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CLOSING THE CLOSING GAP

James G. Cosby*

Call for Reform

It has been twenty-six years since Professor (now Dean) Emerson G. Spies of the University of Virginia School of Law first called for much-needed basic reform in the conveyancing of real property. Professor Spies' suggestions centered around the need for a Marketable Title Act, tract indexes, and the development and use of standards for title examination.¹

Professor Spies was not the first in Virginia to promote reform in this area of real estate law. The Torrens System of land registration² has been statutorily approved in Virginia since 1916.³ However, since the Torrens System has not been implemented in any locality

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1. Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245 (1952) [hereinafter cited as Spies].

2. A concise history and description of the Torrens System of title registration is given in the HUD Report, *infra* note 5, at pages 44-48.

3. § 55-112. *Continuing in force acts establishing Torrens system.*—The act entitled "An act to provide for the settlement, registration, transfer, and assurance of titles to land, and to establish courts of land registration, with jurisdiction for said purposes, and to make uniform the laws of the State enacting the same," approved February 24, 1916, as amended by an act approved March 20, 1916, and last amended by chapter 227 of the Acts of 1948, approved March 13, 1948, is continued in force. (Code 1919, § 5225). VA. CODE, ANN. § 55-112 (Repl. Vol. 1974); 1916 Va. Acts, Ch. 62, at 70.

If a person wanted to register title to a parcel of land in Virginia, he probably would have great difficulty since there are no provisions in the Code which set forth *how* to register title. The above section is the only section of the Code known to the author to address the Torrens system. It is indexed under REAL PROPERTY: Registration and REAL PROPERTY: Torrens system, and no other sections of the Code are so indexed. The procedure is described in

in Virginia⁴ in the sixty-two years since its authorization, most observers including Dean Spies express doubts of its widespread use⁵ although one can still see or hear an occasional call to Sir Robert Torrens' system from time to time.⁶

So much national concern about the high cost of real estate closing has been generated that the Secretary of the U. S. Department of Housing and Urban Development was required by the Real Estate Settlement Procedures Act of 1974 to investigate means for improving land recording systems to reduce settlement costs.⁷ The District of Columbia Bar Association has under consideration a plan to implement a Torrens-like system,⁸ and committees of the Virginia State Bar and the Virginia Bar Association have been considering conveyancing reform for years,⁹ though without any real progress in the major areas such as a Marketable Title Act.

Scope of the Problem: Cost to Home Purchasers

That the cost of real estate settlement is too high in some areas seems beyond dispute; at least so have concluded *The Washington*

1916 Va. Acts, ch. 62, at 70, and more recently in Comment, *Yes Virginia—There is a Torrens Act*, 9 U. RICH. L. REV. 301 (1975).

4. From author's first hand knowledge of a dozen or more Virginia jurisdictions, and conversations with many lawyers across the Commonwealth. If any Virginia community has a well-implemented Torrens System, the author would appreciate being so advised.

5. Spies, *supra* note 1, at 252, 262. See also: U. S. Dept. of H.U.D. and the VA., *Report on Mortgage Settlement Costs*, 48 (Jan. 1972) (HUD-F-5) [hereinafter HUD Report]; Special committee on Residential Real Estate Transactions, *The Proper Role of the Lawyer in Residential Real Estate Transactions*, ABA DRAFT 23 (1974) [hereinafter cited as ABA, *The Proper Role*].

6. Lobel, *A Proposal for a Title Registration System for Realty*, 11 U. RICH. L. REV. 501 (1977) [hereinafter cited as Lobel]; *Buying a House? How to Deal with Closing Costs*, 40 CONSUMER REPORTS 482, 486 (Aug. 1975) [hereinafter cited as Consumer Reports], and *Revamping Real Estate Titles*, *The Washington Post*, May 26, 1976, p. A-18 (editorial), Col. 1 [hereinafter cited as *Revamping Real Estate Titles*], are but two of many such articles.

7. Real Estate Settlement Procedures Act [hereinafter RESPA], 12 U.S.C. §§ 2611 *et seq.* (1976).

8. *Property Record Plan to End D.C. Title Searches Drafted*, *The Washington Post*, May 10, 1976, p. 1 Col. 3. See also Lobel, *supra* note 6, at 517-28.

9. "The Committee has also begun a study of ways and means to improve the efficiency of title examination proceedings thereby reducing the cost to the public for such services. Work on this will be continued." [Annual] *Report of Committee on Real Estate Law*, VA. BAR ASSOC. ANNUAL REPORTS 258 (1971) [hereinafter cited as *Assoc. Annual Reports*]. See also *Id.*, (1972), at 258-259; *id.*, (1973), at 263; for Va. State Bar activities, see the Annual Reports of the VSB Committee on Real Estate Law [now Estates & Property Section] reported for 1972 in the *Report of Estates & Property Section*, 35th ANNUAL REPORT OF THE VA. STATE BAR, at 58-59 [hereinafter cited as *Report of Estates and Property Section*].

Post,¹⁰ Chief Justice Burger,¹¹ a special committee of the American Bar Association,¹² the Real Estate Committees of the Virginia Bar Association¹³ and the Virginia State Bar,¹⁴ and the Department of Housing and Urban Development.¹⁵ The total national cost of providing title *assurance* (being either a title opinion or title insurance or both) is unknown but seems to be on the order of \$1.0 to \$2.0 billion.¹⁶

10. *Revamping Real Estate Titles*, *supra* note 6. See also *Real Estate Settlement Costs*, The Washington Post, June 4, 1975, p. A-18 (editorial), which is but one of many *Post* articles and editorials criticizing settlement practices and costs over the last four years.

11. *Burger Wants Review of Home-Buying Costs*, The Washington Post, May 22, 1974, p. A-2, Col. 3.

Chief Justice Burger repeated this theme in his address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice on April 7, 1976, when he said:

Ways must be found to simplify and reduce the cost of land title searches and related expenses of home purchasing and financing in order to help offset the great rise in land and construction costs that have created barriers to home ownership. With the developments in recent years, I can think of few things that are more likely "candidates" for use of modern computer technology than maintenance of land records and the process of examining land titles. Having spent some time in my early years of law practice in the musty but cool vaults of courthouses, manually and painstakingly charting out multiple transactions in a chain of title, and having now seen something of what a computer can do, I am persuaded that this is one area in which the legal profession should take the lead for a change that will reduce the cost of examining titles to a fraction of the present figures and release lawyers for other useful tasks.

62 ABA JOURNAL 727, at 728 (June 1976).

12. ABA, *The Proper Role*, *supra* note 5, at 12-18, 24.

13. See *Assoc. Annual Reports*, *supra* note 9.

14. See *Report of Estates & Property Section*, *supra* note 9.

15. *Supra*, note 5, at page 4.

16. See *Why Does it Cost So Much to Sell a House?*, FORBES, Oct. 15, 1972, at 35.

The National Association of Realtors' estimate of sales of Existing and New Single-family homes in recent years has been:

<u>Year</u>	<u>Existing</u>	<u>New Homes</u>	<u>Total</u>
1976	3,002,000	635,000	3,637,000
1975	2,452,000	544,000	2,996,000
1974	2,272,000	501,000	2,773,000
1973	2,334,000	620,000	2,954,000

The 1976 figures are preliminary estimates. Source: National Association of Realtors, Department of Economics & Research, *Monthly Report: Existing Home Sales* (Jan. 1977). The figures for New Homes were also provided by the National Association of Realtors, with their source being the Bureau of the Census. See Bureau Census, *Construction Reports: New & One Family Houses Sold & For Sale*, (C25-76, 12/76). This information was provided, and permission for its use given, by courtesy of Mr. Frank J. Katusak, Assistant Director for Economics and Research of the Association on February 23, 1977.

As will be developed later in this paper,¹⁷ the potential cost savings to the consuming public appears to be on the order of at least \$135 per average real estate closing, or about \$540 million in a typical housing year of 4 million sales.¹⁸

In a typical year in Virginia there are about 140,000 sales or refinancings of new and existing homes.¹⁹ Assuming the same potential savings of \$135 per transaction, the total potential savings in Virginia seem to be on the order of \$19 million.

These savings can be developed by eliminating or reducing the wasteful makework of repetitious examination of the same title, and

Another authoritative economist estimates 7.6 million transfers of real estate based on 1971 data. Wunderlich, *Public Costs of Land Records*, 22 AM. U. L. REV. 333, at 362 (1973) [hereinafter cited as Wunderlich]. The American Bar Foundation has estimated national closing costs including broker fees as follows:

Evidence cited by Payne indicates that in the early 1960s closing costs alone were about \$2.0 billion annually. In 1970 broker fees, lawyer fees, and title insurance costs for single-family dwellings were conservatively estimated at \$3.5 to \$4.0 billion. In 1972 a more liberal estimate put the total annual cost of transferring single-family dwellings at between \$7 and \$7.5 billion.

Moyer and Fisher, *Land Parcel Identifiers for Information Systems* (1973) at 12-13 (citations omitted) [hereinafter ABF-CLIPPS]. Assuming that the cost to establish title is \$213 to \$264 per transaction as reported by U. S. Dept. HUD, *supra*, note 5 at page 81, and approximately 4.2 million transfers of single-family homes nationally per year, the total national cost of title evidence would be approximately \$1.0 billion.

Professor Burke has reported, "Closing and settlement work grosses 1½ to 2 billion dollars a year." Burke, *Conveyancing in the National Capital Region: Local Reform With National Implications*, 22 AM. U. L. REV. 527, at 528 (1973) (citation omitted).

17. See p. 617 *infra*.

18. See note 16 *supra*.

19. Statistics on the number of sales of new and existing homes in the State of Virginia appear not to be readily available. The author has checked with the Tayloe-Murphy Institute at the University of Virginia and with the Virginia Department of Taxation, and both report that the number of sales of existing homes in Virginia is not available through their respective departments. However, the author has personally conducted a survey of instruments recorded in the City of Charlottesville and the Counties of Albemarle and Loudoun over a twenty-year period of time and determined that, with only slight deviation, approximately 33% of instruments recorded were Deeds of Trust.

In 1974 there were approximately 350,000 land instruments recorded in Virginia as extrapolated from a 95% sample [by population] which included actual counts of the instruments. Assuming 33% of these represented conveyances or re-financing of property, and further assuming a 20% increase of housing activity over the recession (housing depression) year of 1974, the number of sales and re-financings can be expected to be about 140,000 per year. Data from Clerks of Court and Titlesearch, Inc.

In 1972 Dr. Wunderlich estimated 136,000 taxable transfers of real property in Virginia. Wunderlich, *Title Examination in Virginia*, VPI AND SU AGRICULTURAL ECONOMICS RESEARCH REPORT A.E. 10, 3 and n.8 (July 1972).

re-insuring of the same property without providing a "re-issue credit." This unnecessary repetition has been soundly criticized by responsible spokesmen for both the legal profession²⁰ and the title industry.²¹

Governmental Computerization of Land Records

A number of city and county governmental entities have begun computerization of land records. Two of the more noteworthy are Forsyth County, North Carolina and Fairfax County, Virginia. In both cases the primary effort has been in identification and description of individual land parcels and inputting to the computer the parcel identifier together with other relevant and useful information such as Current Owner, his Grantor, deed book reference, tax map reference, zoning, consideration, assessment, etc.²²

These are modern sophisticated systems, and some will even produce a chain of title to a specified parcel in a matter of seconds. They are limited, however, in that they generally contain only the more recent years in the computer database, and the computer records are short, synoptic abstracts and do not contain the full text of the instruments evidencing title.²³

Thus, while the computer can lead the examining attorney to the right chain documents and the possible adverse or out-conveyance documents, to do his job properly the examiner must still read the full-text deed or a photocopy or microprint copy of it to determine the quality of title in the context of his client's needs and expectations.

20. ABA, *The Proper Role*, *supra* note 5, at 20.

21. *ALTA Presents Testimony at Senate Hearings*, 52 *ALTA TITLE NEWS* (No. 9) 4, at 19-20 (Nov. 1973).

22. Watlington and McMahan, *Forsyth County Land Records Information System* (Feb. 1974) (available from 206 Government Center, Winston-Salem, NC); Hysom, Rucker, Ahuja, & Ahner, *A Handbook for Creating an Urban Development Information System* (available from County of Fairfax, VA 22030).

23. For discussions on computerization of land records, see generally Hadfield, *Computerization of Land Title Records*, 43 *U. CIN. L. REV.* 513 (1974); Jensen, *Computerization of Land Records by the Title Industry*, 22 *AM. U. L. REV.* 393 (1973); 10 *ABA REAL PROPERTY, PROBATE AND TRUST JOURNAL* 593 (1975).

Impediments to Reform

Conveyancing reform has been impeded by legal and practical obstacles. The Torrens System has failed to gain acceptance for 60 years, in part, probably, because it requires a judicial or quasi-judicial proceeding²⁴ which is cumbersome and expensive.

Implementation of the Marketable Title Act has failed for twenty-five years in Virginia, which at least illustrates the difficulty of enacting settlement reform legislation in Virginia.²⁵

Computerization of existing land records is a monumental and expensive task which may not be cost-effective and which, in any event, will be difficult to fund at federal, state, or local level.²⁶

Even if funds were reasonably available, there is not general agreement among technological and land records experts as to the best techniques to be used. A serious debate continues over the questions whether or not every land parcel should have a unique identifier such as a person's social security number, and if so, how should that identifier be constructed.²⁷

Using as an example a subdivision case familiar to most Virginia lawyers, if the present acceptable legal description of a lot is "Lot 10 Block B, Blackacre Hills," should the computer-compatible identifier be a ten or fifteen digit number such as [51-540] 50127-53048 (the CLIPPS identifier for a hypothetical property in Charlottesville, Virginia),²⁸ or a simpler version such as "10-BLACKACRE HL"?

Many observers, including this one, believe that this debate is apt to continue for sometime, and that in the meantime substitute parcel identifiers familiar to real estate practitioners such as tax map or subdivision codes can and ought to be used.

24. Spies, *supra* note 1, at 251.

25. *Id.* at 259-63.

26. "One section of [RESPA] authorized HUD to test methods of modernizing title records. Many experts consider this one of the most important sections of the bill. But HUD hasn't requested any funds for testing, and Congress hasn't appropriated any." Consumer Reports, *supra* note 6, at 486. See also *HUD Ignored Laws, Nader Group Says*, Washington Post, Jan. 8, 1977, p. D-2, Col. 3.

27. See generally ABF-CLIPPS, *supra* note 16.

28. *Id.* at 106.

Shifting The Burden of Title Assurance to the Seller

It is almost universally the case in Virginia today that the burden of title assurance, whether it be a title examination, title insurance, or both, is on the buyer, both to obtain and for which to pay.²⁹ As a result the same property title is re-examined many times, and title insurance (when required) is re-purchased many times, usually without benefit of any re-issue credit.

It is suggested that the burden of obtaining and providing title assurance in the ordinary residential real estate sale be shifted to the seller. This would provide an inducement to a purchaser (#1), when he takes title, to save his evidence of title such as title opinion, abstract and/or insurance, to be updated and offered to the next purchaser (#2) when purchaser #1 becomes the seller. Purchaser #1's attorney would at the time of his client's sale to purchaser #2 update the title to the date of the sales contract (or such other date as fixed by the parties).

A. Where Attorney Title Certificate, But not Title Insurance, is Required

Assume that a sales contract for the sale and purchase of a residence for \$50,000 requires that seller (owner #1) convey good and marketable title by general warranty deed as evidenced by the title opinion, through contract date, of a licensed attorney experienced in title examination.

Owner #1 engages the services of his attorney (A) who certifies (or re-certifies) title to Owner #1 as of contract date. "A" charges a fee of \$300 (in the example) if he has not previously searched the title.

29. The Sales Contract recommended by the Va. State Bar and the Va. Bar Association provides:

At settlement, Sellers will deliver to Buyers a General Warranty deed with the usual covenants of title, said deed to be prepared at the expense of the Sellers . . . Buyers will pay for all other costs in connection with the sale of this property and agree to accept and comply with the terms of the sale as herein set forth, PROVIDED, HOWEVER, that the title to the property described above is marketable and free from all valid objections including restrictions.

Va. State Bar—Va. Bar Assoc., *The Virginia Lawyer*, 18.27.

[Nationally] [u]nder the attorney method [of title examination], the attorney hired by the buyer, makes a personal search of the public records.

ABF-CLIPPS, *supra* note 16, at 25.

Since he probably represented owner #1 when he took title, "A"'s fee may very well be less and is assumed in this example to be \$50.

Pursuant to the sales contract, owner #1 provides "A"'s title certificate to owner #2's attorney (B) prior to closing. "A" should also provide a title abstract consisting of an abstract or photocopies of all instruments mentioned in his title certificate, so that "B" can examine them for the benefit of owner #2.

Concurrently with closing, attorney "B" examines the abstract and runs down the title from the effective date of "A"'s certificate. "B" certifies title as required to owner #2 and the lender, (if any). "B" states clearly that his opinion is based in substantial part on the opinion and abstract of "A".³⁰

After owner #2 takes title, if a loss should occur as a result of attorney negligence the loss should fall upon the person making the error (and his professional liability insurer). If the error occurred during the scope of "B"'s rundown, owner #2 would have recourse against attorney "B"; if during the scope of "A"'s examination, owner #2 would have a cause of action against owner #1 on his general warranty, and owner #1 would have a cause of action against attorney "A" for negligence. Ideally, "A"'s title certificate should run in favor not only of owner #1, but of takers from owner #1 who rely upon "A"'s title opinion, so that owner #2 can proceed directly against "A".³¹

From this point on, any time an owner gives a deed, by general or special warranty, he also provides the abstract and title certificate of his attorney through the date of the sales contract at an estimated cost of \$50. Purchaser's attorney is required only to examine the abstract and rundown the title at closing at an estimated cost of \$50. Of course, fees would be charged for the remaining work done by the attorney.

At a future time, if title insurance is required or desired, a full premium without any re-issue credit would be required, but there would be no additional title examination costs.

For each sale after the first, the only title cost is the run-down fee

30. This would be consistent with Virginia State Bar Legal Ethics Opinion # 177 and Informal Opinion #249.

31. Recovery from "A" or "A"'s liability insurer may not be possible, however, because of lack of privity and the Statute of Limitations. See discussion p. — *infra*.

of approximately \$50 to the seller's attorney and \$50 to the buyer's attorney. Thus, re-examining the same portions of the chain of title over and over again has been eliminated, and title costs have been reduced from \$300 to \$100. Even the \$100 estimate is high, and further reductions are probably possible.

B. Where Title Insurance is Ordinarily Required

Assume that the property in the example is sold for a purchase price of \$50,000 with a \$40,000 mortgage loan to be provided by a lender who requires mortgagee title insurance.

In the usual case today the buyer's attorney would obtain a standard mortgagee title insurance policy for \$2.50 per thousand of loan principal, or \$100 in the example.³² Re-issue credits on prior mortgagee policies are usually not available to new purchasers and lenders, so the same \$100 premium will have to be paid when the property is re-sold.

If, however, both owner's and mortgagee insurance are obtained, the new purchaser ordinarily is eligible for a 40% re-issue credit thus reducing the insurance rate from \$3.50 per thousand (owner rate) to \$2.10 per thousand. An extra \$10 "simultaneous issue" charge is made by most companies.

While the marginal rate of \$115 for owner and mortgagee insurance is slightly higher than the \$100 for mortgagee insurance only, it is submitted that most purchasers and their attorneys would accept the increment because:

1. The owner receives title insurance protection of his interest in the property, as well as the protection afforded by the title examination itself, and
2. The purchaser's attorney can substantially reduce the labor of his examination of title by relying on the former owner policy and/or former title opinion for his "starter" in the examination process.

32. The rates and re-issue credits used in these examples are the so-called "national" rates which prevail in Virginia. The major companies including Lawyers Title Insurance Company, Commonwealth Land Title Insurance Company, Chicago Title Insurance Company, Jefferson-Pilot Title Insurance Company, Pioneer Nation Title Insurance Company, Southern Title Insurance Corporation, and others all have substantially the same rates. The rates are, of course, subject to change.

C. *The Free-Enterprise Torrens System*

The Free-Enterprise Torrens System is one in which the seller would provide a copy of his owner's title insurance policy backed by the attorney's title certificate and title abstract showing title in the seller as of sales contract date. The abstract would consist of photocopies of all instruments mentioned in the title certificate or policy, or abstracts of those instruments.

Buyer's attorney would examine the abstract and run the title down from the date of the sales contract, adding copies of any new, relevant instruments to the abstract. In addition, he would examine the abstract to ascertain that the title is sufficient for his client's purposes.

After closing, final title policies would be obtained, and the buyer would be advised to keep his title policy, attorney certificate, and abstract with his other valuable papers to be provided to his future purchaser.

To accomplish this, it is recommended that the standard form real estate sales contract be amended to read substantially as follows:

Fee simple title to be good and marketable and conveyance by General Warranty. Title evidence of Seller's ownership as of contract date in the form of (Owner's title insurance policy or binder) (Attorney title certificate) (Title abstract) running in favor of Buyer and his successors in title to be provided by Seller ____ days prior to closing, with the costs of such title evidence to be borne by (Seller) (Buyer) (Split).

In the ordinary cases all three indicia of title would be required although the parties could bargain for any one or two.

This simple procedure requires no change of state law. It does require acceptance by the Bar and persuasion of Realtors. However, both ought to be forthcoming. If sellers can be generally required to provide evidence of a termite-free house, why not evidence of their fee simple ownership?

In the author's opinion the cost of title insurance and certification ought to be borne by the seller, at least as far as title into the seller, but even this is not sacrosanct and can be subject to bargaining. It

is assumed that the Buyer will ultimately pay for the title assurance, either directly or as part of the purchase price. Inclusion with the purchase price will reduce "closing costs" or the "cost to get in".

The important thing is that the seller be required to provide the buyer a title abstract, certificate, and/or insurance binder to the date of the sales contract, to back up his General Warranty of title.

If this simple reform is instituted, it can and should reduce the cost of title *assurance* as follows:

Figure 1: SAVINGS POTENTIAL THROUGH SHIFTING TITLE EVIDENCE DUTY TO SELLER

[\$50,000 Residence; \$40,000 loan]

	COST BEFORE REFORM	COST AFTER REFORM	SAVING
Title Examination	\$200-\$300	\$100	\$100-\$200
Title Insurance	\$100	\$115	(15)
Total to Purchaser	\$300-\$400	\$215	\$ 85-\$185
Average Saving, per closing			\$135
Savings to Virginia consumers per year 140,000 purchases X \$135			\$18.9 million
Savings nationally, per year 4 million purchases X \$135			\$540 million

Desirability of Owner's Title Insurance

It is the author's contention that provision for a title abstract and shifting the burden of providing suitable title evidence ought to be done whether or not title insurance is to be provided as part of the transaction. It is further contended, however, that Owner's title insurance ought to be provided, together with the attorney's certificate and abstract in the typical residential conveyance.

In the example above, unless Attorney A's certification of title and the abstract are clearly stated to be for the benefit of Owner #1's grantees as well as Owner #1, there is not privity between future grantees and Attorney A, and a future grantee who suffers a title loss

because of A's negligence probably could not recover from A or his professional insurer.³³

Even if lack of privity were not a defense to A, and an obstacle to the injured grantee, if the loss were suffered more than five years after A's title certification, the Statute of Limitations, section 8.01-246(2) of the Code of Virginia, would probably bar recovery by the injured party. The general rule is that, absent fraud or concealment, the statute of limitations begins to run from the date that an attorney certifies title, not from the date that the defect in title is discovered.³⁴

Other authorities as well have suggested the advisability of Owner's title insurance. A recent publication of the Virginia State Bar and the Virginia Bar Association suggests:

Title insurance indemnifies the insured party against all loss or damages, up to the face amount of the policy, together with costs, attorney's fees and expenses, which the insured may sustain by reason of defects, liens or encumbrances affecting the title which is insured. Defects, liens and encumbrances which are specifically excepted from the policy are not covered. Note the following examples of the relationship between the title examiner and the title company:

1. The title insurance company is liable to the insured under its policy even though the examining attorney failed to exercise due care in examining the title.
2. The title insurance company is liable for existing defects which are not a matter of public record, such as forgery, an undisclosed spouse, legal incompetency of a grantor, a missing heir, and pretermitted children.
3. The coverage afforded by a title insurance policy remains in effect as long as the insured has an interest in the property, either as owner or previous owner thereof. Furthermore, the continuing financial ability of the title insurance company to satisfy claims is controlled by law requiring the establishment and maintenance of loss reserves. The statute of limitations does not

33. See generally, Comment, *Title Abstractor's Liability in Tort and Contract: A Right of Action for Injured Third Persons*, 22 AM. U. L. REV. 455 (1973).

34. Joint Comm. on C.L.E. of the Va. State Bar and the Va. Bar Assoc., *Residential Real Estate Transactions* 2-33 (1975 edition) (hereinafter cited as *Residential Real Estate Transactions*); *Annot.*, 18 A.L.R. 3d 978, 1012-14; *Oleyar v. Kerr*, 217 Va. 88, 225 S.E.2d 398 (1976); see also *Va. Military Inst. v. King*, 217 Va. 751, 232 S.E.2d 895 (1977); *McCormick v. Romans and Gunn*, 214 Va. 144, 198 S.E.2d 651 (1973).

begin to run against an insured under a title insurance policy until the insured has actually suffered a loss covered by the policy. A mortgagee title insurance policy affords coverage to subsequent holders of the note secured by a lien on the property covered by the policy.

In contrast to the foregoing, the holder of an attorney's certificate of title (a) must rely solely on the financial ability of the attorney to satisfy any claim for which he might be liable because of his failure to exercise due care in examining the title (b) has no recourse against the estate of an attorney (c) may become a victim of the statute of limitations which commences to run from the date of the certificate, and (d) in the case of a lender, the attorney's certificate to such lender is probably personal between the attorney and the lender and consequently the transferee of the note should obtain a new certificate.

4. Title insurance companies will assume liability for certain known risks under reasonably favorable circumstances. Since the attorney is not an insurer, under such circumstances he can only advise his client of the risk. For example, title insurance companies insure matters of survey while the attorney can only advise his client if a survey appears to be accurate.

While an attorney's certificate is necessary in all cases, an attorney might be prudent in suggesting to his client that his title opinion be supplemented by a title policy for the purposes of furnishing additional protection which he cannot provide and should not be expected to furnish.³⁵

The Department of Housing and Urban Development advises home buyers:

Title insurance is often required to protect the lender against loss if a flaw in title is not found by the title search made when the house is purchased. You may also get an owner's title policy to protect yourself

Bear in mind that a title insurance policy issued only to the lender does not protect you. Similarly, the policy issued to a prior owner, such as the person from whom you are buying the house, does not protect you [unless reissued in your name]. To protect yourself from loss because of a mistake made by the title searcher, or because of a

35. Residential Real Estate Transactions, *supra*, note 34, at 2-33.

legal defect of a type which does not appear on the public records, you will need an owner's policy. Such a mistake rarely occurs but, when it does, it can be financially devastating to the uninsured. If you buy an owner's policy it is usually much less expensive if purchased simultaneously with a lender's policy.³⁶

The conclusion seems inescapable that an Owner's title insurance policy, together with an attorney's certificate and abstract of title, ought to be provided in residential conveyances.

The Abstract of Title

Appendix A gives a sample of the recommended abstract to be provided by the seller to the buyer. It contains a certification page and copies of all the instruments contained in the abstract.

Ideally, the instruments should be full-text photocopies so the examining attorney can have the benefit of all of the language—in full text—before him. He need read only those instruments with which he is not already familiar, but all are contained in the abstract for the benefit of future title examiners.

In those jurisdictions where the photocopies are not readily or economically available, the abstract can be prepared using the form suggested by Mr. Parham in his *Title Examination in Virginia*,³⁷ or "Residential Real Estate Transactions".³⁸

However, photocopies are becoming much more readily available throughout the Commonwealth. Most Clerk's Offices have photocopiers and provide copies at the statutorily permitted \$1.00 per page,³⁹ and less in some jurisdictions.⁴⁰

If a title examiner needs thirty pages to prepare his abstract, the \$1.00 per page is costly, but this would be required only one time in preparing the initial abstract. Even this cost can and should come down.

36. U. S. Dept. of HUD, *Settlement Costs and You 7* (June 1976).

37. PARHAM, *TITLE EXAMINATION IN VIRGINIA* 161 (The Michie Co., 1965).

38. Residential Real Estate Transactions, *supra*, note 34, at 2-30.

39. VA. CODE ANN. § 14.1-112 (10), (Repl. Vol. 1978).

40. In Frederick Co., for example, the charge is \$0.25. Confirmed by telephone call to Clerk's Office March 1, 1977.

A \$1.00 per page fee seems reasonable, or even low, when, to obtain a photocopy, it requires a Clerk of Deputy Clerk to dismantle the deed book and copy the required pages. The solution here is to use the microfilm which is readily available to most Clerk's Offices in Virginia.

Since 1972 the Virginia State Library has been embarked upon a program to microfilm the land record books in Virginia.⁴¹ Updates of microfilm copies of current deed books are automatically available as part of the recording process.

In most jurisdictions in Virginia, when a deed is presented for recordation, it is microfilmed by the Clerk's staff. The microfilm is sent to a commercial company which prints the image on high-quality paper which is added to the current deed book. A copy of this film could be returned to the Clerk's Office at a cost of about \$9.00 per deed book.

With microfilm reader-printers available in the Clerk's Office, the user could produce the copies he needs without intruding on the time of the Clerk's staff. Such a system is available in the Office of the Clerk of the Circuit Court of the City of Richmond, Division I (and some other Clerk's Offices), and microprint copies are immediately and easily available to the user at a cost of \$.10 per page.⁴² A similar system in the U. S. Patent Office charges the user \$.15 per page.⁴³

For those jurisdictions where microfilm copies of deed books are not readily available, it is suggested that the land records could and should be microfilmed at public expense to improve the quality of services provided by the Clerk's Office, to provide security of the land records against fire or other natural disaster or civil disorder, and to provide the working copies necessary for use by the public. As a ballpark estimate, 500 deed books can be microfilmed for about \$20 per book or a total cost of \$10,000. Add about \$5,000 to \$10,000 for high-quality microfilm reader-printers and you are in business.⁴⁴

41. VA. CODE ANN. § 42.1-83 (Repl. Vol. 1976); 1972 Va. Acts, ch. 555.

42. Confirmed by telephone call of author to Clerk Edward C. Kidd, on February 4, 1977.

43. Confirmed by telephone call of author to Search Room Adviser, U. S. Patent Office, on March 1, 1977.

44. These estimates are from the author's personal experience in supervising the microfilming of over 1,500 deed books, will books, etc. Clerk Edward G. Kidd of the Circuit Court of the City of Richmond, Division I reports approximately \$50,000 as the requirement for their office including microfilm and five reader-printers. *Supra* note 42.

Further discussion of the microfilming of public land records is beyond the scope of this paper. Suffice it to say at this point that we easily have the ability to produce high-quality, full-text micro-print copies of land records for \$0.10 per page.

Conclusion

Shifting the burden (not necessarily the cost) of providing title evidence from the buyer to the seller can eliminate wasteful repetition of title examinations time after time on the same property.

It can be done by including in the sales contract language substantially as follows:

Fee simple title to be good and marketable and conveyance by General Warranty. Title evidence of Seller's ownership as of contract date in the form of (Owner's title insurance policy or binder) (Attorney title certificate) (Title abstract) running in favor of Buyer and his successors in title to be provided by Seller ____ days prior to closing with the cost of such title evidence to be borne by (Seller) (Buyer) (Split).

A title abstract ought to be delivered by seller to buyer at every sale. Preferably, this should be an abstract of full-text photocopies which can be provided for \$0.10 to \$1.00 per page depending upon the jurisdiction. The \$0.10 figure is available where modern micro-film systems are installed.

In any event, the gap between what closings actually cost and what they should cost can be reduced by about \$135 in the average residential transaction, resulting in annual savings on the order of \$19 million to Virginia consumers, and perhaps \$540 million nationally.

As a result of the simple reforms suggested in this paper, the following goals can be attained easily, quickly, and inexpensively:

- Conversion of an antiquated land records system to an easily usable one at minimal public and private expense.
- Retain the attorney in his rightful role in the residential real estate transaction—examining all of the instruments in his client's chain of title and otherwise relating to the property, in full text, to ascertain that the title to the property conveyed meets the client's expectation.

—Elimination of the frequent and justified criticism of repeated re-examination of the same property title.

—Provision of Owner's title insurance at reduced (reissue) rates to supplement the title abstract and attorney's opinion of title and provide full protection to the Owner.

SAMPLE
TITLE ABSTRACT

Effective Date: April 15, 1978 at 9:00 a.m. Case No.: B12345 The undersigned (attorney) (abstractor) (title insurance company) (certifies) (warrants) (insures) that (he) (they) (it) has received the previous Abstract to the property described in Section A below, which Abstract was certified by _____ through the date _____; that the undersigned has continued the record search through the Effective Date given above and has added to the abstract full text copies of all recorded documents in the chain of title and all abatements, easements, encumbrances, and all other recorded instruments which presently affect the property.

Based upon the certified Abstract provided to the undersigned, together with the record search of the undersigned, the documents listed and included herein are all of the documents necessary for an examination of record title back to 1/1/15. Documents marked with an asterisk are those which are currently relevant to the property.

A. Description.

All that certain lot or parcel of land situated on Robin Hood Lane in Albemarle County, Virginia, shown as Lot 5, Block 4, Sherwood Forest Subdivision, on a plat by L. John Surveyor, C.L.S., dated 4/1/57 and recorded with a deed in Deed Book 337, page 332.

B. Chain Documents.

DB	153	342	Chain Document
DB	197	214	Chain Document
DB	243	496	Chain Document
DB	311	153	Chain Document
DB	369	118	Chain Document
*DB	418	329	Last B & S

C. Other Relevant Documents.

*DB	334	114	Right-of-Way
*DB	337	332	Plat, restrictions, covenants, and easements

- *DB 355 38 Right-of-Way
- *DB 418 331 Outstanding deed of trust

D. Outstanding Judgments: None

E. UCC Financing Statements: None

F. Taxes: Real estate taxes are paid through 1977.

G. Other: None

[Photocopies of all of the above are not included in this sample but would be included in an actual case.]

Signed:

Abstractor

