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Standards of Title Examination

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Standards of Title Examination

*Adopted in 1952 and 1953 by
Ohio State Bar Association*

THE PRIMARY PURPOSE of standards of title examination is to promote uniformity of practice pertaining to marketability of titles. Several advantages accrue to both the public and to the profession through observance of the standards. The public interest is served by increasing the stability and negotiability of titles. No undue burden is placed upon clients when the standards are properly prepared. Lawyers are benefited by improved public relations, by guidance and authority on problems which may be debatable, by avoidance of unprofitable controversies between themselves, by elimination of labor and expense in curing irregularities, and by a protection against criticism and charges of negligence when the approved rules have been followed.

We are all acquainted with an evil at which these canons are aimed, to wit;—objections made only because the lawyer fears that the thoroughness of his examination may be disparaged by a subsequent examination. Objections are sometimes made not because the examiner believes that the irregularity is actually significant or makes the title unmarketable but because of the prospect that a following examiner may make the objection. This evil can be remedied when the action of the second examiner can be ascertained in advance by reference to the promulgations of our state association.

Standards of title examination have been adopted by the bar associations of seventeen other states. All reports from these states show that the bar welcomes and appreciates the benefits. As was said in a report of the Connecticut committee to the American Bar Association, "The reputable conveyancers are all following them as if they were a bible." Marketable title acts do not necessarily conflict because most questions of marketability arise during the period not affected by such enactments.

The only sanction for the standards is the attitude of the bar as a whole; their effectiveness depends upon a general observance. Enforcement through legislative action is believed not to be proper; the inflexibility resulting from incorporation in statutes is thought to be inadvisable. Infallibility is not claimed for these rules and is not necessary for their purpose. Even a decision of

the Supreme Court may be overruled. We are convinced that these standards may be confidently relied upon until amendment is required by subsequent statute or judicial decision. An attorney can be justified as reasonably prudent when following the course approved by this association.

This program was initiated in the Ohio State Bar Association during 1950 and was one of the reasons for an ABA award to it this year. The project is a living one as both old and new problems will continue to call for consideration. The scope of the work has been limited by the committee's policy of proposing standards for adoption by the association only where the practice has been diverse and where no substantial doubt as to the law or as to the better practice has been found.

The benefits can be greatly extended by a widespread submission of recommendations. Suggested standards are solicited and may be presented to any member of the committee or may be sent to the association office. Some county associations have already acted by adopting the standards and it is hoped that many more will do so. Additional standards applicable to specific local situations may be found helpful in some communities.

November 9, 1953

Ohio State Bar Association
Real Property Committee

Walter J. Morgan, Chairman of Committee 1950-1954

Thomas J. McDermott, Chairman of Subcommittee 1950-1954

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1.1 GENERAL RULES—MARKETABILITY

Problem A:

What is the general rule as to marketability?

Standard A:

A marketable title is one which a purchaser would be compelled to accept in a suit for specific performance.

Objections to a title should not be made by an attorney when the irregularities or defects do not impair the title or cannot reasonably be expected to expose the client to the hazard of adverse claims, litigation or expense in clearing the title.

Comment A:

The Supreme Court states the following in the syllabus of *McCarty v. Lingham* (111 Ohio St. 551): "A marketable title imports such ownership as insures to the owner the peaceable enjoyment and control of the land as against all others."

2.1 EXAMINATION—PREVIOUSLY BY ANOTHER

Problem A:

When an attorney examines a title which he believes should not be approved and he knows that another attorney has approved it, should he communicate with the other attorney?

Standard A:

Yes, if practicable an opportunity should be afforded for discussion and correction.

2.2 EXAMINATION—PERIOD**Problem A:**

What period of time should be required as the basis for an opinion on title?

Standard A:

An examination beginning with matters which have been of record for at least sixty-five years shall be considered sufficient as to the period, provided the records examined begin with a warranty deed, a judicial proceeding, or other facts which establish a reasonable proof of title; and provided further that prior and undisposed of defects of title or encumbrances are not indicated during the period actually examined.

Problem B:

Should the period of time of the examination be stated?

Standard B:

Yes.

2.3 EXAMINATION—FORM**Problem A:**

What should a report on title contain?

Standard A:

The certificate or opinion should include:

- (1) The period of time of the examination.
- (2) That the opinion is based on an abstract of title or is based on an examination of the public records of _____ County, Ohio, as disclosed by the public indexes relating to the premises.
- (3) That the opinion or certificate does not purport to cover the following: (a) Matters not of record, (b) Rights of persons in possession, (c) Questions which a correct survey or inspection of the premises would disclose, (d) Rights to file mechanics' liens, (e) Special taxes and assessments not shown by the county treasurer's records, (f) Zoning and other governmental regulations.

(4) An opinion or certification that the _____ title is vested in _____ by instrument of record, recorded in _____ Records, Volume _____, Page _____.

(5) That the title is marketable and free from encumbrances except those matters set forth.

(6) Clear and concise language setting forth the defects and encumbrances.

The following basic form is suggested:

The undersigned hereby certifies that he has made a thorough examination of the records of _____ County, Ohio, as disclosed by the public indexes covering the period from _____ to the date hereof, relating to the premises hereinafter described at Item 1.

This certificate does not purport to cover matters not of record in said County, including rights of persons in possession, questions which a correct survey or inspection would disclose, rights to file mechanics' liens, special taxes and assessments not shown by the county treasurer's records, or zoning and other governmental regulations.

The undersigned further certifies that, in his opinion based upon said records, the fee simple title to said premises is vested in _____ by a _____ from _____, dated _____, filed for record _____ at ___ M., and recorded at volume _____, page _____ of the deed records; and that, as appears from said county records, the title is marketable and free from encumbrances except and subject to the matters set forth herein at Items 2 to _____, inclusive.

Dated at _____, Ohio this _____ day of _____, 19_____.

Attorney at Law

3.1 CONVEYANCES—ACKNOWLEDGMENTS

Problem A:

A deed is executed outside of Ohio without an attached certificate showing authority of the notary public. Should objection be made to the title?

Standard A:

No.

Problem B:

Should an objection be raised because a deed bears the signatures of only two witnesses and has certificates of acknowledgments in more than one county of the state?

Standard B:

Yes. Proof should be required that the two witnesses were present at the execution in each county.

Problem C:

Is a deed defective because the seal of the officer taking the acknowledgment is omitted or because his term of office has expired?

Standard C:

No.

3.2 CONVEYANCES—DESCRIPTIONS**Problem A:**

Should an objection to the title be raised because one or more deeds in the chain of title contain an error with respect to the reference to the proper plat book and plat book page of platted land?

Standard A:

If the deed refers to a subdivision by an exclusive descriptive name, an objection should not be raised because of an error in the reference to the plat book and the plat book page where said subdivision is recorded.

3.3 CONVEYANCES—DELIVERY**Problem A:**

Should a title be considered unmarketable when it appears from the county records that the grantor died before the deed was filed for record?

Standard A:

Yes, unless waived for lapse of time or unless there is satisfactory proof of delivery before death.

An affidavit of the notary public or the witnesses, or an attorney at law for a party in the transaction, or of other responsible persons who were present at the time of delivery,

should be deemed satisfactory proof if setting forth sufficient facts.

Delivery should be presumed after the deed has been of record for twenty-one years, in the absence of other facts raising a doubt.

3.4 CONVEYANCES—SURVIVORSHIP

Problem A:

What language creates an estate with right of survivorship?

Standard A:

Where the operative words of a deed clearly express an intention to create the right of survivorship, such expressed intention will be given effect and the survivor will take by force of the terms of the grant. Upon the death of the other grantee or grantees, the survivor acquires the entire estate, subject to the charge of inheritance taxes.

A conveyance is not sufficient to create an estate with right of survivorship when "to A or B"; "to A or B, their heirs and assigns"; "to A or B, his or her heirs and assigns"; "to A and B or the survivor"; or the like.

Comment A:

The use of the disjunctive word "or" in the above quoted language creates uncertainty as to whether the estate passes to A or B, passes to A and B with right of survivorship, or passes to A and B as tenants in common. Many decisions require deeds to be definite and grantees to be ascertainable. The courts should determine the intention and effect under the facts in a particular case.

The following language has been approved in Ohio cases: to A and B "jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns" (*Lewis v. Baldwin*, 11 Ohio 352); "unto said grantees and the survivor of either, their heirs and assigns" (*In re Dennis*, 30 Ohio N. P. (N. S.) 118); "as tenants in common of undivided equal interest for their respective lives, remainder in the whole to their survivor" (*In re Hutchinson*, 120 Ohio St. 542); to A and B "and the survivor of them, her or his heirs and assigns" (*Ross v. Bowman*, 32 Ohio Op. 27).

3.4 CONVEYANCES—SURVIVORSHIP

Problem B:

What shall be sufficient proof of the first death of a grantee of a survivorship deed?

Standard B:

Showing death by the following shall be considered sufficient for a marketable title (subject to payment of inheritance tax, if any):

(a) an affidavit recorded in the office of the County Recorder;

(b) a recital in a deed remaining unquestioned of record for more than ten years;

(c) a recital in a deed referring to an official death record, or

(d) a copy of an official death record recorded in the office of the County Recorder.

Requirements of the County Auditor or County Recorder must be considered in some counties.

Problem C:

Is a title marketable in the survivor where the deed is from A (or from A and B) to A and B with proper words of survivorship?

Standard C:

No, the effect of a deed from the grantor to himself is of such doubt as to render the title unmarketable in the survivor.

3.5 CONVEYANCES—PARTNERSHIP

Problem A:

What should be required to show the authority of partners to execute conveyances in behalf of the partnership?

Standard A:

A conveyance from a partnership holding the title is sufficient if it recites that the partners executing it are all the partners, in the absence of information to the contrary. When it does not appear that all the partners executed the conveyance, satisfactory evidence of authority should be required.

Problem B:

Should an objection be made to the title because a deed to a partnership does not disclose that the grantee is a partnership?

Standard B:

No, the requirement should be considered directory, and the defect not such as will prevent the title from passing to the partnership.

3.6 CONVEYANCES—RECITAL OF MARITAL STATUS**Problem A:**

After what lapse of time should the omission from a deed of a recital of grantor's marital status not be regarded as a defect?

Standard A:

The omission of such recital is not a defect when the deed has been of record for more than fifty years, in the absence of notice of subsequent facts indicating the contrary.

Problem B:

Should an objection be raised when the chain of title discloses that the grantor previously had a spouse who does not release dower?

Standard B:

Yes, unless omission of the release is satisfactorily explained.

Problem C:

Should a title objection be made where the deed recites that the grantor is divorced and the record of the divorce proceedings is not available for examination?

Standard C:

Yes.

3.7 CONVEYANCES—DATES**Problem A:**

Shall errors or omissions in the dates of instruments or acknowledgments be considered defects?

Standard A:

No.

3.8 CONVEYANCES—VARIANCE OF NAME

Problem A:

When shall a variance between the name of a grantor and the name of the grantee in the next preceding deed be considered a defect of title?

Standard A:

A variance shall not be considered a defect, in the absence of other facts:

(a) when the name of the grantee agrees with the name of the grantor as the latter appears of record in the granting clause, or in the signature, or in the certificate of acknowledgment;

(b) when the variance consists of a commonly recognized abbreviation or derivative;

(c) when the word “The” is omitted or added to a corporate name;

(d) when the difference is trivial or the error is apparent on the face of the instrument.

Problem B:

Should an objection be made because a grantee is designated by her husband’s given name, as “Mrs. John Doe”?

Standard B:

Yes. Evidence as to the person intended by such designation should be required.

Problem C:

Should an examiner rely upon a recital purporting to cure an error in the name of a person in the chain of title?

Standard C:

Yes, unless the variance is so great or unless the other circumstances are such as to create a reasonable doubt of the truth of the recital.

3.9 CONVEYANCES—POWERS OF ATTORNEY

Problem A:

Is one spouse competent to act for the other under a power of attorney to convey land or to release dower?

Standard A:

Yes.

3.10 CONVEYANCES—BY EXECUTOR OR OTHER FIDUCIARY

Problem A:

Can an executor convey a good title, under an otherwise valid power, within six months after the probate of the will?

Standard A:

Yes, when sold in good faith and provided proceedings to contest the will have not been commenced at the date the deed is delivered. Good faith is ordinarily presumed.

Comment A:

Ohio General Code Sec. 10509-24 provides that sales made lawfully and in good faith by the executor and with good faith of the purchasers shall be valid as to such executor. It should be presumed that the legislature intended to make a conveyance valid as to a bona fide purchaser when making it valid as to the grantor.

Note: Ohio Revised Code Sec. 2113.23 (Ohio General Code Sec. 10509-24) has been amended so that the rule of this standard is statutory as to conveyances effective after October 15, 1953.

Problem B:

Is a conveyance defective because a fiduciary signs and acknowledges as an individual?

Standard B:

No, provided the conveyance otherwise clearly shows an intention to convey as fiduciary.

3.11 CONVEYANCES—FROM CORPORATIONS

Problem A:

When should the authority of officers of a corporation for profit to execute a corporate deed not be questioned?

Standard A:

The authority should not be questioned when the deed is executed by two officers, in the absence of known facts creating a doubt. This standard is not intended to apply to requirements of the attorney for the purchaser at the time of closing the purchase.

Comment A:

Conveyances from nonprofit corporations are governed by express statutory provisions.

4.1 ENCUMBRANCES—COURT COSTS**Problem A:**

When should an objection be made to a title because of unpaid court costs assessed against one or more owners in the chain of title?

Standard A:

An objection should be made only when such unpaid costs are a lien.

Comment A:

Court costs are a lien only when execution has been duly levied on the property or when a certificate of judgment has been filed during the judgment debtor's ownership of the property.

4.2 ENCUMBRANCES—INHERITANCE TAXES**Problem A:**

Is decedent's real estate divested of the lien of inheritance tax by a conveyance by an executor acting pursuant to a testamentary power of sale?

Standard A:

No.

Comment A:

There is not sufficient authority to justify omission of the lien from the title report.

4.3 ENCUMBRANCES—RELEASE BY ATTORNEY**Problem A:**

Does the attorney for a judgment creditor have implied authority to release specific land from the lien, or to satisfy the judgment upon partial payment, or to assign the judgment?

Standard A:

No.

Comment A:

The judgment creditor only may assign, waive or release the judgment. An attorney for a judgment creditor by reason of the limited agency relating to the case cannot without specific authority from his client, assign, waive or release the judgment. See *Card v. Waldrige*, 18 Ohio 411; *Wilson et al., v. Jennings et al.*, 3 Ohio St. 528; *Beard v. Westerman*, 32 Ohio St. 29; *Counter v. Armstrong*, 9 Ohio Dec. Repr. 62; *Holden v. Lippert*, 12 Ohio C. C. 767; and *Harrison v. Kirkbride*, 16 Ohio St. 391.

4.4 ENCUMBRANCES—LEASES**Problem A:**

Should an oil, gas or coal lease be shown when satisfactory evidence is furnished that rentals are in default and that minerals are not being produced?

Standard A:

No, provided further that the primary term of the lease has expired.

4.5 ENCUMBRANCES—FORECLOSED MORTGAGES**Problem A:**

Should any record of a mortgage release in the office of the county recorder be required when the mortgaged land has been conveyed pursuant to a proper foreclosure sale?

Standard A:

No.

5.1 PROBATE COURT PROCEEDINGS—INVENTORY**Problem A:**

Does omission of the real estate from the inventory and appraisal cast a cloud on the title?

Standard A:

No, such omission standing alone does not affect marketability.

5.2 PROBATE COURT PROCEEDINGS—DEBTS AFTER FOUR YEARS

Problem A:

Should objection be made to the title of a purchaser from the heirs on account of decedent's unpaid debts (a) where the estate has not been administered and more than four years have elapsed since decedent's death, or (b) where the final account has not been approved in the administration and more than four years have elapsed since the granting of letters without suit to subject the real estate having been commenced?

Standard A:

No.

Comment A:

The lien of inheritance tax is not barred by the four-year statute of limitations.

5.3 PROBATE COURT PROCEEDINGS—CERTIFICATES FOR TRANSFER

Problem A:

Do errors in a certificate for transfer from probate court affect the title?

Standard A:

No. Objections on account of errors in a certificate for transfer should not be made (a) unless the errors are such as to cause future difficulties to the client in obtaining a transfer on the tax records, or (b) unless the terms of the certificate raise a reasonable doubt of the facts of ownership shown by other records of title.

Problem B:

Should a recital as to heirship in an instrument in the chain of title be accepted as proof of the facts stated in lieu of a certificate for transfer or of an affidavit for transfer?

Standard B:

Yes, provided the instrument has been of record for more than thirty years.