of reviewing the sufficiency of evidence to support a conviction.[62] A person convicted on perjured evidence cannot attack the conviction by a later showing on habeas corpus that perjured testimony was admitted; he must rely on executive clemency.[63] An excessive sentence may not be attacked until the valid portion has been served, since the prisoner is not invalidly restrained until that time.[64]

Despite the rule that habeas corpus is not a means of reviewing a judgment of conviction by a court of competent jurisdiction, the Iowa court recently reversed a trial court for refusing to consider evidence that the petitioner had been denied his constitutional right to counsel and deprived of his right to appeal.[65] The court felt compelled to consider that contention on habeas corpus because of Supreme Court cases which, it said, either add deprivation of constitutional rights as a ground of habeas corpus or make denial of those rights a jurisdictional defect.[66] The court noted that the alleged irregularity had to be established by facts outside the record and that review of a transcript would not have disclosed their existence.

OTHER CONSIDERATIONS. The writ was used in early Iowa law to contest the legality of contempt commitment.[67] The split of authority as to whether this was a proper use was resolved by statutory provision for review by certiorari.[68]

An Iowa court may not free a prisoner detained under federal process.[69] The converse, however, is not true.[70] But the " . . . writ shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."[71] The petitioner must show a denial of some federal right and that he has exhausted his state remedies. The latter has presented a trap to the wary and unwary alike.[72] Venue lies in the district of confinement.[73]

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[62] Hallway v. Byers, 205 Iowa 936, 218 N.W. 905 (1928).
[63] Springstein v. Sanders, 182 Iowa 658, 164 N.W. 622 (1918); *but see* Mooney v. Holohan, 294 U.S. 103, 112 (1934).
[64] Smith v. Hollowell, 209 Iowa 781, 229 N.W. 191 (1930); Bailey v. Hollowell, 209 Iowa 729, 229 N.W. 189 (1930).
[65] Sewell v. Lainson, 57 N.W.2d 556 (Iowa 1953).
[66] *Id.* at 562. See Comment, 24 CORNELL L.Q. 270 (1939); 24 IOWA L. REV. 170 (1938).
[67] See, *e.g.*, Dudley v. McCord, 65 Iowa 671, 22 N.W. 920 (1885); State *ex rel.* Whitcomb v. Seaton, 61 Iowa 563, 16 N.W. 736 (1883).
[68] IOWA CODE § 665.11 (1950).
[69] *Ex parte* Holman, 28 Iowa 88 (1869).
[70] See Note, 61 HARV. L. REV. 657 (1948); Beverly, *Federal-State Conflicts in the Field of Habeas Corpus*, 41 CALIF. L. REV. 483 (1953).
[71] 28 U.S.C. § 2254 (Supp. 1952).
[72] Darr v. Burford, 339 U.S. 200 (1950); *but cf.* Frisbie v. Collins, 342 U.S. 519 (1952); Note, 34 MINN. L. REV. 653 (1950).
[73] *Cf.* Ahrens v. Clark, 335 U.S. 188 (1948).

The writ *coram nobis* was a common law device to procure review of a judgment of conviction by the court which entered it. Though once a part of Iowa law, the court has held it no longer available because the section authorizing its use has been omitted from the Code.[74]

SAMUEL K. MACALLISTER (June '53)

ROBERT I. LEECH (Feb. '53)

[74] Boyd v. Smith, 200 Iowa 687, 205 N.W. 522 (1925).

THE IOWA TITLE STANDARDS II*

The first installment of this article discussed the theory and practice of the present system of title examination, including the part played therein by title standards such as those adopted in 1950 by the Iowa State Bar Association. That article considered at length two statutes of limitations which to some extent eliminate the necessity of examining the title from the date of its origin, and three of the ten chapters of the adopted title standards.[1]

This comment will consider chapters of the title standards dealing with abstracts, municipal corporations, and private corporations. The remaining chapters are to be reviewed in a subsequent issue of the Drake Law Review.

I. ABSTRACTS OF TITLE

The purpose of the abstract of title is to provide a summary of the official records affecting the title to land and to enable the purchaser to discover, by proper examination, the state of the title in the grantor. Defects in the form of an abstract do not detract from this purpose except as they may hinder examination, and objections should therefore be restricted to those defects in form which obstruct this purpose. For this reason Standards 1.1 and 1.2 provide that hand-written abstracts and properly certified reproductions or copies of abstracts are acceptable forms. The examiner may, however, reject any abstract that is so illegible or

* Students in the class in Conveyances who assisted in the preparation of this comment, under the supervision of Professor Robert W. Swenson, now on the faculty of the College of Law, University of Utah, include Terrence K. Hopkins, Joseph C. Piper, John D. Culbertson, Conrad A. Amend, and Harold J. Lincoln.

[1] *The Iowa Title Standards I*, 2 DRAKE L. REV. 76 (1953). This article dealt with chapters of the Iowa Title Standards on deeds (4.1-4.12), mortgages (7.1), and probate (9.1-9.23), and Iowa Code §§ 614.17 and 592.3 (1950).

mutilated that the entries cannot be read.[2] A vendee usually is reluctant to accept a copy of an abstract, unless there is a certification by the abstracter that the copy is correct.[3]

Standard 1.3 presents the problem of the requirements of an acceptable abstracter's certificate. The purpose of the certificate is to point out to the examiner the sources of the contents of the abstract so that he may pass upon its completeness.[4] It follows that an acceptable abstract should show that the abstracter has examined all records which may affect the state of the title in the grantor. Standard 1.3 indicates that a certificate which refers to everything entered in the public records of the county in which the land is located is sufficient. However, there are certain types of federal liens which do not appear in the county records and which are good against even a bona fide purchaser. A certificate showing a search for these liens, which are described hereafter, should be required under certain circumstances.

Judgments of a federal district court within a state are liens upon the property of the debtor located in that state "in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such state . . ."[5] In Iowa judgment liens of federal and state courts attach to the property of the debtor located in the county in which the court is situated when they are "entered in the judgment docket and lien index kept by the clerk of the court having jurisdiction . . ."[6]

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[2] *Dickerson v. Morse,* 203 Iowa 480, 483, 212 N.W. 933, 934 (1927) states that where the defendant-vendor delivered to the plaintiff a dilapidated abstract of title, plaintiff had the legal right to demand and receive a new abstract. *Fagan v. Hook,* 134 Iowa 381, 105 N.W. 155 (1907) is cited as authority for this proposition. It is to be noted that *Fagan v. Hook* states only that the plaintiff was given an abstract for examination but that it was so dilapidated that the plaintiff demanded and obtained a new one. Nothing is said in the *Fagan* case about a legal right to demand and receive another abstract under such circumstances. Probably the same rule will apply to illegible plats.

[3] PATTON, TITLES § 26 (1938); THOMPSON, A PRACTICAL TREATISE ON TITLE TO REAL PROPERTY § 206 (2d ed. 1930).

[4] PATTON, TITLES § 26 (1938).

[5] 28 U.S.C.A. Sec. 1962 (1948).

[6] IOWA CODE § 624.24 (1950), as amended by Acts. 55th G.A., c. 251 (Iowa 1953). Formerly judgments of federal and state courts became liens upon the property of the debtor located in the county of rendition when such judgments were rendered. Federal court judgments are rendered when the judge hands down the decision. United States v. Stoller, 180 Fed. 910, 913 (D. Wash. 1910). A judgment of an Iowa court was not rendered until it had been made of record. Callanan v. Votruba, 104 Iowa 672, 74 N.W. 13 (1898). Thus, a federal court judgment became a lien before the judgment of a state court. *Recent Iowa Legislation Concerning Liens of Federal Court Judgments,* 14 IOWA L. REV. 118 (1928). The amended section clarifies the time when a judgment becomes a lien, and also requires federal court judgments to be docketed and indexed by the clerk of the court having jurisdiction, to become a lien. Although somewhat ambiguous, the statute apparently means that the lien of a federal court judgment attaches to real estate in the county where that court sits when the judgment is docketed and indexed by the clerk of that federal court. Federal courts sit in the following Iowa counties: Black Hawk, Cerro Gordo, Dubuque, Lee, Linn, Polk, Pottawattamie, Scott, Union, Wapello, Webster and Woodbury.

There is no requirement that federal court judgments be made of record in any county office in order that they be effective against land located in the county of rendition.[7] An examiner might properly require a certificate showing an examination of the records of any federal court located in the county in which the land is located. Indeed, in the case of *Billick v. Davenport*[8] the court held a seller of land precluded from enforcing a contract for the sale of land because his abstract did not contain a certificate showing the land to be free from federal court liens.

The United States Internal Revenue Code provides for a lien upon the property of a delinquent taxpayer in favor of the United States.[9] Such liens are not good against purchasers unless recorded in accordance with the provisions of that section.[10] Subsection 1 provides that such liens must be filed in the office provided by state law if such a law exists. In Iowa, federal tax liens may be filed in the office of the county recorder.[11] Thus, the bulk of federal tax liens will appear in the county records and a search will disclose them.[12] However, estate and gift tax liens need not be recorded.[13]

An unpaid gift tax becomes a lien upon the subject matter of the gift in the hands of the donee if not paid when due.[14] If any part of the property is sold to a bona fide purchaser for value, the property is divested of the lien.[15] Unless special circumstances appearing of record would require inquiry, it would seem that the abstracter need not show a search for gift tax liens in his certificate. Since the general practice is to give fictitious amounts as consideration for a conveyance, a stated nominal consideration probably would not put a purchaser on duty to inquire. Such a duty might exist, however, if in addition no federal transfer tax stamps are affixed to the deed.

An unpaid estate tax is a lien upon the gross estate of a decedent for ten years.[16] The lien attaches at the date of death and,

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[7] Judgment liens do not attach to property of the debtor located in a county other than that in which the judgment is rendered until a transcript of such judgment has been filed in the office of the clerk of court of such other county. IOWA CODE § 624.24 (1950).

[8] 164 Iowa 105, 145 N.W. 470 (1914). *Continental Oil Co. v. Mulick*, 70 F.2d 521 (10th Cir. 1934) holds that certificate of the clerk of court showing that there were no judgment liens cured the defect in an abstract created by the absence of a certificate as to federal court judgments.

[9] INT. REV. CODE § 3670.

[10] INT. REV. CODE § 3670 (1), (2) or (3).

[11] IOWA CODE § 335.11 (1950).

[12] The language of INT. REV. CODE § 3670 is broad enough to include many types of taxes. *See, e.g.*, Grier v. Tucker, 150 Fed. 658, 661 (C. C. Ark. 1907), *aff'd*, 160 Fed. 611 (8th Cir. 1908); United States v. Ferbey, 282 Fed. 332 (D. Pa. 1922); in re Rosenberg's Estate, 153 Misc. 46, 274 N.Y.Supp. 482 (Surr. Ct. 1934).

[13] For a general discussion of federal tax problems and estates, see Miller, *Federal Tax Problems of Attorneys for Estates*, 35 IOWA L. REV. 3 (1949).

[14] INT. REV. CODE § 1009. The Commissioner is empowered by this section to issue a certificate releasing the property from the lien.

[15] *Ibid.*

[16] *Id.* § 827 (a).

as indicated above, it need not be recorded.[17] This lien is not divested by a sale to a bona fide purchaser.[18] If the chain of title shows that the property has gone through probate proceedings or has passed to an heir by the law of descent and distribution within the previous ten years, and the record shows no release of the lien by the Commissioner of Internal Revenue,[19] the examiner should require a certificate showing that a search has been made to disclose any outstanding estate tax liens.[20]

Standard 1.4 indicates that an abstract covering a lot included in an official plat in a city or town is satisfactory if it commences with the date of the filing of the plat, with qualifications depending upon the date of platting. Standard 1.5 states that ancient proceedings need not be abstracted fully. These two standards are based upon two statutes of limitations, Iowa Code sections 592.3 and 617.17, which were amended shortly after adoption of the Title Standards. These statutes, and their effect on the two Standards, were considered at length in the first installment of this article.[21]

Standard 1.6 states that it is not necessary for the abstract to show the closing of the estate, or of the partition proceedings, where real estate has been sold by the executor or administrator to pay debts, or by the referee in a partition action. That conclusion would seem to be correct. The policy of the law is to uphold judicial sales and to protect the rights of purchasers thereat.[22] If the court ordering the sale had jurisdiction of the parties to and the subject matter of the litigation, its decree will be conclusive until reversed in some direct proceeding. Title to property acquirred at such a sale under such a decree, by a bona fide purchaser

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[17] Detroit Bank v. United States, 317 U.S. 329 (1943).

[18] *Ibid.* Property which passes to the beneficiary by reason of survivorship, a gift in contemplation of death, a revocable transfer or a power of appointment may be divested of the lien if sold to a bona fide purchaser for value. INT. REV. CODE § 827 (b).

[19] INT. REV. CODE § 827 (a) provides that the Commisioner may release the property from the estate tax lien.

[20] The Title Standards Committee has received many inquiries relative to the proper showing in abstracts to enable examiners to pass upon the lien of estate, inheritance and gift taxes. It has decided that formulation of a standard covering this problem is impracticable. The chairman of the Committee has stated the principles which are felt to be applicable, and his comments may be found in the latest pocket part supplement to 36 Iowa Code Anno. c. 558, Appendix.

[21] *The Iowa Title Standards I*, 2 DRAKE L. REV. 76, 78-82 (1953).

[22] Norton v. Reardon, 67 Kan. 302, 72 Pac. 861 (1903).

who is a stranger to the record, will be upheld although the decree itself may afterwards be reversed for manifest error.[23]

Standard 1.8 is concerned with the extent to which the abstract should show details preliminary to the execution of a tax deed for property sold at tax sale. The tax sale is one method used in Iowa to collect delinquent taxes which are a lien on real property. The purchaser at a tax sale acquires an assignable certificate of purchase.[24] After a period of time, set in the statutes, he may obtain a tax deed which will vest in him all right, title, and interest of the former owner.[25] However, the former owner has five years from the time the deed was executed in which he may have the tax deed set aside on various grounds (and, if under a disability at the time of sale, he has five years from the time the disability was removed).[26] In early days the court held that strict compliance with every detail was necessary to give a good tax title.[27] The legislature thereafter provided that the tax deed should be presumptive evidence of certain facts, which if untrue might invalidate it, and conclusive as to others.[28] The section making the tax deed conclusive as to certain facts has been construed very narrowly,[29] and the court will construe liberally the pleadings and proof of the former owner (or of one claiming under him) when there is an attempt to show the invalidity of a tax deed.[30] For these reasons, purchasers of real estate are reluctant to take a tax title "until all right has been barred by decree, or by a really effective limitation, or by a conveyance or release from all persons who could raise a question as to their validity."[31] In 1943 the legislature made it possible for the tax title holder to shorten the period in which his title could be attacked, by authorizing him to file an affidavit of his possession after two years from the recording of the tax deed, and by requiring any attack on his title to be within

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[23] IOWA CODE § 686.16, R.C.P. 254 (a), 254 (b) (1950); PATTON, TITLES § 252 (1938). Iowa Code § 635.40 (1950) provides: "no action for the recovery of any real estate sold or mortgaged by an executor can be maintained by any person claiming under the deceased, unless brought within five years after the sale by him or under the foreclosure of such mortgage." *In re Jackson's Estate*, 198 Iowa 680, 200 N.W. 310 (1924) held that Code § 614.8, which extends the times limited for actions in favor of minors and insane persons, has no application to proceedings contemplated by Code § 635.40. It must be remembered that the rule of caveat emptor applies to all judicial sales, and one who purchases at such a sale takes subject to all defects that might exist in the title being sold. Gross v. Anderson, 194 Iowa 825, 190 N.W. 131 (1922); Federal Land Bank of Baltimore v. Parks, 170 Va. 240, 196 S.E. 627 (1938); PATTON, TITLES § 253 (1938).

[24] IOWA CODE § 446. 29 (1950).

[25] IOWA CODE §§ 447.9, 448.1, 448.2, 448.3 (1950).

[26] IOWA CODE § 448.12 (1950). This is limited to some extent by Code § 448.13.

[27] McGohen v. Carr, 6 Iowa 331, 71 Am. Dec. 421 (1858).

[28] IOWA CODE §§ 448.4, 448.5 (1950).

[29] Hotz v. Page County, 235 Iowa 585, 16 N.W.2d 240 (1945).

[30] *See e.g.*, Fidelity Investment Co. v. White, 208 Iowa 519, 223 N.W. 884 (1929).

[31] PATTON, TITLES § 272 (1938).

120 days after the filing of the affidavit.[32] It is common practice for the holder of the tax title either to obtain a deed from the former owner (and his spouse) and a release of all encumbrances affecting the property at the time the deed was executed, or to bring a quiet title action based upon the tax deed within the period limited by statute.[33] Where the abstract discloses a conveyance of the fee by the former owner to the holder of the tax deed, or discloses a legally sufficient decree quieting the title based upon the tax deed, Standard 1.8 states that the examiner should not require the abstract to show details preliminary to the execution of the tax deed affecting its validity. The Standard is correct. The conveyance or the decree will prevent successful questioning of the validity of the tax title. It should be recognized that one who would be able successfully to question the conveyance from the former owner could, if he is the former owner or claims under him, then attack the validity of the tax deed. It is necessary that the decree quieting title be legally sufficient, and the abstract should show that any persons under disability whose interests have been quieted were properly represented.[34]

Standard 1.9 considers whether it is necessary for an abstract to show mortgages or trust deeds which are over twenty years old, whether satisfied or unsatisfied. The Standard correctly states that such a showing is unnecessary unless the record shows that the instrument, or the debt secured by it, has matured within the last ten years, either by its original terms or by the terms of an extension agreement of record. Authority for this position is a special

[32] Provision for such an affidavit was first made in Acts, 49th G. A., c. 257 (Iowa 1941). The "five year" limitation of that chapter was reduced to two years in Acts, 50th G. A., c. 223 (Iowa 1943), and now appears as Iowa Code §§ 448.15-448.17 (1950).

[33] FLICK, ABSTRACT AND TITLE PRACTICE § 613 (1951).

[34] No judgments without defense are to be entered against a party under a legal disability, and such defenses are to be by guardian ad litem. IOWA CODE R. C. P. 13 (1950). The court has held that judgments rendered against minors without defense by guardian are voidable and may be set aside only by direct attack against the judgment showing the existence of a defense in fact against the claim. Equitable Life Ins. Co. v. Cook, 229 Iowa 911, 295 N.W. 428 (1940); Beardsley v. Clark, 229 Iowa 601, 294 N.W. 887 (1940). Suppose that a guardian ad litem has been appointed. What will be the effect on a judgment adverse to the "ward's" rights if the guardian makes no defense or if he fails to assert available defenses which he could have discovered? In *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 299 N.W. 553 (1941), the trial court had held that a statement in the guardian's answer, which the record showed to be untrue, amounted to constructive fraud and the judgment could be set aside upon timely application therefor by the wards. The Supreme Court reversed the lower court for other reasons and did not disagree or agree with the trial court's position on this proposition. There are several cases from other jurisdictions to the effect that misconduct on the part of the guardian ad litem (including failure to make proper defenses) does not make the judgment void, but it may be set aside in direct proceedings. Welsh v. Koch, 4 Cal. App. 571, 88 Pac. 604 (1906); Nelson v. Estill, 190 Ga. 235, 9 S.E.2d 73 (1940). With respect to the duty of the guardian ad litem, see *U. S. v. 15,883.55 Acres of Land*, 45 F.Supp. 558 (D. S. C. 1942); Millage v. Noble, 334 Ill. 315, 166 N.E. 50 (1929); Tymony v. Tymony, 331 Ill. 420, 163 N.E. 393 (1928).

statute of limitations, the "ancient mortgage" statute, which provides that no action for foreclosure or enforcement of "any real estate mortgage, bond for deed, trust deed, or contract for the sale or conveyance of real estate" shall be maintained after twenty years from the date of the instrument unless a period of ten years from maturity has not expired. If the maturity date has been changed, the change must be of record to affect rights under the statute. The change may be made of record either by filing an extension agreement duly acknowledged, or by noting the extension in the margin of the record of the instrument.[35] The Standard indicates that if such mortgages are omitted, the abstracter should make a statement to that effect. Probably the examiner should insist that the abstracter state either that he did omit such mortgages or that he did not omit mortgages.

Standard 1.10 is concerned with public ordinances, resolutions and regulations that regulate or restrict the free use of real estate. For a number of years Iowa cities and towns have had authority to adopt comprehensive zoning plans or restricted residence districts.[36] Toward the end of World War II municipalities, including counties and villages as well as cities and towns, were permitted to adopt zoning regulations for airport hazard areas.[37] The Fifty-second General Assembly, recognizing the growth of unincorporated suburbs around large cities, authorized the larger counties to adopt zoning regulations that would apply to land outside corporate limits of cities or towns if used for other than agricultural purposes.[38] Should the abstract mention the fact that the real estate it covers has been zoned or placed within a restricted residence district? To what extent should the abstract describe the restrictions applicable? Standard 1.10 states that an abstract should call attention to any public ordinance, regulation or resolution that in any way restricts the free use of the land, but says that it is not necessary to abstract them extensively. There is no applicable Iowa authority, but Warvelle's comments indicate that in most instances an abstract which complies with the Standard will be adequate on this point.[39]

Code section 366-12 provides that the ordinance or resolution of the city council establishing a restricted district, building lines, or fire limits, "shall" be certified to the county recorder immediately after passage. This provision was held, in *Boardman v. Davis*,[40] to be directory rather than mandatory, and restrictions of a zoning ordinance were enforced although the ordinance had not been certified and was not of record in the county recorder's

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[35] IOWA CODE § 614.21 (1950).
[36] IOWA CODE §§ 414.1, 414.2, 415.1 (1950).
[37] Acts, 51st G. A., c. 149 (Iowa 1945), as amended, presently IOWA CODE c. 329 (1950).
[38] Acts, 52d G. A. c. 184 (Iowa 1947), presently IOWA CODE c. 329 (1950).
[39] WARVELLE, A PRACTICAL TREATISE ON ABSTRACTS AND EXAMINATIONS OF TITLE § 330 (4th ed. 1921).
[40] 231 Iowa 1227, 3 N.W.2d 608 (1942).

office. There are no statutory provisions for recording either airport hazard zoning regulations or county zoning regulations.[41]

The owner of land who subdivides it may include restrictive covenants in the deed to each lot for the benefit of the entire subdivision. The requirements of such covenants may be similar to provisions of some zoning ordinances or requirements applicable to restricted residential districts. Restrictions through private covenant are in the nature of negative easements and are incumbrances upon each of the lots for the benefit of the others.[42] There is considerable doubt that a similar restriction established by public ordinance or resolution would be considered an incumbrance. Patton states that there are some decisions holding that restrictions so established are not incumbrances, as between vendor and purchaser, and that there are a few to the contrary.[43] There are no Iowa decisions on this point. The court, in *Boardman v. Davis*,[44] commented that authorities recognized zoning ordinance requirements were not an easement upon the property, nor a taking under eminent domain, but merely were a restraint upon the owner's use of his property to prevent harm to the public.

Standard 1.11. Since 1939 assistance furnished by the county or the state for support of an insane person has by statute been a lien on property owned by that person or by his spouse.[45] The statute provides for indexing only under the name of the person committed.[46] Apparently there has been some doubt as to whether

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41 If the airport owned by a municipality is located outside the territorial limits of that municipality, airport hazard zoning regulations may be adopted by the owning municipality and the municipality where the airport is located acting jointly, or may be decreed by the district court upon petition of the owning municipality. IOWA CODE § 329.4 (1950). If the municipality has adopted a comprehensive zoning scheme under Code c. 414, it may incorporate the airport hazard zoning regulations in that scheme, Code § 329.7, in which case they may be recorded. Airport hazard zoning regulations thus may appear in one or more of the following places: minutes of the city or town council; minutes of the board of supervisors of the county; judgments of the district court; the miscellaneous record or other book provided by the county recorder for special records. The minutes of the board of supervisors and of the board of adjustment are the only official records required to show county zoning regulations. IOWA CODE §§ 358A.6, 358A.7, 358A.12 (1950). Apparently very little county zoning has been accomplished to date. The Board of Supervisors of Polk County are now considering the first county zoning ordinance for that County.

42 PATTON, TITLES § 350 (1938). Standard 1.7 takes the position that such covenants are or may be within the doctrine of reciprocal negative easements, and that an abstract as to one lot should show the conveyance of other lots. This will permit the title examiner to resolve the question of applicability of the doctrine, an approach both cautious and wise.

43 *Ibid.*

44 231 Iowa 1227, 3 N.W.2d 608 (1942).

45 Acts, 48th G.A. c. 98 § 4 (Iowa 1939), now IOWA CODE § 230.25 (1950).

46 IOWA CODE § 230.26 (1950). Although there are no cases dealing with the constiutionality of §§ 230.25 and 230.26, an analogy may be drawn to the lien for old-age assistance furnished to the spouse of the owner. CODE § 249.20. This statute was upheld in Thomas v. State, 241 Iowa 1072, 44 N.W.2d 410 (1950).

the abstract should show that a search had been made as to both the owner of the land and his spouse. Standard 1.11 correctly requires such a showing. An unsuccessful attempt to amend this statute was made in 1953. The proposed amendment provided that the lien arose if the county auditor where the land is located maintained a record of the amount of the claim and an index showing *both* the name of the person committed *and* the name of the spouse.[47] This clearly would have removed the necessity for searching both names.

The proposed amendment would have settled two other uncertainties with regard to the statutory lien. First, it is clear from the present statute that only the county of legal settlement is responsible for the support, and only the auditor of that county will index the name of the person supported. But the lien is upon "any real estate owned" without limitation as to county (or state). There thus may be a lien for support of an insane person which cannot be located in any public records in the county in which his land is located.[48] The amendment permitted, but did not require, the county supporting the patient to file a claim with the auditor of any county in which the patient or his spouse owned real estate. If the supporting county did not file such claim, no lien could be asserted against the land. The second matter in doubt is the duration of the lien. There is no provision in Chapter 230 of the Iowa Code which indicates when the lien expires. Under the proposed amendment, the lien would continue for a period of ten years from the date of the last entry of the charge for such assistance of record in the county in which the real estate is located.

II. MUNICIPAL CORPORATIONS

Standard 2.1, the only standard in the chapter on Municipal Corporations, affirmatively states that it is necessary, when a deed is made by a municipal corporation of the state of Iowa, to require that a copy of the resolution authorizing the execution of the deed by the governing body of that corporation be filed for record. The Standard, in contrast with the corresponding Standard (3.1) relating to private corporations, is not concerned with the power of the municipality to acquire property. Before examining this Standard, a few brief remarks will be made about the power of municipal corporations to acquire and to dispose of real estate.

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[47] S.F. 90, 55th G.A. (Iowa 1953). This bill passed the state Senate unanimously, was approved by the House Judiciary I Committee, but was not brought up for vote in the House before the end of the session. In its original form the bill provided for alternate indexing, either under the name of the person committed or the spouse's name. This was changed by an amendment from the floor at the time the bill passed the Senate. S.J. 342, 55th G.A. (Iowa 1953).

[48] IOWA CODE § 249.20 (1950), dealing with the lien for old-age assistance, provides for indexing and recording in the manner provided for the indexing of real estate mortgages both in the office of the county recorder of the county in which the recipient lives, and of the county in which real estate belonging to the recipient or his spouse is located.

The power of a municipal corporation to acquire real estate for municipal purposes usually is expressly granted by statutory or charter provisions,[49] although, in the absence of such provisions, at common law the corporation has power to purchase and hold such real estate as is necessary "to the proper exercise of any power specifically conferred, or essential to those purposes of municipal government for which it was created."[50] Power to dispose of real estate often is governed by statutory or charter provisions, and it would seem that a distinction is made between property held in a governmental capacity—for public use—and that held in a private capacity. The general rule is that legislative authority is required for disposition of property held in a governmental capacity, whereas no special authority is required for disposition of property held in a private capacity.[51] The method of disposition usually is governed by statute.[52]

In Iowa the pertinent statute is Code section 569.7. It provides that the "governing body may appoint its chairman, president, or other member to execute and acknowledge, for and on behalf of the state, county, or municipality, leases and deeds of conveyance, but said instruments when executed shall be approved by the said body and said approval spread upon its minutes with the yea and nay vote thereon." The statute further provides that a transcript of the minutes certified by the secretary of the governing body shall be entitled to be recorded in the same manner as the approved instrument is entitled to be recorded.

An earlier and somewhat different version of this statute was involved in *Smith v. Standard Oil Co.*[53] Smith brought action for breach of a contract. Under its terms he was to procure a lot and erect thereon an oil station, to lease them to defendant, and to operate the station as defendant's agent. He entered into a contract for purchase of certain county owned land, signed by himself and by "C....., Act. Chairman, Board of Supervisors", and he claims to have performed his part of the contract with defendant. However, the county board of supervisors had not been in session, and there were no official proceedings by it relative to the sale of the land. The record failed to show that any authority was given to C..... to execute the contract of sale, or that the board subsequently had authorized, confirmed, or ratified his action. A decision for plaintiff was reversed and the lower court was ordered to direct the verdict for defendant because plaintiff had failed to show that he

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[49] 10 McQUILLAN, MUNICIPAL CORPORATIONS § 28.02 (1950).
[50] *Id.* at 6.
[51] *Id.* § 28.37.
[52] *Id* § 28.44.
[53] 218 Iowa 709, 255 N.W. 674 (1934).

had procured a lot. The county was not bound by the contract of sale.[54]

The approval of the governing body is essential under the statute, and in view of the *Smith* case the examiner should insist that such approval be shown in the abstract, as Standard 2.1 provides.

III. PRIVATE CORPORATIONS

Standards 3.1 and 3.3 are concerned with the showing that should be made as to the power of a corporation to buy and sell real estate and the authority to execute deeds of the corporate officer who has done such an act. Both Standards state that no showing, of power or of authority, is necessary, unless the articles of incorporation are recorded in the county where the land is located, in which case the articles are said to give notice of limitations upon the power of the corporation or the authority of the officer. Although the positions taken by these two Standards are open to question on several counts, no authority to support them is cited.

Three problems are present in Standard 3.1. What is the effect of an unauthorized, or "ultra vires" acquisition of real estate, by a corporation, upon title thereto? What is the effect of charter or other limitations upon the power of a corporation to sell its real estate? Does a purchaser of real estate from a corporation have constructive notice of limitations upon corporate authority, and, if so, under what circumstances? In addition to the question of the applicability of the doctrine of constructive notice to articles of incorporation, Standard 3.3 deals with the problem of the failure to check the authority of a purported agent. Each of these problems is to be considered for its bearing upon the position taken by these Standards.

If the corporation has no power to acquire real estate, but has purchased it anyway, who may question this abuse of power? The grantor and the corporation are both estopped to deny the lack of corporate power. Objecting stockholders might have been able to enjoin the corporation from completing the purchase, and they may be able to force a sale of the property. However, if the title of the corporation is subject to divestment, it is possible that only the state has power to force rescission of the contract by which the property was acquired, and that power will cease once the corporation has transferred to other parties the title to that property.[55] In *Barnes v. Suddard*[56] the Illinois court suggested that the corpo-

[54] IOWA CODE § 10258 (1931), under which the case was decided, provided: "A transcript of such resolution and action of the board thereon, including the yea and nay vote on its adoption, certified by the county auditor and under the seal of said board, shall be sufficient to pass the title or lease-hold of such real estate to the purchaser or lessee." This implies that a deed was not necessary to convey the county's title. This section was repealed by Acts, 45th G.A., c. 167 (Iowa 1933), and was replaced by the present Code § 569.7.

[55] The Chicago, B. & Q. R. Co. v. Lewis, 53 Iowa 101, 4 N.W. 842 (1880); Watkins v. Iowa Central R. Co., 123 Iowa 390, 98 N.W. 910 (1904); PATTON, TITLES § 223 (1938).

[56] 117 Ill. 237, 7 N.E. 477 (1886).

rate title is indefeasible and that the only remedy available to the state is an action for forfeiture of the corporate charter. Thus, the purchaser from the corporation acquires an indefeasible title, and it is immaterial that the corporate acquisition of title was an ultra vires act.[57] Actual notice that the acquisition was ultra vires apparently would not affect the title acquired from the corporation.

Restrictions on the power of the corporation to convey properly acquired real estate may be another matter. (Most restrictions on conveyance by corporations relate not to the power to convey but to the manner in which the conveyance is authorized and executed.) If the purchaser is or should be aware of limitations on the power of the corporation to convey, an objecting shareholder may be able to have the conveyance set aside.[58] As the corporation presumptively has the power to convey,[59] a taker with no knowledge, or with no reason to know, of limitations on that power could acquire good title, unless the corporate documents which are of record give him constructive notice.

As noted above, both Standards 3.1 and 3.3 state that articles recorded in the county where the land is located would give constructive notice of limitations they contain. This portion of the Standards, as qualified, is open to criticism. Either it does not go far enough, in failing to require search of articles of incorporation filed with the Secretary of State, or it goes too far in requiring search for any articles of incorporation. The position taken does not have the support of Iowa authority.

Only one Iowa case clearly has recognized that the articles give constructive notice of their contents. This case, *Dempster Mfg. Co. v. Downs*,[60] dealt with the effect of a provision of the Dempster Company's articles that restricted transfer of the company's stock, upon a purchaser of that stock who did not have actual notice of the restriction. The court held that he had constructive notice and took subject to the restriction, stating that:

> ". . . everyone who acquires certificates of stock must be assumed to know that they were issued by virtue of arti-

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57 PATTON, TITLES § 223 (1938).

58 *See* Buell v. Buckingham & Co., 16 Iowa 284 (1864) which suggests that a stockholder may be able to set aside an improper conveyance by the corporation to one of its officers, when the purchaser from that officer has knowledge of the facts regarding the conveyance from the corporation.

59 One of the statutory powers of the Iowa corporation is "to make contracts, acquire and transfer property,—possessing the same powers in such respects as natural persons." IOWA CODE § 491.3 (6) (1950). This is considered to give the corporation the power to acquire and dispose of real property unless specifically negatived or limited in the corporate articles. Buell v. Buckingham & Co., 16 Iowa 284 (1864).

60 126 Iowa 80, 101 N.W. 735 (1904).

cles of incorporation, and that these may be found in the office of the Secretary of State."[61]

If the constructive notice doctrine is applicable, as the Standards intimate, it would seem from the above quotation that such notice is obtained from those articles filed with the Secretary of State, as well as from those recorded in the county where the land is located.[62] It is not certain that the constructive notice doctrine would be applied. This doctrine has been severely criticized. Both Stevens and Ballantine contend that the statutory requirement of filing articles for record has a different purpose than have the recording acts. They believe that these corporate records are made public merely to give the public the opportunity to learn of their contents, rather than to charge them with notice of those contents.[63] Stevens can find no case which has applied the constructive notice doctrine in the analogous situation of articles or certificates of limited partnership filed in accordance with applicable statutes.[64] He suggests: ". . . the corporate body is not entitled to the unqualified protection which the constructive notice rule woud give it; but is entitled to protection against persons, who, in dealing with corporate agents, are culpably negligent and fail to ascertain that the transaction contemplated exceeds the authority conferred upon the agents. . . . The interest which the public has in preventing the usurpation of authority by the corporation fades beside the interest of the public that there shall be a feeling of security in dealing with corporations. The results of litigation evidence this."[65] Despite these criticisms, it unquestionably is safe practice to check the articles of incorporation if recorded in the county where the land is located. But a check with the records of

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[61] *Id.* at 84, 101 N.W. 735, at 736. In its direct holding, that a purchaser of stock has constructive notice of restrictions on transfer of stock that may appear in the articles, the case has been overruled by enactment by the legislature of the Uniform Stock Transfer Act. Sec. 15 of that Act, now Iowa Code § 493A.15, provides that there shall be no lien in favor of a corporation upon its issued and outstanding shares and no restriction upon transfer of its shares, "unless the right of the corporation to such lien or the restriction is stated upon the certificate." When restrictions in articles of incorporation have not been placed upon the stock certificate, as required by the statute, courts in other jurisdictions have divided on the question whether the restriction is applicable against a purchaser with actual knowledge thereof. O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV. L. REV. 773, 789-790 (1952). The statutory overruling would have no effect as to the applicability of the doctrine of constructive notice to any restriction other than one upon the transfer of stock.

[62] Corporate articles are to be recorded in the office of the recorder in the county in which is located the principal place of business of the corporation. Filing with the recorder is not accomplished by the corporation, however. The Secretary of State forwards the articles to the recorder, after photostating them and issuing a certificate of incorporation. IOWA CODE § 491.5 (1950).

[63] STEVENS, CORPORATIONS § 74 (2d ed. 1949); BALLANTINE, CORPORATIONS § 99 (Rev. ed. 1946).

[64] STEVENS, CORPORATIONS § 74 (2d ed. 1949).

[65] *Ibid.*

the Secretary of State would be safer, and for the same reasons should be made if check of local records is required.

What if the corporate agent who executed the deed was not authorized to do so? The officers of a corporation have no authority to convey corporate real property, unless authority has been given them by statute, in the articles or by-laws, or by resolution of the governing board. On this point, Patton states that ". . . the only safe course in many states, and the safer one in all of them, is to require that proof be made by conclusive evidence appearing of record."[66] As examples of such conclusive evidence, he names the articles and a certified copy of the minutes containing the directors' resolution. Standard 3.3 seems almost in conflict with Patton's comment. Is it supported by Iowa authority?

In *Blackshire v. The Iowa Homestead Co.*,[67] an early Iowa case which has been followed in a number of subsequent cases,[68] a purported corporate grantor was sued by the grantee for breach of the covenant of seizin. The deed bore the corporate seal, and the signature of two officers who, the corporation alleged, had no authority to sign such documents. The court held that, as the document had the corporate seal, and as the genuineness of the signatures was not in issue, the seal was *prima facie* evidence that it had been affixed under authority. Therefore it would be *presumed* that the officers had not exceeded their authority. Judging from the language of the dissent, the corporation had not attempted to prove lack of authority, and it is doubtful that the presumption mentioned in the *Blackshire* case is a conclusive one. It should be noted also that Iowa corporations today are not required to have a seal,[69] and as to their conveyances the doctrine of the *Blackshire* case clearly would be inapplicable.

If the deed has been acknowledged according to the form provided in Iowa statutes, will that eliminate need for proof of authority of the officers executing the conveyance? According to the applicable statute the certificate of the notary must show that "such persons as such officers, naming the office of each person, acknowledged the execution of the instrument. . . ."[70] To acknowledge, the officer must swear or affirm that he held such office and that the instrument was signed (and sealed) on behalf of the corporation by authority of its board of directors, and must acknowledge that the deed was voluntarily executed by the corporation.[71] This acknowledgement could create the presumption that the acknowledging parties were the officers they claimed to

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[66] PATTON, TITLES § 226 (1938).
[67] 39 Iowa 624 (1874).
[68] The Chicago B. & Q. R. Co. v. Lewis, 53 Iowa 101, 4 N.W. 842 (1880); Goodnow v. Oakley, 68 Iowa 25, 25 N.W. 912 (1885); Morse v. Beale, 68 Iowa 463, 27 N.W. 461 (1886); Wisconsin Lumber Co. v. Telephone Co., 127 Iowa 350, 101 N.W. 742 (1904); Homesteaders Life Ass'n v. Salinger, 212 Iowa 251, 235 N.W. 485 (1931).
[69] IOWA CODE §§ 491.3(3), 558.2, 558.3, 558.4 (1950).
[70] IOWA CODE § 558.38 (1950).
[71] IOWA CODE § 558.39 (1950).

be, and perhaps that they had been authorized to execute the instrument.[72] It should not be conclusive as to these points, and for these reasons Patton recommends, even though such a statutory form of acknowledgment be used, that the examiner require that conclusive evidence of authority, at least, appear of record.[73]

Neither the doctrine of the *Blackshire* case, nor the acknowledgment statutes, clearly sustain the position taken in Standard 3.3 that such evidence of authority need not be required.

A matter related to the problem considered by Standard 3.1, but not discussed in any of the Standards, is the effect upon a chain of title of a corporation therein which had no legal existence. It is generally recognized that a de facto corporation may purchase and sell real property, and for that reason Patton indicates that the abstract need not show in detail whether all measures have been taken for a valid incorporation, as long as there is sufficient evidence of record to establish the existence of a de facto corporation.[74] If a legally constituted corporation has ceased to exist before conveying, other problems are presented. Under Iowa law, the corporation which is voluntarily dissolved, or whose existence terminates because of failure to renew its charter, will continue in existence "for the purpose of winding up [its] affairs."[75] A similar rule applies to those corporations involuntarily dissolved by administrative decree.[76] However, if the corporation has been dissolved involuntarily by judicial decree it does not so continue,[77] and a deed conveying the property formerly owned by it should be executed by its stockholders and creditors.[78] Probably the same is true of the corporation whose stockholders forgot to renew the charter, where business is carried on as usual rather than for winding up purposes. In view of these possibilities, it would appear to be safer to require some showing that the corporation was in existence, either de facto or de jure, at the time of the conveyance, or that it was being wound up and was within the provisions of Code section 491.56.

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72 PATTON, TITLES § 226 (1938).

73. *Ibid.* The corresponding Standard adopted in Nebraska takes a position opposite to the one adopted in Standard 3.3. It indicates that a showing of authority of an officer other than the president or vice-president may be omitted only if the statute of limitations has run against the claim that the executing officer was unauthorized. Standard 11, *Nebraska Title Examination Standards*, 24 NEB. L. BULL. 125 (1945). The exception made for the president and vice-president is based upon a Nebraska statute which gives those officers the power to execute deeds. NEBR. REV. STAT. § 25-202 (1943).

74 PATTON, TITLES § 227 (1938).

75 IOWA CODE § 491.56 (1950).

76 The charter of an Iowa corporation may be forfeited and cancelled by the Secretary of State for failure to file an annual report. IOWA CODE §§ 496.8-496.12 (1950).

77 IOWA CODE §§ 491.56, 491.66, 492.11 (1950).

78 State v. Fidelity Loan & Trust Co., 113 Iowa 439, 85 N.W. 638 (1901); Peoria Engraving Co. v. Streator Cold Storage Door Co., 221 Iowa 690, 206 N.W. 548 (1936).

Standard 3.2 indicates that it is not necessary to require a showing by a foreign corporation[79] executing a deed that the corporation has authority to do business in Iowa. If a foreign corporation has not complied with the statutory requirements for obtaining a permit to do business, Iowa denies to it the right to maintain an action on any contract made in this state.[80] This provision does not make the contract void. It merely affects the remedy and forbids courts in Iowa to enforce the terms of the contract.[81] While the prohibition extends to any person claiming as assignee of the rights of the corporation or either under the assignee or the corporation,[82] apparently there have been no instances in which the grantee from such a foreign corporation was unable to enforce his rights under the deed because of this statute. Patton states that generally it is held that the state alone can question the title held by a foreign corporation, and then only if it acts prior to conveyance by the corporation.[83] The Standard appears to be stated properly. However, if the doctrine of constructive notice applies to articles of incorporation filed with the Secretary of State, it should also apply to those articles filed by foreign corporations when they obtained permits to do business in the state. If that be true, a search to determine whether a permit has been obtained will then be required.

Standard 3.4 suggests that it is proper to require an affidavit of identity when there is a slight variation in the corporate name such as the omission in one instrument and the inclusion in a later one of the word "the", or vice versa. The only one that can record such an affidavit is a person who is both "the owner" and in possession, and the recording raises the presumption that the facts are true. After three years from the date of recording such presumptions become conclusive.[84]

Such slight misnomers in the corporate title do not affect the validity of the deed. The problem this Standard considers was present in *Public Industrials Corporation v. Reading Hardware Co.*,[85] a case from another jurisdiction. The plaintiff, attempting to show that defendant did not have marketable title to three tracts of land, attacked the conveyances under which defendant claimed because defendant was named therein as "Reading Hardware

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[79] The term foreign corporation is here used to mean any corporation other than one organized and chartered under the laws of the state of Iowa or under an act of the Congress of the United States.

[80] IOWA CODE § 494.9 (1950).

[81] Stokely-Van Camp, Inc., v. Hackert, 80 F.Supp. 837 (S. D. Iowa 1948); Heyl v. Beadel, 229 Iowa 210, 294 N.W. 335, 130 A.L.R. 994 (1940). Foreign corporations sidestep the limitation of the statute by an arrangement whereby their contracts are "made" outside of Iowa, or can be said to involve doing business in interstate commerce. Hayes, *Iowa Corporations and Partnerships: 1942-1952*, 38 IOWA L. REV. 462, 489 (1953).

[82] IOWA CODE § 494.9 (1950).

[83] PATTON, TITLES § 223 n. 134 (1938).

[84] IOWA CODE § 558.8 (1950).

[85] 29 F.2d 975 (3d Cir. 1929).

Company", not as "The Reading Hardware Company". The court said the plaintiff's contentions were without merit as there could be no question as to the defendant's identity. The court quoted what it called a well established rule from Thompson on Corporations, as follows:

> "An immaterial misnomer, as the omission of one word in the corporate name, will not render an instrument invalid, where there was a proper authority to execute it."[86]

The Michigan supreme court, in a recent dictum, indicated that substitution of the word "association" instead of "society", in a conveyance to Saginaw Hebrew Benevolent Society, was an inconsequential error.[87]

It is well established in Iowa that the affidavits of identity are only good to explain a defect in the title and can not be used to supply a link in the chain of title.[88] The recording of an affidavit of identity should satisfy the title examiner as to any slight misnomer in conveyances to or from the corporation.

Standard 3.5 pertains to a somewhat similar problem. It is concerned with the effect of including the name of the town where the corporation is located, in one conveyance, and omitting that name in another. The Standard also suggests that the examiner request an affidavit of identity.

It was argued to the Delaware court that a variation of this sort destroyed the marketability of a corporation's title.[89] Title had been acquired through a deed which named the grantor, recited that he was from the City of Wilmington, and that he was conveying to "Washington Fire Company of said city". The correct corporate name was "Washington Fire Company of the City of Wilmington", and defendant contended that the incorrect description of the grantee was not sufficiently definite to identify the corporation. The court, holding for the plaintiff, said:

> "In the construction of documents, the importance of names is emphasized because of their significance in the process of ascertaining the identity of the persons intended. Intention is the thing sought after. . . . Names are to be subordinated to intent, for they are to be regarded as mere aids in arriving at intent. If the intent is clear, error or mistake in the use of the name will not be permitted to frustrate that intent which the name was meant to convey. . . ."[90]

There was little doubt in the court's mind that the deed could be construed as a conveyance to a corporation other than the plaintiff.

Frequently corporations with similar names can be found. Iowa has a number such as Farmers Elevator Company, Farmers

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[86] *Id.* at 976.
[87] Petition of Saginaw Hebrew Benevolent Society, 333 Mich. 700, 53 N.W.2d 586 (1952).
[88] Fagan v. Hook, 134 Iowa 381, 105 N.W. 155, 111 N.W. 981 (1907).
[89] Washington Fire Co., No. 7, of City of Wilmington v. Yates, 13 Del. Ch. 32, 115 Atl. 365 (1921).
[90] *Id.* at 35, 37, 115 Atl. 365 at 366, 367.

State Bank, State Savings Bank, which could be clearly identified only by adding the name of the place where each one does business. It is more difficult to determine the grantor's intent, where the conveyance to one of these companies omits the town name, than it was in the *Washington Fire Co.* case. As the Standard indicates, recording of the affidavit should be sufficient to explain the error of including in one conveyance and omitting in the other the name of the town which is part of the corporate name.

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