cannot be located in the clerk’s office, help can be found in the commissioner of the revenue’s office. His records contain a list of all record owners. These records may also contain the deed book and page number or the will book and page number by which title was acquired. In addition, the city assessor’s office contains plats, records of street closings, repairs and construction. A check of his records will show when a house was constructed, a street was closed or title was transferred.

XXIV. INHERITANCE TAXES

Property acquired and conveyed by devisees, surviving co-tenants, heirs or an executor is subject to Virginia inheritance taxes. These taxes are a lien on the property for a period of twenty years or for a period of ten years from the time of conveyance to a bona fide purchaser for value when there has been no assessment.

The “Record of Fiduciary Accounts” must be examined to determine that inheritance taxes have been paid or that no taxes are assessable. A certificate to this effect is recorded in the account records. Reference to this certificate of inheritance taxes being paid or not assessable may be found by examining the index to the will book in the name of the decedent.

108. Id. § 58-152 et seq.
109. Id. § 58-180.
110. Id.
111. Id. § 58-179.
XXV. Federal Estate Taxes

Federal estate taxes are a hidden lien and are not shown as separate liens in the clerk's office wherein the property is located. They are shown in the judgment docket books as any other judgment once they have been assessed.\(^{112}\)

XXVI. Charter Books

Each clerk's office contains a series of charter books showing the articles of incorporation for each corporation incorporated with its principal office in that locality.\(^{113}\) In addition, changes in registered agents are also shown in the charter book.\(^{114}\) In the event a question arises as to the existence of a corporation whose principal office is located wherein the land lies, examination of the index to charter books will enable the examiner to find the charter of the corporation. Unfortunately, the index to charter books is in alphabetical order by year. One must search through the index for each year under the particular letter of the alphabet to locate the date when the charter was issued and in what charter book it appears. For instance, if you desire to know when XYZ Corporation was incorporated and whether or not it had authority to convey real estate, you would have to go through the corporate name each year until you come to the year of incorporation at which time you will find a reference to the charter book and page number. Charter books are not used extensively today but are important to determine the validity of a corporation to transact business. In the event a corporation does not exist or has no authority to transact business in Virginia, then its deed may be a nullity. The State Corporation Commission can answer any question regarding the validity of a corporation.

\(^{112}\) Uniform Federal Tax Lien Registration Act, Va. Code Ann. §§ 55-142.1 to -142.9 (Repl. Vol. 1974). The federal estate tax remains a lien on the real estate for a ten-year period from the time of the decedent's death. Int. Rev. Code of 1954, § 6324. In order for a federal tax lien to have priority over other interests in the property, however, it must be recorded on a public index at the Internal Revenue Service District Office for the district in which the property subject to the lien is situated.

\(^{113}\) Va. Code Ann. §§ 13.1-51, -232 (Repl. Vol. 1973) provide that certificates of incorporation shall be recorded in the State Corporation Commission's Office and the local clerk's office except that recordation in the local clerk's office is not required in the City of Richmond or Henrico County.

XXVII. Partnerships and Fictitious Names

The clerk's office contains a list of books frequently called the "partnership," "assumed name book," or the "fictitious name book." These books are indexed alphabetically by year in the names of all partnerships, corporations or any entity carrying on business other than in its own name. By reviewing these books, one can locate the correct names and addresses of partners composing a partnership. Where property is conveyed in the partnership name, verify that the parties are in fact partners. To eliminate this requirement, title attorneys frequently require the partners to convey not only in the partnership name but in their own name with their spouses joining in, thus eliminating the possible contingent right of dower or curtesy.

XXVIII. Map Books

Each clerk's office contains a set of map books wherein are recorded maps and plats of property. If a plat is small enough, it will be photocopied and recorded with the deed in the deed book. When reviewing a plat in a map book, the following information should be extracted: title of the plat; authorization for recordation of the plat or for a subdivision; dedication of streets, utilities and other easements; source of title; restrictions, reservations, easements, setback lines and other restraints on use of the property; notations indicating vacation of portions of the plat; and resubdivision of lots from one plat into another plat. Prepare a sketch of the real property which is the subject matter of the title examination and compare the sketch of the real property as shown on the recorded plat with any physical survey made of the property.

XXIX. Zoning and Certificates of Occupancy

To determine the zoning of property, contact the zoning officer in the building inspector's office for the map showing the zoning of local property. A certificate of occupancy of property, when required

116. A partner, in accordance with section 50-10, may convey title to real property in the partnership name. If so, verification of the partnership's existence must be recorded in the clerk's office.
117. See generally id. § 50-9.
by the local governmental body, is issued by the building inspector. In rehabilitation areas, this certificate of occupancy may be issued by the health department through the building inspector’s office. To determine whether or not a piece of property has access to water, sewers and other site improvements, the information is available in the building inspector’s office through a review of maps and plats of the area.

XXX. Declaration of Restrictions

When a developer develops acreage into building sites for residential homes, in lieu of setting forth restrictions in each deed conveying title to the lots, he may make a blanket declaration of restrictions. This declaration of restrictions is a statement whereby restrictions are imposed upon all lots platted and enumerated in the declaration, usually a single section of the property. The declaration of restrictions will set forth restrictions on the use and enjoyment of the property and methods of enforcement of these restrictions, either at law or in equity. Careful note must be made of these restrictions to verify that the improvements and use of the property conform with the restrictions and, furthermore, that there is no reversion of title or possibility of reverter.

XXXI. Power of Attorney

In many instances, real estate is conveyed through the use of a power of attorney. A power of attorney is customarily recorded prior to the recordation of the deed conveying title to the property or simultaneously therewith. The attorney should review the power of attorney and verify that it is still valid, that it in fact grants the attorney-in-fact the right to convey the real estate in question, and that the power may be exercised even though the principal becomes

118. Such restrictions may be recorded in each individual deed, recorded with the plat, or both.

119. The title examiner must satisfy himself that the restrictions have not been violated and that a future violation will not cause a forfeiture of title. Racial restrictions are unconstitutional and may not be enforced.

A ten-year statute of limitations is provided for breach of a condition subsequent and for the right of re-entry for condition broken. Id. § 8-5.1 (Cum. Supp. 1976).

incompetent. If the power of attorney does not authorize the conveyance of the real estate in question, then any act by the attorney-in-fact will be a nullity unless subsequently ratified by the principal. Unfortunately, this ratification never appears on the records; thus, the record title is defective.

XXXII. Adverse Possession

Since the examiner verifies record fee simple title to the property, he usually has no knowledge of any adverse possession of the real estate. It is important for the purchaser of real estate to view the premises to satisfy himself that the property is not being occupied adversely. Title to property can be acquired through fifteen years of adverse possession.\(^\text{121}\) After such time, the possessor may bring suit in a court of record to acquire record title to the property. In this fashion, he will be able to obtain a decree affirming title to the property in him, and this decree may be filed of record as deeds are recorded. The decree will then constitute a link in the chain of title.

XXXIII. Escheat

When a person dies without heirs and intestate, his property escheats to the Commonwealth.\(^\text{122}\) By statute, in order for the property to escheat to the Commonwealth, a specific legal procedure must be instituted by the state escheator for a jury to determine and for proof to be exhibited to the jury that the decedent died without heirs.\(^\text{123}\) For title to be transferred to the Commonwealth in this fashion, it is essential that all necessary elements of due process be complied with. Where title has in its source a deed of escheat, the title examiner should carefully review state statutes governing escheat and verify from the court procedure that all necessary requirements of due process have been obeyed.

XXXIV. Annexation

In Virginia, cities are not located in counties. Consequently, when a city annexes land from a county, the land becomes part of the city, but the "old deeds" and the chain of title to the property remain in

\(^{121}\) Id. § 8-5 (Repl. Vol. 1957).
\(^{122}\) Id. § 55-168 et seq. (Repl. Vol. 1974).
\(^{123}\) Id. § 55-173.
the county.\textsuperscript{124} Care should be taken that the date of annexation is known for the particular property involved and that the complete title examination is made not only in the city wherein the property now lies but in the county where the property previously was located. Time has a tendency to cure problems of annexation particularly in regard to past-due taxes.\textsuperscript{125}

XXXV. Divorce

Where a husband and wife own property together and subsequently obtain a divorce, the parties become tenants in common.\textsuperscript{126} A conveyance by divorced parties should be handled as if each were unmarried, with the appropriate reference being made to their marital status. In examining title to property conveyed by a divorced person, the examiner should determine whether the divorce is \textit{a vinculo matrimoni} or \textit{a mensa et thoro}. If a divorce \textit{a mensa et thoro} is granted, no property rights are terminated between the parties. Consequently, the spouse may have a contingent right of dower or curtesy in the property. Reference should be made to the divorce by referral to the court and the date of the divorce decree.

XXXVI. Physical Surveys

The title examiner cannot detect, nor is he liable for, any defect in record title which may be revealed by an accurate physical survey of the property even though such a survey may reveal unrecorded easements, encroachments, zoning and set-back line violations, insufficient acreage, riparian rights, errors in descriptions and profits in gross. However, most lending institutions will require this survey for the loan approval. Currently, loans which are regulated or insured by the federal government require a flood insurance policy. To obtain a favorable premium rate, a physical survey will be required to show the elevations of the land above sea level.

\textsuperscript{124} For general laws on annexation see \textit{id.} § 25.1-1032 \textit{et seq.} (Repl. Vol. 1973).

\textsuperscript{125} \textit{id.} § 58-767 (Repl. Vol. 1974) (liens on property for taxes delinquent twenty years or more are released).

\textsuperscript{126} \textit{id.} § 20-111 (Repl. Vol. 1975).
XXXVII. Condominiums

Many states have passed "horizontal property" laws to enable the benefits of apartment and single-family residential living to be combined. These statutes pose difficult problems for the title examiner for several reasons. First, there are few, if any, cases interpreting the statutes and the rights of the parties. Second, numerous instruments must be examined in relationship to the statutes to verify marketable title. Third, the concept to most title examiners is so new that few, if any, have bothered to study the act. Before embarking upon the examination of a condominium, the examiner would be well advised to study the statutes first.

XXXVIII. Title Insurance

A title examiner can only verify record fee simple title. The title examiner cannot verify defects in title which do not appear in the court records or in the tax records. In addition, title examiners make mistakes. These mistakes may be due to negligence in failing to find an adverse conveyance or an encroachment or a docketed judgment, or they may be errors in judgment. Frequently, the title examiner will conclude as a matter of law that a title is good when subsequent developments, such as the action of a court, determine that a defect makes the title unmarketable. To provide additional protection to the grantee of property, title insurance may be utilized. Title insurance will cover errors that the title examiner makes, errors that do not appear in records, and in some instances, willful neglect and loss due to the attorney's failure to exercise proper diligence. Title insurance is generally issued in two forms. First, mortgagee insurance protects the lender but offers no protection whatsoever to the purchaser of property, and secondly, owner's insurance provides protection for the purchaser of property.

XXXIX. Conclusion

Once the title examiner becomes familiar with the various books

and the method of examining title, titles can be examined expeditiously. This writer would recommend that after completing a title, index cards should be maintained on each title, both in the owner's name and in the description of the property. Where there are numerous adverse conveyances, indexing these adverse conveyances may be helpful in the years to come.