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# Real Estate Title Examinations

Arnold Weinberger

# REAL ESTATE TITLE EXAMINATIONS

*By Arnold Weinberger of the Denver Bar*

THIS paper is intended for lawyer and layman alike, as a plea for adequate compensation for the members of the legal profession who must (unfortunately) devote their time to the examination of titles to real estate—among the most important, yet least remunerative, of all services they are called upon to render.

The work of examining real estate titles has grown to enormous proportions during the past few years. As long as thirty-six years ago, our Court of Appeals in *Taylor v. Williams, 2 Colo. App. 561,* had occasion to observe that:

> "Few persons purchase real estate at the present time without obtaining from the vendor an abstract of the vendor's title and with the view of having such title passed upon by some one learned in the law."

There has been an unprecedented increase in real estate loans, transfers, financing programs and transactions of every kind and character, due to the general commercial and industrial expansion, the great influx of population, the rapid growth of cities, towns and rural districts, and the extraordinary building activity that has been prevalent everywhere in the United States. This has not been without its effect on the legal profession. The business of title examinations, which, prior to this era of expansion constituted only a very small part of a lawyer's practice, has increased in proportion to the general prosperity of the land, so that today it is a very important part of his work.

It has been said that no question of law more constantly presents itself in the average law practice than that of the title to real estate. And this, notwithstanding the inroads made by title guaranty companies on this type of work, which formerly was an exclusive function of the legal profession, for it still seems that the average careful investor desires the independent old fashioned examination by his attorney, although often in conjunction with a title guaranty policy.

A brief reference to the history and development of abstracts of title and title examinations will suggest why title examination work has become so important.

Warvell, Thompson, Martindale and other writers on the subject agree that there is little definite information concerning the origin of the practice of furnishing abstracts of title. Yet they are used generally throughout the civilized world, although the systems employed are vastly different.

In England there is evidence of the use of abstracts for some considerable length of time. References to their use are found in English writings during the early part of the Nineteenth Century as an established custom and practice. In England abstracts are made from the original instruments comprising the chain of title and title examinations are made from such abstracts or the original instruments themselves. In this way, the use of the abstract of title probably originated. There was great danger of the loss of the various muniments of title. Hence the owners were loath to part with them and furnished the abstract instead. Notwithstanding the adoption of the Torrens Registration System in 1875, the custom of making abstracts from the original unrecorded documents in England has never been abandoned and still prevails. It is the practice for the vendor's attorney to prepare the abstract and submit it, together with the original documents of title, to the attorney for the vendee, who compares them and determines whether the abstract correctly and fairly shows the condition of the title. If there are any objections, the attorney for the vendee makes so-called "requisitions" for corrections. These objections must be made and certified within a specified time or they are deemed waived and the title is considered accepted.

In this country, the English system was adopted in the colonial states and to a great extent still prevails in the eastern part of the United States. It has been departed from in the middle and western states, where abstracts are prepared from the public records instead of the original instruments; a procedure which is so familiar to all lawyers that it requires no further explanation. However, in this country during the earlier years, abstracts were practically not used at all. There was little necessity for their use for title passed by inspecting the original deeds and instruments of title and by the vendor's "warrantee" deed. With this and the covenants contained therein, the purchaser was satisfied. Conveyances and changes

in title were infrequent. The average purchaser relied to a great extent on the possession of the seller as conclusive evidence of his ownership, and on his deed of transfer. But with the passing of the years and the ever increasing commercial activity and development, property began to change hands more frequently and the old method was no longer convenient or practicable. Laws were passed everywhere which facilitated the transfer of titles; property disqualifications were gradually removed; titles soon became encumbered and involved with numerous ownerships; legal questions began to arise concerning the sufficiency of conveyances; real estate became more valuable and purchasers more careful. They no longer relied on the past or the present. Possession under the new order was only an incident of ownership, and the "warrantee" deed merely evidence thereof. The owner must look forward to the future and be careful to see that his title will be accepted by a subsequent purchaser. All of these and many other considerations gave rise to the development of the modern abstract of title and, as an indispensable incident thereto, the trained and qualified title examiner.

In the course of a pending real estate transaction, there are often great delays because of title defects, due to many causes, some of which will now be considered.

In the first place, seldom, if ever, does the vendor of property have his title examined before entering into a contract of sale. It is rather the custom to do it afterwards. There are often party-wall agreements, restrictions, reservations, rights of way, easements and many other similar encumbrances involved in a title which should be excepted or provided for in the contract and which, obviously, will be overlooked unless there is an examination of the abstract prior to drawing the contract. The dangers involved and the difficulties to be avoided are well stated by Martindale in his work on Abstracts of Title, in which the author says:

"Title Should be Investigated Before Sale is Contracted. It often happens that a defect in the title, disclosed to a purchaser, leads to a claim by a person who may assert a title founded on this defect; it is, therefore, a very prudent caution on the part of sellers to have their title thoroughly investigated by their own counsel before they offer their lands for sale, so that they may be satisfied that there is no reasonable chance of exposing their

title to a successful claim, or even to a troublesome and expensive litigation. Nor is this the only advantage to be derived from such a previous investigation, under the advice of those who are conversant with the subject. The formal difficulties with which the title may be attended may be pointed out; the necessary steps may be taken to remove the cloud; or, if the defect be found insurmountable, provision may be made in the conditions of sale against the production of proof of any deed or other fact, so far as to compel a purchaser to accept a conveyance without the same. As a consequence of the want of such precaution in having the title examined, and all matters of dispute growing out of it settled, before entering into a contract, delay is often occasioned, interest on purchase money lost, and expensive litigation incurred in seeking to enforce or resist specific performance of the agreement.

It would be a wise precaution on the part of real estate agents and brokers to adopt a rule requiring sellers to furnish an abstract of their titles before placing the property upon the market, in order that they might be enabled to protect the interests of their clients in contracting for its sale, and that buyers might know what title they were negotiating for; besides this, a sale is often defeated in the time it takes to prepare an abstract, where one has not been prepared in advance. Moreover, an abstractor should not be compelled to make a hurried search."

Secondly, an unusually large number of persons deal in real estate without any title examination at all. They are satisfied to accept the title because the seller said he had had it examined or so and so passed it for a loan. Much to their discomfort, they may soon ascertain that the title is being held up on account of defects. This often results in losing a profitable deal.

There is more truth than fiction in the story that is told of the person who became involved in title litigation and thought he had a good title when he bought the property because the seller furnished an abstract of title in a handsome blue cover, with a beautiful gold seal and red ribbon on it.

Frequently, an investor prefers to act as his own lawyer or permit others outside the legal profession to meddle with titles, not appreciating the importance of referring this work to those specially trained for it, until some difficulty arises. Often it is then too late and irreparable loss may follow. Said Judge Cooley many years ago, in the introduction to his excellent edition of Blackstone:

"Real estate has been cheap; we have been near the sources of title; conveyances of any particular parcel have not generally been numerous, nor the title complicated; the modes of transfer have been tolerably uniform and well understood; we have a general system of registry designed to give purchasers

information concerning the conveyances which have been made; and as every man of plain common sense is able to understand all these, one naturally comes to think that the nearest justice of the peace is competent to transact the business connected with his purchases and sales, and that his own good sense is sufficient to protect him against flaws in titles, or against being entrapped through the means of inadequate conveyances of the land he buys. Unfortunately he sometimes discovers, when too late, that unaided good sense is not always an infallible guide in matters of law, and that one who relies on it, implicitly, is in the proper condition of mind to be made the victim of misplaced confidence. Many a man has lost his all by assuming the sufficiency of his own knowledge and judgment in real estate matters, and by resting satisfied with his own examination or that of his county register of deeds, where he ought to have called in the best legal advice that was attainable."

The foregoing is unquestionably sound advice today.

In the third place, many investors do not select a title examiner with the same degree of care that they would choose a medical adviser or specialist. The work of title examinations is indeed a specialty. It requires painstaking care and caution in every detail of the work and a thorough knowledge of the numerous legal and practical problems which arise in connection therewith and, among other things, a comprehensive understanding of the significance and meaning of every word and term in contracts concerning real estate. As one example—witness the subject of marketable titles. What is a marketable title? The decisions on the subject are innumerable. Titles are indiscriminately referred to as good, marketable, perfect, satisfactory, etc., yet each one carries its own distinctive meaning and upon that interpretation a contract may stand or fall, a law suit be invited or forestalled. The latter fact appears by reference to a recent 300 page annotation in 57 A. L. R., pages 1253-1554, in which, on the subject of marketable titles and various defects in titles, there are 957 point citations to New York cases alone, 286 to New Jersey cases, 194 to Massachusetts, 165 to Illinois, and 167 to English cases. Many Colorado citations are included.

In England, title examination has become "a highly artificial system of rules and practice which maintains its own separate body of practitioners," while "in this country the tendency has been to loose and incoherent practice in the examination of titles and the drawing of conveyances, and few practitioners take the trouble to inform themselves in the nice distinctions and technical discriminations with which the

law of conveyancing abounds". (Martindale—*"Abstracts of Title"*, page 2).

The last-mentioned criticism of the profession by Martindale leads one to search for possible causes of this tendency to a "loose and incoherent practice in the examination of titles." If this be true, may it not be principally attributed to the insignificant fees paid to the profession for this important service? Hasty title examinations are frequent. Why? Because the average client, not appreciating the great volume of work involved in, and the responsibility of the attorney attached to title work, will not adequately compensate him for the same. The experience of the average lawyer is about as follows: A client comes to his office and states that he contemplates purchasing a parcel of real estate or making a loan. The deal usually involves a considerable sum of money. He places the abstract on his attorney's table and with it the entire responsibility. He expects to receive an assurance that his money will be invested or loaned safely. He immediately dismisses all worry regarding the matter from his mind and relies entirely on the advice of counsel. He expects the usual opinion of title under the signature of his attorney. Several hours, sometimes days of time must be spent in examining the title, and among other numerous things, inquiring into the condition of taxes, attending to a survey of the property, ascertaining the rights of those in possession, closing the deal, etc. Counsel may be obliged to resort to the law books to determine whether certain irregularities he may have found should be objected to or passed. If the title is complicated by foreclosures, court proceedings or estates, still more time is consumed in examining the original records and documents on file and weighing their legal effect. Upon completion of the title work, the attorney proceeds to draw the deeds, mortgages, releases or other necessary documents. He makes the required adjustments, closes the transaction and attends to the recording of the papers. Nor does the work cease after the opinion has been rendered and the deal closed. The next title examiner, at some future time, may discover something in the title about which he is doubtful or which he deems defective and which the previous examiner considered immaterial or inconsequential. The first examiner is then called upon to make correc-

tions. Perhaps he relied entirely upon the abstract and did not carefully examine the original records. Something may have appeared therein which was not disclosed in the abstract, or his opinion may have failed to except doubtful matters in the title, or a real defect may have been overlooked altogether. In the conference which follows between attorneys, a discussion ensues in which much speculation is indulged in as to what the law is or might be with reference to the objections raised. Sometimes they are frivolous and in fact do not affect the marketability of the title; other times they are questionable, and in still other instances, beyond any doubt, they are real. In the last-mentioned case, of course, there is nothing to do but correct or quiet the title at the attorney's own expense. In the former, the objector must be convinced that his objections are without merit, often an impossible task. And for all the foregoing the examining attorney receives the munificent fee of $15, with a possible additional $5 or $10 for closing the deal, sometimes more and often less; hardly an ash hauler's wage for the time consumed and the responsibility assumed.

The road which the title examiner must travel is rough indeed, beset with pitfalls at every turn. For the sake of the security of titles and property, the public sooner or later must be educated to the necessity of adequately compensating the profession for this highly technical work. This will insure better title examinations and fewer title complications.