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Title Insurance and Marketable Title

notice to the community of the proposed amendment in the manner suggested by the Massachusetts statute. This would require a municipality to give publicity to a proposed amendment in order to protect itself. In so doing, the municipality would also protect the individual landowner who might otherwise be taken by surprise. Finally, such a statutory extension would be a deterrent to the occasional practice of passing ordinances in order to defeat the application of a single landowner who desires to use his land for a purpose which is perfectly lawful, but perhaps obnoxious to the sensibilities, either esthetic or pecuniary, of a few well placed town lords.

TITLE INSURANCE AND MARKETABLE TITLE†

I. Introduction

In the past forty years title insurance has become an indispensable factor in almost all real estate transactions. It would appear, however, that the courts have not given it sufficient consideration when adjudicating the rights and obligations of the parties involved. Legal opinion of real property experts has often been held inadmissible as evidence of whether the seller has tendered marketable title.[1] Since the willingness or refusal of a title guarantee company to insure a seller's title represents, in essence, the legal opinion of the company's attorneys as to its marketability, it, too, is apparently inadmissible.[2] The effect is to defeat the understanding of the parties that title insurance will be available to protect the purchaser from unascertainable defects in title. What is the basis for this judicial restraint? Is tradition inexorably binding?

II. Methods of Protection

One of the primary reasons for the phenomenal growth of title insurance in recent years is the advantages which it has to offer over other forms of title protection. A cursory consideration of such forms reveals their basic inadequacy. The "lawyer's opinion," which is the traditional system of title protection in small towns and rural areas and throughout the Midwestern states, is based either on abstracts of title prepared by professionals or on title searches made by the interested attorneys.[3] Both approaches are of limited

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1. See, e.g., Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640 (1892); Winter v. Stock, 29 Cal. 407 (1866); Evans v. Gerry, 174 Ill. 595, 51 N.E. 615 (1898); Mead v. Altgeld, 33 Ill. App. 373 (1889), aff'd, 136 Ill. 298, 26 N.E. 388 (1891); Leahy v. Hair, 33 Ill. App. 461 (1889); Moser v. Cochrane, 107 N.Y. 35, 13 N.E. 442 (1887); Bibber v. Weber, 199 Misc. 906, 102 N.Y.S.2d 945 (Sup. Ct.), aff'd mem., 278 App. Div. 973, 105 N.Y.S.2d 758 (2d Dep't 1951); Murray v. Ellis, 112 Pa. 485, 3 Atl. 845 (1886).

2. See, e.g., Bibber v. Weber, 199 Misc. at 909, 102 N.Y.S.2d at 948-49.

3. See Burger, Abstracts of Title, in Real Estate Encyclopedia 515 (1960); Committee on Acceptable Titles to Real Property, Section of Real Property, Probate and Trust Law, Report, A.B.A., App. A, at 47 (1953). The abstract is "a summary of the most important parts of the deeds and other instruments comprising evidences of title, arranged in chron-

value, however, since there are various title elements which the record is incapable of reflecting.[4] Consequently, certain defects go undiscovered. On the other hand, title insurance protects against such faults,[5] thus assuring a clear title even in cases of erroneous judicial decisions which are later reversed or overruled. If the title, as insured, was not marketable, the liability of the company is definite, whether it acted negligently in searching the title or not, while the abstractor and the attorney are liable only upon proof of such negligence.[6]

Land title registration, the "Torrens system," is another method of title protection,[7] but since its limitations are recognized, it is usually supplemented by title insurance.

A full covenant and warranty deed from a responsible vendor, coupled with the opinion of a competent attorney that the title is marketable is of obvious significance, but this, too, may prove ineffective for although the vendor may be financially able to respond in damages at the time of the sale, there is no assurance that he will be so situated at some unascertainable future date when the defect is discovered. The advantages of title insurance here are apparent. The title guarantee company has perpetual life[8] and is so regulated that the purchaser is assured of its financial stability.[9] The title company agrees to defend or initiate legal action whenever the insured's title is attacked directly or indirectly.[10]

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ological order, and intended to show the original source and incidents of title and all the charges, encumbrances, liens and liabilities to which the property may be subject." Friedman, Contracts and Conveyances of Real Property § 16, at 58 (1954). An abstract of title "shows nothing more than an abbreviated transcript of the records pertaining to such property, be the same perfect or faulty." Evans v. Gerry, 174 Ill. 595, 602, 51 N.E. 615, 617 (1898).

4. E.g., errors by officials in indexing, copying and recording deeds, mortgages, wills, and a range of legal documents that affect title, mistakes made by surveyors, forged deeds and other documents, missing heirs, deeds by minors, deeds by persons lacking the requisite mental capacity to convey, secret marriages, undisclosed divorces, the birth or adoption of children after the execution of a will devising the property, undisclosed illegitimate children, defective legal proceedings and adverse possession. See Grimes, Title Insurance, in Real Estate Encyclopedia 554-55 (1960); Friedman, supra note 3, § 18, at 61 n.13.

5. Grimes, supra note 4, at 554-57.

6. Ames, Liability of Abstracting Attorneys and Title Examiners, 7 Ala. L. Rev. 87 (1954).

7. See Friedman, supra note 3, § 19, at 65-67; Powell, Registration of the Title to Land in the State of New York (1938). But cf. McDougal & Brabner-Smith, Land Title Transfer: A Regression, 48 Yale L.J. 1125 (1939) (a critical review of Powell). For a detailed study of the intricacies of title insurance, see Johnstone, Title Insurance, 66 Yale L.J. 493 (1957).

8. N.Y. Ins. Law § 430.

9. N.Y. Ins. Law §§ 433-35.

10. E.g., under a policy which insures marketability, if the insured contracts for a loan on the property, or sells it, and the title is rejected due to defects existing at the date of the policy, the company will test its validity in court at its own expense, and, if unsuccessful,

For these reasons, and due to the fact that the cost of title insurance is nominal when compared with the security obtained,[11] sales and mortgages of real property have been consummated in exclusive reliance upon policies of insurance by the individual investor,[12] banks and institutional lenders.[13] The result has been that insurable title is treated by the parties as being indispensable to a good and marketable title.[14] Many contracts for the sale of real property contain an express stipulation that a named title company must insure unconditionally a good and marketable title. This clause makes the specified title company the arbiter of the title.[15] Such provisions have been consistently upheld by the courts and have been literally enforced.[16] Moreover, if in good faith, the named arbiter refuses to insure the vendor's title, it is immaterial whether title be good or bad.[17] Furthermore, the fact that a title insurance company other than the one named in the contract would approve and insure the title does not deprive the purchaser of his right to reject title.[18] On the other hand, the purchaser could not object to marketability when the company indicated that it would insure marketability.[19]

The more common practice in drafting contracts of sale, however, is to

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will pay the insured damages, or will make the loan, or will take the property at the contract price. See Foehrenbach v. German-American Title & Trust Co., 217 Pa. 331, 66 Atl. 561 (1907).

11. When the policy is issued, the premium is paid, and no further charges are made. The rates vary depending on the expenditure of time by the title company in compiling the necessary data preliminary to the issuance of the policy, e.g., abstracts, and depending on whether it is an owner's policy or a mortgage policy (the mortgage policy rate is less than that of the owner's policy). The premium on the owner's policy is about $3.50 per thousand for the first $50,000 of value, $3.00 per thousand for $50,000 to $100,000, and $2.00 per thousand over $100,000. Grimes, supra note 4, at 561-63.

12. Powell, supra note 7, at 7.

13. Henley, The New Title Insurance Policy Form, Title News, Sept. 1960, p. 2, at 7.

14. "The views of . . . practitioners, including experts, are . . . to the effect that the proffer of such title policy insuring marketability is almost decisive and at any rate is deemed conclusive as a practical matter, that is . . . in the market place . . . among counsel and according to . . . custom and usage. . . ." Plimpton v. Mattakeunk Cabin Colony, Inc., 9 F. Supp. 288, 313 (D. Conn. 1934). This can be illustrated by referring to the contract clause involved in Hebb v. Severson, 32 Wash. 2d. 159, 201 P.2d 156 (1948), to wit: "'If title is not insurable and cannot be made insurable within 60 days from date of title report, earnest money shall be refunded and all rights of purchaser terminated, except that purchaser may waive defects and elect to purchase. But if title is good and purchaser neglects or refuses to complete purchase, the earnest money may, at seller's option, be forfeited as liquidated damages.'" Id. at 162, 201 P.2d at 160. (Emphasis omitted.)

15. New York Investors, Inc. v. Manhattan Beach Bathing Parks Corp., 256 N.Y. 162, 176 N.E. 6 (1931).

16. E.g., in Fineman v. Callahan, 218 App. Div. 854, 219 N.Y. Supp. 165 (2d Dep't 1926) the court stated that upon proof that a title company would not insure the title except subject to certain encroachments, the purchaser was justified in refusing to take title.

17. Eastman v. Horne, 141 App. Div. 12, 125 N.Y. Supp. 553 (2d Dep't 1910), aff'd, 205 N.Y. 486, 98 N.E. 758 (1912).

18. Allen v. McKeon, 127 App. Div. 277, 111 N.Y. Supp. 328 (2d Dep't 1908).

19. Pope v. Thrall, 33 Misc. 44, 68 N.Y. Supp. 137 (Sup. Ct. 1900).

exclude provisions requiring approval by a title company. This is done primarily because the vendor would be taking on an additional burden. But the mere failure to express this condition may not always avoid its effects. When not expressed, the stipulation as to the quality of title to be tendered is usually quite general. Nevertheless, it is well settled that in the absence of a contrary provision in the contract, there is an obligation implied by law on the part of the vendor to tender a marketable title.[20] Invariably the vendee will seek to procure a title insurance policy to protect himself from possible defects in the vendor's title. To this end, he would seek a policy covering title defects, liens, encumbrances and unmarketability,[21] *i.e.*, a policy insuring marketable title without reservation or exception other than those expressly reserved in the contract of sale. If the title company refuses to insure and the vendor cannot or will not cure the objection by the company, the purchaser will probably reject title and refuse to perform the contract. The vendor may bring an action for breach of contract or for specific performance. The question then arises concerning the legal effect to be given to the refusal or willingness of a title guarantee company to insure the title when the parties litigate their respective rights under the contract of sale.

III. Refusal or Approval of Insurance as Evidence of Lack of Marketability

In a majority of cases, the opinions of attorneys, who are expert in real property law, have been held inadmissible on the question of marketability of title.[22] The reason underlying these decisions is the traditional approach—that the question of whether a title is good or bad is one for the court to decide[23] and, therefore, the opinion of a witness, however learned, has no probative or substantive force.[24] Otherwise, the court would "be deprived of its judicial function to determine marketability or a reasonable doubt thereof . . . . "[25] With few exceptions,[26] cases so holding were decided prior to the twentieth century, when title insurance did not play the dominant role in real estate transactions that it does today.[27] As a consequence, the effect of title insurance on the question of marketable title was not even introduced.

On the other hand, there are more recent cases which have recognized that reasonable objections to title by unbiased experts, such as counsel for title companies, taint a title with reasonable doubt.[28] Since an opinion as to the

20. Vought v. Williams, 120 N.Y. 253, 24 N.E. 195 (1890); Annot., 57 A.L.R. 1253, 1256-60 n.1 (1928).

21. Trenton Potteries Co. v. Title Guar. & Trust Co., 176 N.Y. 65, 68 N.E. 132 (1903).

22. See note 1 supra.

23. Leahy v. Hair, 33 Ill. App. 461, 464 (1889).

24. Atkinson v. Taylor, 34 Mo. App. 442, 452 (1889).

25. Plimpton v. Mattakeunk Cabin Colony, Inc., 9 F. Supp. 288, 313 (D. Conn. 1934).

26. E.g., Bibber v. Weber, supra note 1.

27. See Roberts, Holahan, Painter & Giannella, Public Regulation of Title Insurance Companies and Abstracters (1961). This text traces the growth of title insurance since its inception in the United States, and its present position in the economy of the nation.

28. See, e.g., Canaday v. Miller, 102 Kan. 577, 171 Pac. 651 (1918). In Flood v. Von

status of title by counsel for a title company is not mere guesswork, but is based on detailed studies of the relevant evidence by experts, such an opinion, where it varies with the first impression of the court as to the state of title, should impel the court to look into the matter with closer scrutiny.[29] However, since "the quality of a title is a matter of opinion, as to which even men learned in the law of real estate may differ,"[30] the court must ultimately make its own determination, independent of the opinions of experts.[31]

Correspondingly, where a title company agrees to insure title, that fact is not conclusive on the question of the marketability.[32] No amount or form of insurance can change the legal character of title or the rights in the property of those who have an interest. The insurance merely indemnifies for the loss which the buyer sustains when a paramount title or other equity defeats his interest.

IV. Availability of Title Insurance as an Implied Condition for the Benefit of the Purchaser

A distinction should be made between admitting into evidence the legal opinion of counsel (whether he is on the staff of the title company or represents the purchaser or is otherwise involved in the litigation) as a decisive factor on the issue of marketable title, and the fact that after making a reasonable attempt to secure title insurance, the purchaser finds that, in fact, none is available. In the latter case, the purchaser is, in effect, getting less than that for which he had bargained, because it is submitted that marketable title includes, as a necessary element, that the title be insurable. In *King v. Stanley*,[33] the

Marcard, 102 Wash. 140, 146-47, 172 Pac. 884, 886 (1918) it was stated: "[W]e are convinced that the title was not free from reasonable doubt. . . . That it was not such a title as a buyer would take when exercising ordinary prudence in the conduct of his affairs is sufficiently evidenced by the refusal of its general counsel, whose learning and skill in the law cannot be questioned, to approve the title. Neither of these had any interest in the main transaction, and we can conceive of no higher evidence of a want of marketability of title as that term has been construed . . . than these opinions." In Miller v. Bronson, 26 R.I. 62, 58 Atl. 257 (1904) the court said: "But if, as it appears, a loan company declines to take a mortgage on the property in question, because its counsel will not certify the title, it falls short of a marketable title. . . . 'If there is a considerable—"a rationale"—doubt, the court has not attached so much credit to its own opinion as to compel a purchaser to take the title. . . .'" Id. at 641, 58 Atl. at 258.

29. Atkinson v. Taylor, 34 Mo. App. 442, 452 (1889).

30. Foehrenbach v. German-American Title & Trust Co., 217 Pa. 331, 336, 66 Atl. 561, 563 (1907).

31. Bibber v. Weber, supra note 1. Cf. Magnolia Enterprises, Inc. v. 1099 Union Ave., Inc., 143 N.Y.S.2d 718 (Sup. Ct. 1955), aff'd mem., 1 App. Div. 2d 1005, 153 N.Y.S.2d 534 (1st Dep't 1956).

32. Magnolia Enterprises, Inc. v. 1099 Union Ave., Inc., supra note 31. Such an approval should be given some weight in deciding the equities on the question of whether there is a reasonable doubt on the title. Plimpton v. Mattakeunk Cabin Colony, Inc., 9 F. Supp. 288, 313-14 (D. Conn. 1934).

33. 32 Cal. 2d 584, 197 P.2d 321 (1948).

court intimated that a vendor does not fulfill his implied contractual obligation to furnish marketable title, if the purchaser cannot obtain title insurance, even though such a requirement is not expressed in the contract of sale. The court reasoned that "in the absence of express conditions, custom determines incidental matters relating to . . . title insurance policies,"[34] and that title insurance "is a reasonable method by which a vendee may determine the merchantability of the vendor's title. . . . "[35]

"In the absence of perfection or an instrument of precision to determine the marketability of title, courts apply the tests developed by the market place"[36]—tests which generally regard title insurance as conclusive between buyer and seller.[37] The courts have incorporated this recognition of customs in real estate transactions by considering the value of title on resale as an element determinative of marketability.[38] It has also been said that " 'marketable' means salable."[39] Thus, it is often required that the title be such that it "can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money."[40] Similarly, it is demanded that "dealers in real estate, savings banks and trust companies would be willing to take and invest in" such title.[41] Since dealers and institutional lenders universally require title insurance and will not deal without it, refusal by title companies to insure the property will virtually preclude the buyer from getting a purchase money mortgage, and from subsequently marketing his title at a fair price—at a price which he reasonably anticipated at the time he purchased the property.

V. Conclusion

In addition to an implied covenant of marketable title, which evolved in the law through custom, it would be reasonable to read into a contract for the sale of real property an implied convenant of insurability in order to comply with the intentions of the parties as manifested by the custom of the real estate market, *i.e.*, to consider a title not "marketable," in the practical sense of the term, unless insurable.

34. Id. at 589, 197 P.2d at 324.

35. Id. at 590, 197 P.2d at 325. "Courts are not so far divorced from the affairs of the market place whose questions they are daily called upon to decide as to be unmindful of the existence of economic forces and their effect upon sales contracts and the conduct of buyer and seller." Plimpton v. Mattakeunk Cabin Colony, Inc., 9 F. Supp. 288, 311 (D. Conn. 1934). See also, Dennis v. Overholtzer, 178 Cal. App. 2d 736, 3 Cal. Rep. 193 (Dist. Ct. App. 1960), which held that where a title insurance company would not insure the title, there was a sufficient ground for the vendee to reject title.

36. Plimpton v. Mattakeunk Cabin Colony, Inc., 9 F. Supp. 288, 291 (D. Conn. 1934).

37. Id. at 313.

38. Hebb v. Severson, 32 Wash. 2d 159, 171, 201 P.2d 156, 162 (1948); Flood v. Von Marcard, 102 Wash. 140, 147, 172 Pac. 884, 886 (1918).

39. Bier v. Walbaum, 102 N.J.L. 368, 370, 131 Atl. 888, 889 (Ct. Err. & App. 1926).

40. Moore v. Williams, 115 N.Y. 586, 592, 22 N.E. 233, 234 (1889).

41. Vought v. Williams, 46 Hun 638, 642 (Sup. Ct. 1887), aff'd, 120 N.Y. 253, 24 N.E. 195 (1890).