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# Responsibilities and Duties of Title Examiners

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When a client employs an attorney to examine a title to a piece of real estate which the client is about to purchase or upon which he is about to make a loan, he evidences by such employment his confidence in the ability of the attorney to make an examination of the title.

The law as to the legal responsibility to his client of an attorney in the examination of an abstract of title is clear. The test of liability is the same as it is in the employment of an attorney in any other matter, namely, that the attorney must use a reasonable degree of care and skill and possess to a reasonable extent the knowledge requisite to a proper performance of his duties and that he is liable to his client for injury resulting as a proximate consequence from the want of such knowledge and from a failure to exercise such care and skill. But the attorney is not an insurer of the title which he passes; he is liable only for failure to exercise a reasonable degree of skill and care. Nor is he liable for making an incorrect decision on a doubtful question. The degree of knowledge, skill and care required is that ordinarily required of members of the legal profession generally who engage in like work of that character. It is negligence if he fails to apply the settled rules of law which should be known to all conveyancers. It would also seem that it would be negligence if he fails to have knowledge of and apply the applicable statutes of his own state.

From the very nature of the situation, the attorney can examine the title only as such title appears upon the face of the records which are indicated by the abstract of title furnished to him and all that he can tell his client is that the title is good so far as the face of the records show. A title may be good on the face of the records and yet be bad as a matter of fact, because, for example, the signature to a deed in a chain of title was a forgery or, even if the signature to such deed were the genuine signature of a man bearing that name, nevertheless such man was not the person of the same name to whom the property had been conveyed, or the person who executed the deed was a minor or a mental incompetent or a deed which is on record had never been delivered. However, the lawyer is not employed to be a detective and no duty is imposed upon him to make any investigation as to the genuine-

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ness of signatures or identity of persons executing the deeds or the legal capacity of any of such persons or the actual delivery of an instrument, unless on the face of the records there appears something which is legally sufficient to put him upon inquiry. If the title appears good on the face of the records, the attorney in so advising his client incurs no liability for any defects in the title that may afterwards appear because of matters not shown on the face of the records.

So much for the legal side of the responsibility of the examining attorney in performing the duties of his employment. Let us now consider some of the more practical aspects of his work.

The test of whether the title should be rejected or not is whether such title as shown on the face of the records is a merchantable title or, as the phrase is often used, a marketable title. This has been defined by the Colorado Supreme Court and the Court of Appeals to be a title without defects of which the vendee can lawfully complain (which does not help much). In the exercise of the judgment of an attorney as to whether a defect is such as to render the title unmerchantable, the applicable statutes and the decisions of the Courts of the state naturally are controlling and in the absence of any controlling statutes or decisions of the State, the law as laid down in decisions of other states should be considered and, in the absence of any statutes or decisions upon the question, the common practice of attorneys in the community in passing upon such a defect can properly be considered as justifying the action of the attorney in passing or rejecting the title.

There are two extremes of position which an attorney might take regarding whether a certain situation shown by the records constitutes such a defect as to cause him to reject the title as unmerchantable. Neither of such extremes should be taken. One of these is that of laxity in passing defects, which in the exercise of a reasonable degree of knowledge, skill and care should cause the title to be rejected. The other is that of rejecting the title because of any irregularity, no matter how immaterial it may be. It is not every irregularity which should cause a title to be rejected, but the effects of such irregularity, the possible rights of persons who might make claims because of same, the rules of law applicable thereto and the effects of any curative statutes should all be given careful consideration. A middle ground between these extremes must be taken and of course the difficulty is to determine just what is this middle ground. One of the things that an attorney should not do is to reject a title because of an irregularity when the examining attorney, after thorough consideration and study, feels that it does not render the title unmerchantable, just because the attorney thinks that later some other attorney examining it might reject the title because of it. The attorney is employed by his client because his client desires to purchase the property or to make a loan upon it. He is employed

to exercise his skill, knowledge and care in determining whether irregularities that appear on the records are of such a nature that the title should be rejected and he evades and abdicates his duty and his responsibility to his client if, in spite of his own belief that the title is good, he rejects it and prevents from going through the purchase or the loan, merely because of a fear that some other attorney will reject the title and it will come back upon him. Of course if the Colorado courts have not passed upon the question and the decisions of courts outside of Colorado are in substantial conflict upon the question, the attorney cannot say which of the two opposing views of the courts will be adopted by the Colorado Supreme Court and therefore he must reject the title. But, if the attorney, after careful study, is of the opinion that the title is good in spite of the irregularity, even if he knows that, for example, a certain attorney in the same community rejects a title because of this irregularity, he should pass it and assume the responsibility of upholding his convictions. In other words, the attorney should decide the effect of the irregularity upon his own judgment and not upon unreasoning fear.

Another thing that an attorney should not do is to reject the title because of an irregularity without making any examination of the law as to whether such defect is sufficient to cause the title to be rejected and place the burden of producing authorities and arguments sustaining the merchantability of the title upon the attorney who had examined it for the present owner. When the attorney accepts employment to examine the title he assumes the responsibility and the duty of doing everything that is necessary to determine whether the title, as shown on the face of the records, is merchantable and if he, either through laziness or lack of time, does not examine into the law sufficiently to determine for himself the results of such defect, he is not true to his employment and he evades a responsibility which is justly his. The results of this practice are twofold. In the first place, if the defect is one which does not render the title unmerchantable, he imposes upon the attorney, who had previously examined the title for the present owner, a large amount of work in producing the authorities and the arguments showing that the title is merchantable, which of course should have been done by the attorney who raised the objection and for which work the attorney who made the previous examination will receive no compensation. And in the second place, upon the attorney raising the objection being shown that the defect does not render the title unmerchantable, he must, if he performs his duty and obligation to his client, back down from his position and incur the embarrassment and the injury in the eyes of his client of his having first objected to the title and then concluded that the defect did not make the title objectionable.

In saying this, I do not mean to be understood as saying that an attorney after raising an objection should not change his position if he afterwards becomes of the opinion that the defect does not impair the merchantability of the title. His duty and his obligation to his client require that. If he believes that the title is merchantable, he should say so and the fact that there may be embarrassment to him in reversing his position should not interfere with his fulfilling his duty and his obligation.

I firmly believe that an attorney who, upon examining an abstract, has found a defect which upon consideration and study he believes does not make the title unmerchantable, should not burden his client either in conference or in his opinion with a discussion of the defect and of the possible results of it upon the merchantability of title and of his reason for passing the title in spite of such defect. Unless the client is another lawyer, he knows nothing about law or about the technicalities that go to make up the problems in examination of titles. He employs his attorney because he has confidence in his ability and in his judgment and he employs that attorney for only one purpose, namely, to tell him whether he should buy the property or whether he should not or whether he should make the loan or whether he should not. If the attorney's conclusion is that the title is merchantable, he should merely tell that to the client, because that is all the client wants to know. If he goes on to discuss the questions involved in the defect and the rules of law upon which he has decided to pass the title, he confers no benefit to his client, but merely confuses him.

What the attorney should do in such a case is merely to tell his client that the title is merchantable and give him an opinion to that effect and preserve in his notes the data as to reasons, statutes and decisions upon which he decided to pass the title, so that if in the future an examining attorney should raise the question of the same defect, he will be able to show him why he concluded the title should be passed. Of course, if the attorney is of the opinion that the title is not merchantable, he should, to justify himself, state to his client the reasons why he rejects the title.

A word or two as to the mechanics of the examination. No attorney should undertake the examination of an abstract of title of any length or any degree of complexity without first making a diagram of the chain of title shown by the abstract from which diagram he can see at a glance whether there are any breaks in the chain and just what the outstanding liens and encumbrances are. In addition to making the diagram, I find it very helpful to have my secretary make a list of the entries in the abstract. It requires no work on my part to have this done, as I simply hand to her the abstract and she makes a typewritten list containing the number of each entry and the book and page or

filing number of each respective entry. After the examination is finished the diagram and the list of entries, together with the notes that have been made, are filed away and if later any question comes up as to the title shown by the abstract, the combination of the list of entries and the diagram will give one what is in effect a complete abstract. In addition this list of entries is valuable later in checking an abstract of title to property in the same subdivision or even closer locality to determine whether the entries shown in the first part of the abstract to be examined are the same as those in the abstract already examined. If they are found to be identical, there is no necessity of examining the portion of the later abstract which is the same as that of the earlier one, except to make sure that the instruments in the identical portions of the abstracts described the property, the title to which is being examined.

From what I have learned of the experiences of other attorneys, I have concluded that for my own protection it is advisable to state in my opinions certain exceptions or reservations. Such a statement might read:

> "This property is subject to the lien of the general taxes for the year 1940 which are payable in 1941, the amount of which has not yet been fixed by the authorities."

This is not very important, but the taxes for the current year which are not payable until the next year do constitute a lien after April 1st and therefore should be in the opinion. Of course I insert this reservation only when the opinion is given on or after April 1st.

Another suggested reservation is this:

> "This opinion is given subject to the rights of any person or persons other than the record owner of said property who may be in actual possession of said property or any portion thereof, either under contract, agreement, lease or unrecorded deed. If there are any persons in possession of said property other than said record owner of the title, inquiry should be made of such persons as to what rights they claim in and to said property or the possession thereof."

This accomplishes two purposes. It protects me from liability and it protects my client from possible claims against the property. It protects me because in my opinion I make it clear that my opinion is based only on the title as shown on the face of the records and I suggest that there might be claims not shown by the records which imposes on my client the duty of investigating for himself the rights of any persons in possession. It protects the client because it points out to him that there is danger of rights being asserted by persons in possession and that he must, to protect himself, investigate such rights. I also advise the client as to this danger at the time that he employs me.

The next reservation that I insert in each opinion is as follows:

"This opinion is also given subject to possible claims for mechanic's liens for labor or material furnished in repairs, additions, alterations or improvements upon said property which were not finished until three months next prior to the date the said abstract was so last certified. The abstract does not show any mechanic's liens filed against said property up to the time when the abstract was so last certified, but the law gives mechanic's lien claimants up to three months after the completion of the work within which to file such liens. Inquiry should be made as to whether or not any such repairs, additions, alterations or improvements have been made upon said property which were not completed until after three months next prior to the date when the abstract was last certified as aforesaid."

This reservation accomplishes the same two purposes with regard to possibility of mechanic's liens being later filed for work already done that are accomplished by the reservation I have just mentioned regarding possible rights of persons in possession. If the property I am examining is vacant and unimproved, I combine the two paragraphs regarding the rights of persons in possession and the possibility of mechanic lien claims being filed in one paragraph which I use in the place of the two I have mentioned and which is as follows:

"This opinion is given upon the understanding that the property herein described is vacant and unimproved so that there can be no question of any mechanic's lien claim being hereafter filed for labor or materials furnished prior to this date in the construction, erection, alteration or repair of improvements upon said property and so that there can be no question of anyone other than said record owner of said property being in the actual possession of said property and thereby giving notice of rights, claimed under any unrecorded contract, agreement, lease or deed. However, if there is any person in actual possession of said property other than said record owner, inquiry should be made of such person as to what rights he claims in and to said property or the possession thereof."

The next reservation that I put in each opinion is the following:

"This property is subject to the lien of Moffat Tunnel Improvement District Taxes becoming payable hereafter."

I include this reservation because, of course, the lien for the Moffat Tunnel Improvement District Taxes is one which now exists and will remain during our lifetimes.

In view of the recent Soldiers and Sailors Civil Relief Acts, it is also advisable, if in the title there is a judgment or decree in a suit

which might fall within the provisions of such Acts, to include in the opinion a paragraph reading:

> "This opinion is given subject to possible rights of persons having an interest in the said property who may at the time of the entry of a judgment or decree shown in the said abstract have been in the military service of the United States and therefore within the provisions of one of the Soldiers and Sailors Civil Relief Acts which were passed by Congress in 1940."

The including of these stock paragraphs in my opinions entails little additional work on me because my Secretary has the forms of the paragraphs, each designated with a letter, so that all I need do is to tell her to put in the paragraphs bearing certain letters.

Perhaps I should mention one other problem, one which I believe has bothered me more than any other that has arisen in connection with the examination of titles. It is not a problem of law, but one of relationship between myself and other lawyers. It arises in a case where upon examination of a title I find a defect which renders the title unmerchantable because of a defect purely technical, one from which there is no actual danger, and my client purchases the property upon the understanding that the seller is to have his attorney bring a proceeding to correct the defect. The attorney for the seller frequently asks me to check each of the papers that he prepares in the suit or proceeding before he files it so that, when each step has been taken, it is in a manner acceptable to me, instead of allowing me to check the entire proceedings when he has finished his work. Naturally an attorney desires to be courteous and accommodating to a brother attorney and so for years I followed the practice in such a case of letting the attorney send to me each paper as he prepared it, then checking it and, if it was not entirely satisfactory to me, marking the corrections to be made or rewriting it myself. However, I found this practice entailed on me a very large amount of work and in come cases, especially where the work was being done by a young and inexperienced attorney, it involved as much work as if I had prepared the papers in the first place. I found that it was less work for me to rewrite the papers entirely than to tell him just how he should rewrite them and then after he had done so check them again. I finally concluded that I was doing an injustice to myself in following this practice. My client who employed me to examine the title has paid me for the examination of the title and cannot be expected to pay me anything for the correction of the title, which is to be done at the expense of the seller. And the seller cannot be expected to pay me for my work because he has employed his own attorney to handle the suit and is paying him.

Of recent years, therefore, I have followed the practice of refusing to assume this uncompensated work. Instead, after he has

finished his work, I then examine, at the court house, the papers and proceedings in the action just as I would do if I were examining the title for the first time. It is naturally rather disagreeable to me to be forced to take this position. On the one hand there is the natural desire to be courteous and helpful to a fellow attorney. On the other, there is the question as to whether another attorney has the right to expect me to put in all the extra time and work that is involved without any compensation at all just to be courteous and accommodating. Which of these two courses is to be followed by the individual attorney is a matter for his own conscience and judgment. If he is willing to put in the time and work in order to be cooperative, courteous and accommodating, God bless him! If, on the other hand, he feels that it is unfair to him to expect him to do so, then I do not believe that he should be subject to any criticism whatsoever for his position.

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## Denver Lawyers in Military Service

Among the members of the Denver Bar now in active service with the military forces of the United States are the following:

Sergeant Mandel Berenbaum, Headquarters Co., Fort Sill, Oklahoma.

Corporal Thomas C. Chapin, Officers Candidate School, Ft. Balzair, Virginia.

Major Robert D. Charlton, Field Artillery, Camp Forrest, Tennessee.

Major Sydney P. Godsman, Camp Forrest, Tennessee.

Captain Stanford W. Gregory, Army Air Corps, Fort Bliss, Texas.

Major James R. Hoffman, Fort Bliss, Texas.

Lieutenant Colonel William O. Perry, 157th Infantry, Ragley, Louisiana.

Private Marvin M. Pepper, Headquarters Co., Quartermasters Corps, Fort Logan, Colorado.

Lt. Colonel Feay B. Smith, War Department, General Staff, Div. G-3, Washington, D. C.

2nd Lieutenant Jerome R. Strickland, Army Air Corps, Las Vegas, Nevada.

1st Lieutenant Edwin P. Van Cise, Infantry, Camp Walters, Texas.

Major Harold M. Webster, Quartermasters Corps, 1919 E. Lee, Tucson, Arizona.

Captain Ford E. Williams, 120th Observation Squadron, Biggs Field, Texas.

If you know of others, let us know.