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Report of the Committee on Standards for Title Opinions

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REPORT OF COMMITTEE ON STANDARDS FOR TITLE OPINIONS*

The Committee on Standards of the Real Property Section of the American Bar Association has for several years offered encouragement to the various State Bar Associations in promoting standardization and agreement among their members as to the types of defects which are sufficiently immaterial to be disregarded in giving opinions of title. The work has gone forward in a great many states and in most cases outstanding results are being obtained. This Committee now exists in this state for the first time.

Most of us are fully aware of the curse attending the over-meticulous examination of titles. See 17 Nebraska Law Bulletin 4; "The Over-Meticulous Title Examiner as a Nuisance to the Public and to the Profession." Many of us are guilty ourselves—partly because up to the present there has been no satisfactory way of determining "when a defect is not a defect." A client goes to one attorney and obtains an opinion of title thinking he can rest secure that he has bought property with a marketable title. When he goes to sell, however, the purchaser has the abstract examined by a different attorney who says that a foreclosure sale was held on improper notice back in 1910. What can the first client reasonably think? Either his confidence in his lawyer is shaken or his regard for the profession as a whole is lessened. Not infrequently it is even suggested by the seller that the second examining attorney is attempting to promote a quiet title action. The probability is that the objection raised by the second lawyer is not a real defect, and in most cases the objection was made solely because the second examiner is afraid that the next attorney who examines will also raise the point, thus challenging his opinion. The

*Adopted by the Washington State Bar Association at its annual meeting at Spokane on September 25, 1942.

third examiner may be moved by similar consideration, and so a vicious circle is established.

Again, each examiner, remembering his own clients coming in with an adverse report on a title which he had previously passed, is inclined to take out his spite on the next abstract he has occasion to examine by taking exception to every uncrossed "t" or undotted "i." In this manner we are causing each other no end of trouble and are making a nuisance of ourselves to the public. If we can but agree in advance to pass over certain types of alleged defects, not only will we greatly relieve our own individual difficulties as examiners but we shall also have done a public relations job for the entire profession.

At the outset there are two fundamentals which should be kept in mind. First, an examining attorney is giving merely an *opinion* of the title. The law protects him if he has used the care of a reasonably prudent title examiner—it does not require him to be 100 per cent accurate. Second, the object of examination is to ascertain if the abstract shows a *marketable title,* not a letter perfect title. As stated in *Cummings v. Dolan,* (52 Wash. 496):

> "The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt, in other words, that a purchaser is not entitled to demand a title free from every possible technical suspicion; he can only demand such title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept."

On the first proposition, if an examiner follows the standards set up by us after careful consideration and conference and after submission and acceptance by the bar, he will almost certainly, so far as those standards are involved, be satisfying the care required of a reasonably prudent title examiner.

This does not mean that the standards proposed by this committee will necessarily conform to ultimate decisions of the courts, or that such standards have any legal effect in themselves. But this does not destroy their usefulness, as has been demonstrated by the successful working of the plan in other states. Successive committees will correct our standards if and when they prove erroneous. Until that time we can rely on them just as we rely on a court decision until it is overruled. So far as possible, controversial matters have been avoided and every effort made to avoid giving the semblance of judicial importance to any of the proposed standards.

The method of procedure adopted by the committee follows generally the system used in other states. Actual problems taken from the experience of our members have been gathered together and after study and consideration a recommendation has been made. These represent only a start on what may eventually be done by subsequent committees. Many of the problems may seem to deal with trifles—yet it is so often the trifling defect which causes the trouble. It is hoped that these problems and answers will be approved with the acceptance of this report and that members of the bar will assist the efforts of the committee toward uniformity by following said standards and by submitting to the committee the problems which they encounter in their own abstract examinations.

The aim of your committee has been to liberalize standards for title opinions so far as reasonably permissible. At the same time, it should be pointed out that title examinations indicate many inexcusable errors made by attorneys, and it is hoped that nothing herein will encourage carelessness or lax methods on the part of the bar in connection with documents and proceedings affecting real estate titles.

Your committee respectfully moves:

1. That this report be accepted, together with the standards hereto attached.
2. That a permanent file be kept for the reports and standards of this committee.
3. That the publication of this report and of said standards be authorized.

Respectfully submitted,

HERMAN BROWN,
KENNETH ROEGNER,
RICHARD A. HOGAN,
ELWOOD HUTCHESON,
H. M. RAMBLEN,
Chairman.

Standard No. 1

Problem:

Most U. S. Government patents have been issued subject to vested and accrued water rights, the right to extract ore, and rights-of-way for ditches and canals. Shall we list these matters as encumbrances in our title opinions?

Recommendation:

It is recommended that the attorney list said matters in his title opinion, with the added statement that no objection to the marketability of the title is made on that account.

See *Dopps v. Alderman,* 112 Wash. Dec. 90 (Jan. 17, 1942).

No. 2

Problem:

Some U. S. Government patents, particularly those issued to railroads, contain a clause: "Excluding and excepting all mineral lands should any such be found. . . ." May we disregard this exception in our title opinions?

Recommendation:

It is recommended that no exception be listed in our title opinions on this account.

Comment:

The issuance of a U. S. Government patent (except when based on mineral claims) has been held to be a conclusive determination by the Government that the land is agricultural and non-mineral bearing and exceptions such as the foregoing are void.

See *Burke v. S. P. R. Co.,* 58 L. Ed. 1527.

No. 3

Problem:

State deeds expressly reserve and except "all oils, gases, coal, ores, minerals and fossils . . . and the right to explore," subject, however, to the requirement that full payment must be made to the owner for damage to his land in event the state exercises such rights.

See REM. REV. STATS. 7797-56.

Recommendation:

It is recommended that where title is derived under such a state deed, that the attorney list such exceptions and reservations in his title opinion with the added statement that no objection to the marketability of the title is made on that account.

Problem: **No. 4**

Many railroad deeds, particularly from the N. P. R. R. Co. and N. P. Ry. Co., contain reservations of railroad rights-of-way and of coal and iron lands.

Recommendation:

It is recommended that the examining attorney list such reservations in his title opinion.

Comment:

A floating railroad right-of-way is not extinguished by non-user or by ordinary adverse possession. *See 142 Wash. 204.*

The purchaser or mortgagee for whom an attorney is examining will ordinarily be justified in accepting the title subject to the above exceptions on the basis of a reliable affidavit or report that no railroad has been located and that the lands in question are non-coal or mineral bearing.

Problem: **No. 5**

May interlopers in the chain of title be disregarded?

Recommendation:

It is recommended that a conveyance or mortgage appearing in the abstract from a person who appears never to have had any connection with the property may be disregarded as not constituting any cloud on the title, except where the conveyance or mortgage is the last instrument in the chain of title.

Comment:

See *Cummings v. Dolan,* 52 Wash. 496.

Problem: **No. 6**

When may discrepancies in names or initials of parties in the chain of title be disregarded?

Recommendation:

(a) In identifying a grantor with a prior grantee, it is recommended that the following discrepancies be disregarded unless the abtract discloses other information creating a reasonable doubt as to the identity:
   1. If the party is designated by a full Christian (given) name and a full surname (family name), discrepancies in the spelling of either or both may be disregarded so long as the pronunciation remains unchanged.
   2. If the party is designated by a full Christian and full surname plus a middle initial, discrepancies in the initials may be disregarded. *e.g.* Lewis E. Haywood and Lewis R. Haywood.
   3. If a party is designated in one place by a full Christian name and in another place simply by initials, identity should be established by affidavit or otherwise, unless the last discrepancy is more than 10 years old, in which case the discrepancy may be disregarded if the first initial corresponds to the first letter in the Christian name.

(b) Where the discrepancy appears in a court proceeding affecting the title in which process or notice is served on the owner and he does not appear, the discrepancy may not be disregarded, unless the pronunciation thereof is substantially the same within the rule of *iden sonans.*

Comments

See generally *Kelly v. Kuhnhausen,* 51 Wash. 193; *Carney v. Bigham,* 51 Wash. 452.

Problem: **No. 7**

1. May an examiner disregard the omission of a notarial seal on the acknowledgment of a recorded conveyance?
2. May other defects in the form of an acknowledgement of a recorded conveyance be disregarded?

Recommendation:

1. It is recommended that omission of the seal be disregarded if the deed is 10 years old, *or* if it be shown that the notary was in fact duly commissioned at the time the acknowledgment was taken.
2. Defects in the form may be disregarded, although good practice will suggest correction of the defect and re-recording wherever it is possible.

Comment:

See *In re Deaver's Estate,* 151 Wash. 454; REM. REV. STAT. Sec. 10599.

Problem: **No. 8**

May an examiner pass over a conveyance or a release executed by a corporation on which the corporate seal is omitted?

Recommendation:

It is recommended that such defect be passed, if the authority of the officers to execute the instrument can be otherwise established, *or* if the deed is at least 10 years old.

Comment:

See *Oldfield v. Angeles Brewing & Malting Co.,* 77 Wash. 158.

Problem: **No. 9**

In support of a corporation's conveyance, mortgage or release, must the resolution or other authority for the same be supplied?

Recommendation:

Not if the instrument is

1. Executed by the president or vice-president and secretary, and also
2. Is either under corporate seal or is at least 10 years old.

Problem: **No. 10**

When may a contract of sale be disregarded—title having been retained, or conveyed to someone other than the contract purchaser, and there being of record no relinquishment or quitclaim deed from the contract purchaser.

Recommendation:

It is recommended that if the contract contains a specific provision for consummation on or before a fixed time, that after the lapse of ten years from the expiration of the time limit, it should no longer be considered an encumbrance, provided it is shown that purchaser or others

claiming under purchaser have not been in possession within the last 10 years.

Problem: **No. 11**

After what period of time may an unreleased mortgage be disregarded?

Recommendation:

It is recommended that the title be certified in disregard of the mortgage if there has been reasonable activity in the title for a period of 30 years without recognition of the unreleased interests.

Comment:

"Reasonable activity" may be considered too indefinite a criterion, but this is a situation where some discretion must necessarily be exercised. Ordinarily, if, spread over the 30-year period suggested, there are at least five instruments such as warranty deeds or mortgages which would be expected to refer to old claims if there were any substance to them, the title should be considered reasonably active.

Problem: **No. 12**

A mortgage is placed of record followed by the recording of a "correction mortgage" which corrects or revises the first instrument in some regard and contains a recital to that effect. The correction mortgage in due course is released, but the original mortgage is not. Is it necessary to require a release of the original mortgage?

Recommendation:

It is recommended that the title be passed without requiring a release of the original mortgage.

Problem: **No. 13**

May the examining attorney pass a mortgage as released when the release properly describes the date and amount of the mortgage but fails to refer to the book and page of recording?

Recommendation:

It is recommended that such mortgage be treated as released if the abstract shows only one mortgage which fits the description as to date and amount shown in the release and if the abstractor will add a notation that there is of record no other mortgage between the same parties of the same date and amount covering this or any other property.

Problem: **No. 14**

May the examining attorney pass a mortgage as released when the release shows the correct book and page of recording but shows an incorrect date or an incorrect amount for the mortgage?

Recommendation:

It is recommended that the mortgage be passed as released if the abstractor will add a notation that there is no other mortgage of record between the same parties on this or any other property of the date or amount referred to in the release.

Problem: **No. 15**

May the examining attorney pass a mortgage as released when the release identifies the mortgage by correct date and amount but refers to the wrong book and page of recording?

Recommendation:

It is recommended that the mortgage be passed as released if the abstracter will add a notation showing that there is no other mortgage between the same parties recorded at the book and page referred to in the release, and that there is no other mortgage of record between the same parties having the same date or for the same amount.

No. 16

Problem:

A deed runs to a grantee without showing name of grantee's wife, or grantee's martial status. Later grantee and his wife convey the property away without any recital that they were husband and wife at the time they acquired title. May an examining attorney pass the title in this condition?

Recommendation:

It is recommended that the title be not certified without objection on this account unless it appears from *other* instruments in the abstract or from reasonable collateral inquiry that grantee had the same wife or was unmarried at the time he acquired title.

Comment:

Strictly speaking, it is possible for the wife of a grantee to have died (or to have been divorced) after title was acquired and the grantee to have remarried before conveying so that if the first wife died leaving children the title to an undivided one-half would be vested in them (or in case of divorce in the divorced wife). As a practical matter, however, experience shows that it is almost impossible for this to happen without some notice thereof appearing in the records. There are thousands of conveyances which fail to name the grantee's wife and it is often impossible to secure any showing with reference thereto. This is a situation where the extent of the inquiry to be made must be determined by each examiner in the light of the particular case.

No. 17

Problem:

A deed is given to John Smith, trustee, without naming a beneficiary and without setting forth any trust. There is no declaration of trust or other trust instrument shown in the abstract. Thereafter, there is a conveyance from John Smith, trustee. May the conveyance be considered sufficient?

Recommendation:

It is recommended that the conveyance be considered sufficient in the following circumstances:

1. If the instrument creating the trust is obtained and placed of record showing trustee's authority to convey, or
2. If the conveyance is 30 years old and John Smith's wife joined in executing the deed—no further reference to any trust being made in later instruments.
3. If (for more recent conveyances) the wife joins in the deed and satisfactory showing by affidavit is made that there were in fact no trust restrictions.

See *Davidson v. Mantor,* 45 Wash. 660; *Reilly v. Hopkins,* 133 Wash. 425.

Problem: **No. 18**

There is a conveyance to *A* without any showing or indication of *A's* marital status. Later *A* conveys, again without any indication of marital status. An affidavit is supplied showing that *A* was unmarried at the time of acquiring title. May the examiner pass the conveyance on the basis of such an affidavit?

Recommendation:

It is recommended that the conveyance be passed.

Comment:

See *Singer v. Guy Investment Co.*, 60 Wash. 674.

Problem: **No. 19**

There is a conveyance to *A*. Later *X, Y* and *Z* convey the property by deed containing a recital that *X, Y* and *Z* are the sole heirs at law of *A*, deceased. A disinterested affidavit is also supplied showing that *X, Y* and *Z are* the sole heirs of *A*. May the title be passed in this condition without probate of *A's* estate?

Recommendation:

It is recommended that the title be passed if the conveyance from the heirs is 30 years old and if the affidavit establishes the death of *A* prior to 1901 (when the inheritance tax law was enacted) or if subsequent thereto, that waiver from the inheritance tax division be obtained.

Comment:

It is recognized that ordinarily an affidavit to establish heirship will not be accepted as sufficient (See *Crosby v. Wynkoop,* 56 Wash. 475). Nevertheless, where a disinterested affidavit is supplied and the deed from the heirs is at least 30 years old, so that subsequent owners have held under color of title for a period exceeding the combined total of 21 years plus the statutory limitation period, it is thought that an examiner may reasonably consider the title marketable.

Of course, if there is no deed from the heirs the title cannot be passed simply on the strength of probate proceedings on the estate of *A's* spouse. (See *France v. Freeze,* 4 Wash. (2nd) 124).

Problem: **No. 20**

It appears from the abstract that a deed in the chain of title was placed of record after the grantor (or one of the grantors) died.

Recommendation:

It is recommended that a reliable affidavit be obtained showing when the deed was delivered and if possible the actual consideration paid. If the delivery was made prior to grantor's death, the deed may be treated as a valid conveyance:

If the deed was delivered within two years of grantor's death and the full market value was not paid therefor, an objection may be noted covering the possibility of a lien for state inheritance tax or federal estate tax.

Any deed delivered after grantor's death will not be passed as valid.

Problem: **No. 21**

May title be passed based upon a recorded statutory community contract between husband and wife?

Recommendation:

It is recommended that the same be approved upon proper showing of record by affidavit or otherwise that the spouse has been deceased for more than six years, that the parties were married at the time of such decease and that the property is exempt from inheritance and estate taxes, or that the same have been fully paid.

(See *Rem. Rev. Stat.* 1368, 6894).

Problem: **No. 22**

Under what circumstances may the conveyance of a person who has been committed to a state institution in insanity proceedings and subsequently discharged as recovered, be regarded as sufficient?

Recommendation:

It is recommended that such a conveyance be considered sufficient where an order restoring to competency has been entered in the proceedings under which such person was committed.

Problem: **No. 23**

Under what circumstances may a deed or mortgage executed by an executor under a non-intervention will be passed where the estate is in process of probate?

Recommendation:

It is recommended that such deed or mortgage be passed in either of the following situations:

1. Where the will contains specific authority for the conveyance in question and there are no inheritance taxes or such taxes have been paid, *or*
2. Where an order of solvency has been entered and a showing is made that the conveyance is for an administrative purpose and there are no inheritance taxes or such taxes have been paid; *or*
3. Where a petition to sell or mortgage is presented to the court showing necessity for selling of mortgaging for administrative purposes and the regular procedure followed as prescribed by statute for intestate estates.

Problem: **No. 24**

May the examining attorney pass a mortgage as released when the release is executed by the executor or administrator of the estate of the mortgagee, which is in course of probate in another county or state?

Recommendation:

It is recommended that such mortgage be treated as released if certified copies of the portions of the foreign probate showing due and proper appointment and qualification of such executor or administrator be recorded in the county where the real property is situated and showing made that the letters have not been revoked at the time of executing the release.

Problem: **No. 25**

A mortgage held by a corporation is released by an attorney-in-fact acting under a properly executed, acknowledged and recorded power of attorney from the corporation. Is it necessary for the release to bear the corporate seal?

Recommendation:

It is recommended that the release be passed without the corporate seal.

Problem: **No. 26**

A, a mortgagor, conveys the real property subject to the mortgage to *B*, the mortgagee.

Recommendation:

1. Where the deed contains the recital that it is given in extinguishment of the mortgage and the debt secured thereby, such deed may be treated as extinguishing the mortgage and transferring the fee interest to the mortgagee.
2. Where the deed contains no recital of intention of extinguishing the mortgage by the conveyance, there is only a presumption of merger, the ultimate effect depending upon the intention of the parties. Such deed may be given effect as an absolute conveyance, where the mortgagee executes a release, or where he subsequently conveys with a warrant against the encumbrance.

Comment:

The vital and essential thing to the validity of a deed taken in lieu of foreclosure of a mortgage is that the debt secured by the mortgage must be cancelled. If that is not done and the relation of debtor and creditor continues, then the mortgage lien continues.

Problem: **No. 27**

The abstract shows that the patent from the United States has not been recorded, there being merely a takeoff from the records of the U. S. Land Office.

Recommendation:

It is recommended that the attorney make note of this fact, and recommend that the patent, or a certified copy thereof be recorded, with the added statement that no objection to the marketability of the tile is made on that account.

Comment:

Title by patent from the United States is title by record and neither delivery to the patentee nor recording of the patent in the office of the county auditor is necessary in order to give it validity. The patent should be recorded, however, in order that the evidence of title may be readily available.

See *Sayward v. Thompson,* 11 Wash. 706.

Problem: **No. 28**

The abstract shows an unreleased claim of lien of mechanics or material men's that has been filed for a period in excess of eight calendar months.

Recommendation:

The treatment of such liens is largely a matter within the discretion of the examiner based on consideration of the facts of each case. If the lien notice contains no statements about the extension of credit, liens of small amount may be safely ignored after eight months from the date of filing. Liens of large amounts should be investigated before being pasesd and if possible release should be required, unless at least two years old.

Comment:

Rem. Rev. Stat., Sec. 1138, provides that no such lien shall bind the property subject to the lien for a longer period than eight calendar months after the claim has been filed, unless an action be commenced in the proper court within that time to enforce such lien; or if credit be given, then eight calendar months after the expiration of such credit. The Supreme Court has not decided whether the credit given must be stated in the lien notice in order to extend the lien beyond eight months. If an effective extension may be given without such extension being set forth in he notice, then it cannot be determined from the records whether a lien is outlawed.

Problem: **No. 29**

Secs. 841 and 842, Rem. Rev. Stat. refer to the serving of "notice" on tenants in common in partition proceedings. Is the requirement satisfied by the serving of a summons in regular form.

Recommendation:

It is recommended that service of summons be considered sufficient.

BAR BRIEFS

The annual meeting of the Washington State Bar Association and Association of Superior Court Judges was held in joint convention at the Hotel Davenport, Spokane, on September 25 and 26, 1942. On account of war conditions, it was practically completely devoted to business, but the members of the Spokane Bar were most hospitable in their welcome and provided a very enjoyable stag supper and entertainment at the Round Table Room of the Desert Hotel on the evening of September 25. Among the interesting matters presented to the convention and not otherwise noted in this issue of THE JOURNAL was a debate upon a proposed bill abolishing the defense of contributory negligence and creating a rule of comparative negligence in civil actions for the recovery of damage arising out of negligence. Upon conclusion of the debate the Bar Association resolved to abandon any action towards sponsoring or recommending passage of any bill substituting the comparative negligence rule for the rule of contributory negligence.

The Honorable Scott Z. Henderson was selected President of the Washington State Bar Association for the ensuing year and the Honorable Charles W. Hall was selected President of the Association of Superior Court Judges.

The Legislative Committee of the Association requests all persons desiring to submit bills for the consideration of the committee to deliver the same in complete form *immediately* to the Bar Association office. Briefs in support of submitted bills are helpful. Assistance with respect to bills may be obtained from any member of the committee.

Judge Charles H. Leavy was sworn into office at a special session of the United States District Court for the Western District of Washington, Southern Division, at Tacoma, on August 1, 1942. Judge John C. Bowen presided, with Judge Edward E. Cushman, Judge Jeremiah Neterer and Judge Lloyd L. Black on the bench. Judge Cushman administered the oath of office to Judge Leavy, and Judge Bowen expressed for the Court its pleasure in receiving Judge Leavy as a member.