Guarantees of Title

Ownership of land consists of:

1. A good written title with the right of possession.
2. Possession with the right to acquire written title as a result of a lawful, unwritten conveyance.

Because most laymen are incapable of determining when written title defects exist or when others have lawful title rights arising from possession, a need has arisen for experts willing to guarantee titles to be free of defects.

The professional surveyor certifies to land location and status of encroachments; he does not issue a policy of location guarantee, but he is liable for failure to exercise due care. Title companies, attorneys, courts, or the state (Torrens titles), depending on the jurisdiction, guarantee written title adequacy, and, sometimes on request, they will guarantee location. How titles are guaranteed and who guarantees written titles are the subjects discussed in this Handout. Such discussion cannot be complete without mention of possession guarantee, since lawful occupancy can defeat paper title.

A deed to land is never proof of ownership; it is evidence of ownership. Others may have rights against the land because of taxes, liens, mortgages, easements, judgments, bonds, improvement assessments, restrictions on zoning, and many other items. Because of the numerous hazards, new landowners demand ownership guarantee or at least a statement of ownership condition, along with a guarantee that no rights exist other than those stipulated.

Exposures to written title defects are not visible and cannot be seen; the purchaser can see exposure to possession defects. The demand for title guarantee has been greater than the demand for possession guarantee. Under American Law, ownership equals Title + possession.

Registration of Title versus Registration of Ownership

Recording of a deed in a public place is registration of evidence of land ownership. Torrens registration of land includes both registration of title and registration of ownership. When an automobile is registered, the name of the owner is registered; when an automobile is sold, the state requires that the new owner must be registered within a definite period of time. The Torrens registration system is similar; new transfers of land must be accompanied by a change in registration of ownership. The difference between the two systems is that one registers title, whereas the other registers ownership.

Aids to Title and Location Guarantee

Unwritten title rights are aids to cure location defects. The statute of limitations is of material assistance in maintaining the status quo and preventing spite litigation. These aids to cure defective titles do not include the element of financial guarantee and are not a part of this Handout.
Courts, in general, do not guarantee title; courts declare by decree what are the existing rights between litigants. Parties not involved in the action have their rights unimpaired. But in the Massachusetts Land Court the court actually guarantees ownership of both title and location; an assurance fund is set up to pay damages to those inadvertently harmed by the court's decree.

In Torrens title registration a similar situation exists, provided the registration includes both written title and location guarantee. However, in many Torrens registrations location is not a part of the registration, and location is not guaranteed.

Title and Possession Guarantees

Within the United States title guarantee, possession guarantee, and statements of title condition guarantees (abstracts) vary from state to state and can be classified here:

1. Warranty deed (Grant Deed in California).
2. Abstract of Title (guarantee of facts).
3. Abstract of Title with attorney's opinion.
4. Written title insurance.
5. Written title and possession insurance.

1. Warranty Deed

The grantor of a warranty deed personally guarantees the title to be free of defects. Such a guarantee is sufficient, provided the grantor has adequate funds to pay in the event of damages. From the grantor's viewpoint he is often unwilling to issue a warranty deed and would rather pay to have others assume the risk of guaranteeing title. Death or financial ruin of the grantor leaves the grantee without guarantee; therefore the grantee is usually willing to pay for responsible assurance of title.

2. Abstract of Title

An abstract of title is a statement of publicly recorded facts relating to the chain of title. An abstract is not a complete statement of every detail of past title transfers; it is a summary of the essential facts necessary to pass judgment on the sufficiency of written title.

An abstract is usually completed for a period of time that varies from state to state according to the accepted title standards in effect. In general abstract search is usually for a period of 40 years or to a warranty deed at 40 years or further back.

In California search usually stops at the previously issued title insurance policy.

An abstract by a reputable abstract company is a guarantee of a statement of facts, and liability is limited to the effect of omission of publicly recorded facts. Issuance of an abstract is not a guarantee that a title is free of defects; someone else passes opinions on the sufficiency of the title, a legal question. The abstract is merely a history of ownership.
The abstractor's job is to compile a complete statement of all publicly recorded matters affecting the ownership of a particular parcel of land. Who signed a conveyance will be noted, but whether the person had the authority to sign the conveyance is not always noted. If a word is misspelled in a conveyance, the misspelled word is perpetuated and usually underlined to direct attention to it.

Completion of an abstract reflects the paper history or condition of the real property. The desire of the attorney and the abstractor is to give certainty about the "health" of the written title. Changes in the description of the property through subsequent conveyances disturb these individuals. The most certain title is that property that retains today the exact same description as in the original conveyance. The surveyor, on the other hand, is interested in describing the same parcel in relation to boundaries and monuments on the ground today. Describing parcels of land relative to the boundaries and monuments on the ground and then making reference in the description to the original and subsequent source of title can overcome this discrepancy.

3. Abstract and Attorneys' Opinions

An Abstract by itself is not a guarantee of ownership; someone else assumes the responsibility of proclaiming the sufficiency of the facts stated, usually attorneys. The attorney's opinion does not include possession matters, and unless there is a survey, location is not guaranteed. The opinion of the attorney is limited to facts revealed by the abstractor through the abstract. Attorneys' opinions do not include guarantee against fraud, forgeries, or acts of omission or commission not of record. Title policies often do.

4. Title Insurance Policy

Title insurance is a written guarantee that as of a particular moment of time no title defects, other than those stated, exist. The limit of financial liability is stated on the face of the policy and may be increased or decreased in proportion to the fee paid. Unless otherwise stated, a policy is limited to title facts of record, not matters of location or unrecorded documents.

Policies show the amount of the policy, the person or persons whose title is guaranteed, the estate (fee simple, life estate, lease, etc.) being guaranteed, and the description of the real estate covered by the policy.

Title companies are in the risk business; for a fee they will assume a financial responsibility. If a person examines any title close enough, he can almost always find something that will present an uncertainty. In the matter of obtaining Torrens titles through court quiet-title actions, it may take months or even years to clear a small defect that may never materialize. Title companies generally do not delay title transfers because of remote defects; they can and do take calculated risks. For speed and quick service the title companies are far superior; for this reason more and more people are relying on them for title matters. Most lending agencies insist on title insurance.

Matters that title policies ordinarily insure against are taxes, bonds, assessments, trust deeds, mortgages, easements (sewer, water, gas, electricity, oil lines, drainage, etc.), liens, insanity, minor children's rights, forgery, false impersonations, wives with community rights, irregularity of
conveyance form, omissions, heirs, leases, attachments, judgments, restrictions, reservations, reversal of court decision, senior rights, errors in public records, errors in transcribing and interpreting the public records, attack on the title, and many other items.

Title policies do not insure against everything. No guarantee is made against bankruptcy power, eminent domain, future police power or law, ordinance or regulation limiting the use of property such as zoning ordinances, building ordinances, or other regulations. Defects arising from a person's own violation (fraud or things known by the person to whom the guarantee is issued), matters not of record, such as a mechanic's lien not recorded, possession, and survey are excluded.

Owners' policies are based on the record, and no attempt is made to investigate matters of possession. Mortgage policies, however, are subject to claims of possession and questions of survey. Ordinarily in a mortgage policy the title company sends out an inspector to determine possession, and, if doubt exists, a survey is required.

The wording of title policies varies, depending on the title association. In general a named person, persons, and/or corporations are insured for a maximum stipulated sum of money against loss or damages sustained because of:

a. Unmarketability of the described title unless it is caused by conditions listed.
b. Title to the land being vested otherwise than as stated.
c. Any defects in title not listed (includes easements).
d. Any rights, interests, claims or facts that could be ascertained by an inspection of the land or by inquiry of the person in possession or by a correct survey.
e. Laws, government acts or regulations (zoning, restrictions, use of land, setback, occupancy, etc.).

5. Titles and Location Insurance Policy

If a competent surveyor surveys a parcel of land and encroachments are certified to, most title companies will extend the coverage to include matters of possession without extra charges. But it must be remembered that if a title company is insuring location as based on a survey, it is its prerogative to accept or reject the results of a surveyor.

Surveyors, because of professional liability, must guarantee their work to the extent required by law. Liability is not stipulated as in a title policy but is one of mistakes or omissions caused by failure to do what an ordinary skilled surveyor would do and one of subsequent reliance by the parties involved.

Many surveyors carry liability insurance to protect themselves from loss. This type of insurance is not for the benefit of the client as is a title policy; it is designed to protect the surveyor from the client.

The amount of damages that can be collected from a surveyor is in proportion to his assets and liability insurance; it is wise for those using the surveyor's services to inquire into his financial condition.
6. The Torrens Principle of Title Registration

In essence, the Torrens registration requires a quiet title action for all first registrants, requires registration of title by the state, includes guarantee of sufficiency of title by the state, has optional and sometimes mandatory requirements for location guarantee, and has mandatory requirements that all matters pertaining to the land's title be recorded on the Torrens title. Historically, a system similar to the Torrens titles was practiced as early as the thirteenth century in Bohemia. The present Torrens title registrations, developed by shipping clerk Sir Robert Torrens of Australia, was adapted from the method of titling merchant ships. The system was passed into law in 1858 and Sir Robert Torrens became the first registrar of titles. In recognition of this genius, Torrens was knighted.

This system was adopted in England, parts of Canada (British Columbia, Alberta, Saskatchewan, and parts of Ontario), in Norway, the Philippines, Sweden, Denmark, Puerto Rico, France, and many British colonies. To a limited extent it has been put into practice in the United States Twenty states have passed permissive legislation for such a land registration system:

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California repealed the act in 1958 because of its disuse. Many other states seldom use Torrens registration.

Characteristics of the Torrens System

The validity and sufficiency of written title is dependent on a continuous chain of valid transfers from the first sovereign's alienation to the present. The chain of title grows and grows with time. One primary purpose of Torrens registration is the elimination of maintaining previous transfer records (chain of title). To fulfill this objective the written title must have a new starting point, and this is done by a quiet title action and court guarantee of ownership.

Essentially, initial Torrens title registrations are quiet title actions. A responsible party is appointed to examine the sufficiency of title; and, if the title is found wanting, a quiet title suit is instigated.

Those registering titles are charged with the responsibility of protecting other valid title rights; titles are not supposed to be registered if defects exist. But in the event a title is registered and others do have a valid claim, the state is financially responsible and pays damages from an assurance fund.

The state guarantees title; this creates a new starting point for the title. If others are found who do have rights to the land, they cannot claim possession or usage; they can only claim damages from
the state. To compensate those collecting damages, an assurance or indemnity fund is provided, said fund being accumulated by a charge on each title transfer.

As soon as title sufficiency is satisfied, the land is registered in the name of owners, and a certificate of registration is issued to the owners. All new valid transfers or encumbrances on the title must be done by an entry in the register. Provision in the law is made that failure to register transfers or encumbrances operates only as between the parties of the transaction but not as against future register owners. Thus the new owner is assured that only items registered can interfere with his rights.

Since the Torrens system was first developed in Australia, it was impossible to obtain possession rights against a Torrens titleholder. Since that time the policy has eroded, and, under some circumstances, land can be obtained by occupancy.

**Advantages and Disadvantages of Torrens**

Because the title and ownership are up to date each time a new conveyance appears, searches are unnecessary after the system is in force. The identity fund, if properly set up, will cover most claims that arise from clerical errors and omissions. The protection also covers loss from fraud and wrongful possession. After initial registration, there is some saving of time and money to the parties of the conveyance, and the administration realizes some benefit in improving tax rolls.

Since the condition of the title can be determined immediately, the delay and expense of having the title abstracted are eliminated. In some cases, the registered land can be transferred without the need of a new survey, unless further subdivision is made. Forgery is quite unlikely, if not impossible, since the certificate of title must be presented before a transfer is affected.