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HOUSE BILL 2783 - CHANGES FOR THE TITLE EXAMINER, THE ABSTRACTER AND THE TITLE INSURER

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HOUSE BILL 2783 - CHANGES FOR THE TITLE EXAMINER, THE ABSTRACTER AND THE TITLE INSURER

A. INTRODUCTION

The rules which title examiners, abstracters and title insurers have followed for years have undergone some dramatic changes under Oklahoma's House Bill 2783 (1994 Okla. Sess. Law Serv. Ch. 238), effective as of September 1, 1994. In many ways, their title duties have been potentially simplified. In other instances, burdens of risk have been shifted. In still other ways, it remains to be seen how this Bill will or should change the way title examinations and the concept of "marketable title" are approached in Oklahoma. Title insurers may have new risks if they rely on a "marketable title" if it is bases on certain new presumptions created by H. B. 2783.

The author acknowledges with thanks comments and insights as to the Bill from Donald F. Heath, Jr., who prepared the first draft of the Bill submitted to the Legislature.[1] H.B. 2783 was designed to reform Oklahoma conveyances of real property so that the conveyancer, insofar as possible, may rely on the record title alone.[2] The Bill was intended to simplify land transactions by liberalizing the execution requirements for corporations and banks, and by creating presumptions of fact to satisfy technical defects in title, and defects in title instruments. Mr. Heath states it will save costs in land transactions, expedite distribution of oil and gas proceeds, and eliminate standardized requirements routinely made by title examiners which have little or no substantive meaning in this day and age.[3] However, some changes under this Bill will have to be carefully considered by not only the title specialists,

but also the public at large. Those changes may effectively shift the risk of loss of title from a seller, title examiner or title insurer, to either the purchaser, or a third party who believes himself to own an interest in the property, but whose title is not clearly reflected on the face of the recorded chain of title.

B. REVIEW OF KEY CHANGES UNDER H. B. 2783

A summary of some of the key changes under H.B. 2783 is as follows:

1. **Deeds, mortgages and instruments executed by banks or corporations affecting real property may now be executed by a chairman or vice chairman of the board of said entity.**[4] Thus, we can expect corporate instruments affecting real property to be signed by the vice chairman or chairman of the board, in addition to other authorized officers.

2. **The old requirements that recorded real estate instruments executed by banks or corporations affecting real property have a corporate seal affixed, and that they be attested by a corporate secretary, have been abolished.** Prior to H.B. 2783, by statute, instruments affecting real property executed by a bank,[5] or by a corporation,[6] had to be attested by the bank cashier, assistant cashier, secretary or assistant secretary, or corporate clerk, with the seal affixed, unless executed by their attorney-in-fact,. H. B. 2783 abolished those requirements. It should be noted that this applies to such instruments if recorded on or after September 1, 1994. However, there is still a debate among title attorneys over whether such defects can be waived if

not included on corporate instruments recorded before September 1, 1994.

3. Recorded affidavits relating to real estate have been increased in significance from mere notice of the statements contained therein, to now create a rebuttable presumption that the facts stated therein relating to the property are true. House Bill 2783 amended 16 O.S. 1991, §82, stated that recorded and acknowledged affidavits would be notice of matters covered therein, relating to title to real property. The old §82 also specifically stated: "The affidavit shall not take the place of a judicial proceeding, judgment, decree, or title standards."

Under H.B. 2783's amended §82, recorded affidavits now create rebuttable presumptions that the facts stated in them are true insofar as they relate to the real estate, its use, or its ownership. Amended §82 removed the previous statutory provision that affidavits would not take the place of a judicial proceeding, judgment, decree or title standards. Thus, arguably one might infer that affidavits may now be valid substitutes. When one encounters an affidavit of intestate succession, but there appears to be no formal probate, may the title examiner rely on a recorded affidavit of death, heirship and intestacy in lieu of a judicial probate? H.B. 2783's author believes that amended §82 makes an affidavit "prima facie evidence" of the facts stated therein, and that the statute authorizes the use of affidavits to establish intestate succession in title matters.[7] Thus, one could argue now such affidavits not only give notice of facts, but also create a "rebuttable presumption" that those facts are true. (See below for

an explanation of what a "rebuttable presumption" and "prima facie evidence" are.)

This author questions whether such affidavits should rise to the level of valid substitutes for judicial determinations such as Final Decrees at the end of probate cases or Journal Entries of judgment at the end of quiet title suits. Amended §82 does not expressly authorize the use of affidavits as such substitutes. A judicial decree comes after facts are tested in Court, but an affidavit could be rebutted by strong evidence the assertiions in the affidavit are untrue. In trying to determine whether or not one has a valid "marketable title", i.e., (per Oklahoma Title Examination Standard 4.1) a title free from apparent defects, grave doubts and litigious uncertainty, ascertainable of record, an examiner generally feels safe in relying on a final judicial decree as being determinative of the facts stated therein. An affidavit, on the other hand, creates merely a presumption, which can be refuted at a later time with appropriate rebuttal evidence. Consider an affidavit of death and intestate heirship by a layman who, lacking an understanding of legal heirship, leaves some heirs out. If one relies on the presumption the affidavit is true today, and gets a deed only from the heirs named in the affidavit, he is likely to be upset if he later finds the facts in the affidavit rebutted by the unnamed heirs who later prove they are in fact, also heirs. A legal probate would more likely have addressed this issue by the time a final probate decree was rendered. Thus, affidavits do not have the same conclusive effect as judicial determinations.

If affidavits are ultimately determined to be valid substitutes for judicial proceedings, abstracters could lose part of their business dedicated to reproducing transcripts of such court proceedings as probates, foreclosures and quiet title suits.

This change can help in such title situations as a deed which does not reflect the marital status of a sole grantor, evidence of homestead rights claimed or not claimed in a property, and a determination of intestate death and heirship where a "marketable title" is not required. The examiner is relieved of the burden of having to weigh the facts and veracity of the witness, such as was required in the past.

4) The Bill creates a list of 12 rebuttable presumptions which apply to recorded, and signed (but not necessarily acknowledged) instruments. Perhaps the most dynamic and controversial set of changes under House Bill 2783 is found in Section 2, which is a new statute, 16 O.S. §53. This Section creates certain "rebuttable presumptions" which apply to all recorded, signed documents relating to real property. A few of the newly created presumptions should give each title examiner some reason for serious reflection.

A "Presumption" is a rule of law, statutory or judicial, by which the finding of a basic fact gives rise to the existence of a presumed fact, until the presumption is rebutted. In a contested matter, a legal presumption is treated as evidence which entitles one relying on the presumption to prevail unless the fact finder determines that rebuttal evidence has been sufficient to rebut the presumption. In short, a "prima facie presumption" us a fact taken

as true unless and until it is rebutted by strong enough evidence to show it is not true. The standard for rebuttal evidence sufficient to overcome the presumption is "evidence so clear and convincing that reasonable minds would agree that it is true".[8]

It is important to note that these are prima facie presumptions, any one of which can be rebutted. They are <u>not conclusive</u>. The examiner must now make certain presumptions as a matter of law from the face of instruments, absent other and conflicting information from recorded documents, or the examiner's having personal knowledge of facts which would rebut such presumptions. These presumptions shift the burden of proof from the proponent of a recorded document to one trying to rebut the presumptions the document creates.

16 O.S. §53A now creates <u>rebuttable presumptions</u> relating to "<u>recorded, signed documents relating to title</u>", to-wit:

> (1) The document is genuine and was executed as the voluntary act of the person purporting to execute it.
> (2) The person executing the document and the person on whose behalf it is executed are the persons they are purported to be and the person executing it was neither incompetent nor a minor at any relevant time.
> (3) Delivery occurred notwithstanding a lapse of time between dates on the document and the date of recording.
> (4) Any necessary consideration was given.
> (5) The grantee, transferee, or beneficiary of an interest created or claimed by the document acted in good faith at all relevant times up to and including the time of the record.
> (6) A person purporting to act as an attorney-in-fact pursuant to a recorded power of attorney held the position he purported to hold and acted within the scope of his authority. It shall also be presumed that the principal was alive and was neither incompetent nor a minor at any relevant time.
> (7) A person purporting to act as:
> (A) one of the officers listed in Section 93 of Title 16 of the Oklahoma Statutes on behalf of a corporation,
> (B) a partner of a general partnership,
> (C) a manager of a limited liability company,

(D) a trustee of a trust,

(E) any officer or member of the board of trustees of a religious corporation,

(F) a court-appointed trustee, receiver, personal representative, guardian, conservator, or other fiduciary, or

(G) an officer or member of any other entity,

held the position he purported to hold, acted within the scope of his authority (unless limitations of authority were previously filed of record and indexed against the property in question), and the authorization satisfied all requirements of law.

(8) All entities that are parties to the document are in good standing in this jurisdiction of organization.

(9) If the document purports to be executed pursuant to or to be a final determination in a judicial or administrative proceeding, or to be executed pursuant to a power of eminent domain, the court, official body, or condemnor was acting within its jurisdiction and all steps required for the execution of the title document were taken.

(10) Recitals and other statements of fact in a conveyance are true if the matter stated was relevant to the purpose of the document.

(11) Persons named in, signing, or acknowledging the document and persons named in, signing, or acknowledging another related document in a chain of title are identical, if the persons appear in those conveyances under identical names, or under variants thereof,

(A) commonly recognized abbreviations, contractions, initials, or colloquial or other equivalents,

(B) first or middle names or initials,

(C) simple transpositions that produce substantially similar pronunciations,

(D) articles or prepositions in names or titles,

(E) descriptions of entities as corporations, companies or abbreviations or contractions of either, or

(F) name suffixes, such as Senior or Junior, unless other information appears of record indicating that they are different persons, and

(12) All other requirements for its execution, delivery and validity have been satisfied.

These presumptions give more liberal allowances that persons referenced in instruments are who they appear to be, have the authority to act for and on behalf of the party for whom they sign, and that the instruments are generally valid, as presented. Section 53A(10) creates a presumption that statements of fact in a

conveyance are true if the matter stated was relevant to the purpose of the document, regardless of whether the instrument is acknowledged, verified or notarized, or not. Now, in unsworn and unacknowledged instruments, such statements appear to rise to the same level of presumptive fact as in a sworn affidavit under amended §82.

C. OTHER LAWS WHICH CURE TITLE DEFECTS IN INSTRUMENTS

Prior to the Bill's adoption, Oklahoma already had several curative acts which allowed certain execution and acknowledgment defects in recorded instruments, and other indefinite title situations of record, to ripen into cured defects and established conclusive presumptions of validity of instruments. Such curative Acts include the Oklahoma Simplification of Land Titles Act, 16 O.S. §61, et seq., ("SLTA"), the Oklahoma Marketable Record Title Act, 16 O.S. §71, et seq., ("MRTA"), 46 O.S. §301, and 16 O.S. 1988, §27a. Each of these curative Acts are designed to complete or reform, as a matter of law, imperfect transactions after a stated period of time.[9] Each of these statutes allows defects to be cured and perfected into marketable title under certain circumstances, but only after a waiting period has lapsed. Under H.B. 2783, a recorded instrument creates presumptions that certain facts are immediately presumed true. However, such documents create only prima facie evidence of such facts, and are subject to being rebutted. Thus, unlike a title which has been cured under the aforesaid curative Acts, presumed facts under H. B. 2783 will not be deemed conclusive, but only prima facie evidence of those facts.

Note that H. B. 2783 presumptions, subject to being rebutted, are different from presumed facts which mature into legally defendable and conclusive facts, under Oklahoma's various curative title Acts.[10] For example, new 16 O.S. §53A(2) creates a presumption that a person executing a recorded instrument was competent at the time of execution. This is a current rebuttable presumption. However, under the SLTA, one claiming under a deed which has been recorded for 10 years or more is permanently protected by the curative provisions of 16 O.S. §62A, which effectively cuts off the ability to challenge such a Deed due to the incompetency of the apparent signatory. One should not confuse the rebuttable presumptions under the new Bill with presumptions which have ripened into legally enforceable and unrebuttable facts under Oklahoma's curative title Acts. Under these Acts, past document defects have, by the passage of time, ripened into conclusive presumptions that they have been cured, and are no longer rebuttable. The lack of finality in a rebuttable presumption should give a title examiner cause for concern, if his opinion is based upon rebuttable presumptions.

16 O.S. §27a also conclusively cures a variety of defects in the execution of instruments relating to real estate after they have been of record for 5 years. It cures defects such as a corporate seal left off of a corpotrate deed, failure to acknowledge an instrument or failure to obtain a lot-split approval on a deed otherwise requiring it. Here again, this statute allows the defects and questions of validity to be resolved after the instrument has been of record for 5 years, but not until.

D. ISSUES FOR THE TITLE SPECIALISTS

1. How does this affect the concept of "marketable title"?

Most title examiners, realtors buyers and title insurers have traditionally looked to "marketable title" as the standard most buyers could rely on and expect to have a title which would not be disturbed. Oklahoma Title Standard 4.1 defines "marketable title" as follows:

> "All title examinations should be made on the basis of marketability as defined by the Supreme Court, to-wit: 'A marketable or merchantable title is synonymous with a perfect or clear title of record; and is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deductible of record.' "

If our current standard envisions a "perfect title or clear title of record; and . . . one free from apparent defects, grave doubts and litigious uncertainty, . . .", then one must ask how far can an examiner rely upon the legal presumptions created by H.B. 2783. Should one approve a title as marketable based on rebuttable presumptions?

The Bill's author has suggested that these presumptions may be relied upon to establish marketable title, stating:

> "The presumptions under the Bill are rebuttable - they merely shift the burden of proof to the purchaser. They enhance the power of the record by minimizing the need to produce unrecorded evidence to prove title. A chain of title based on these presumptions is marketable and will support a suit for specific performance requiring the purchaser to accept the title. The owner of a title based on these presumptions can quiet his title in a district court action. Evidence conflicting with any presumption can be ignored unless it is sufficient to overcome the prima facie presumption. This is consistent with 12 O.S. §3004 in the Oklahoma Evidence Code."[11] (emphasis added)

If the presumptions created under §53A were conclusive presumptions, the presumptions would be unrebuttable, and could be relied upon to support a suit for specific performance requiring the purchaser to accept the title based on same. However, the ability to sue for specific performance relying on rebuttable presumptions under §53A may support a suit for specific performance, UNLESS AND UNTIL those presumptions are rebutted. While many presumed facts would ultimately not be rebutted in Court, that possibility is not known unless and until a Court rules that the rebuttable presumption is not rebutted by conflicting evidence. In a contested matter, that will not be known until the prima facie evidence is presented in Court, the potential opponent has the opportunity to be heard, but has failed to produce sufficient evidence to overcome the prima facie presumption. Yet, if the opposing party does present evidence sufficient to rebut a prima facie presumption, a "marketable title" may suddenly be rendered unmarketable, despite the presumptions. Thus, one can argue there is a "grave doubt and litigious uncertainty" which attaches to reliance on these rebuttable presumptions, until such time as the presumptions become unrebuttable.

Consider an example of what could occur if presumptions under §53A(9) are relied upon to establish marketable title: Suppose the abstract reflects a Sheriff's Deed stating it is issued pursuant to a Sheriff's Sale in a foreclosure case, filed against Defendants X, Y and Z. The abstract contains no foreclosure decree, Order Confirming Sale, or pleadings relating to the foreclosure case itself. You rely on newly adopted 16 O.S. §53A(9), which creates

a presumption that the Sheriff's Deed was executed pursuant to an Order of a Court acting within its jurisdiction, and that all steps required for the execution of a valid Sheriff's Deed were taken. Using that presumption, and having nothing in the record abstract to rebut it, you approve the Sheriff's Deed, and use same as a foundation in the chain of title for several subsequent conveyances. You render your title opinion stating the current owner, Mr. O, has marketable title based upon your examination of the abstract. Your client, the purchaser of the property from Mr. O, relies on your title opinion, pays the purchase price and begins to move into the property. When your client, the purchaser, finds Defendant X still living in the property, your client explains he is the new property owner. Defendant X responds that he was never notified of a foreclosure case, does not know Mr. O, and still owns the property. Subsequent review of the transcript of the foreclosure case reveals that the record supports his story, and Defendant X was never served in the case. At that point, Defendant X is still the owner of whatever interest he had in the property prior to the Sheriff's Deed. Your client, has a title which is inferior to the title of Defendant X, despite your previous opinion that Mr. O had marketable title. At that point, your client philosophically asks: "What is a marketable title? I had one yesterday, but today I do not."

This last example shows how reliance on these presumptions by a title examiner could leave clients deeply frustrated, and could cause attorneys and title insurers to not only lose clients, but also be exposed to claims, whether founded or unfounded, by clients

who thought they were getting a good and defendable title, only to find that the opinion they relied upon was based upon presumptions which ultimately proved not to be the true facts. A title insurer would have a new insurance risk if he insures a "marketable title" which is based on such presumptions, and the presumptions are later rebutted as untrue. Thus we are left with questions: Should we rely on these rebuttable presumptions to establish marketable title? If so, should we amend the definition we have used for a marketable title in Oklahoma? Perhaps our definition of marketable title should be changed to be a "title which is synonymous with a perfect or clear title of record, and one free from apparent defects, grave doubts and litigious uncertainty, SUBJECT TO SUBSEQUENT REBUTTAL OF PRESUMPTIONS RELIED UPON UNDER 16 O.S. §§53 AND 82, and consists of both legal and equitable title fairly deductible of record". Arguably, at least some of these presumptions should not be relied upon alone to support a "perfect marketable title", since the presumptions can be rebutted, and a purported marketable title could thus become unmarketable. Of all of the new §53 presumptions, this author believes a purchaser may be exposed to considerable risk if the examiner relies on a deed pursuant to §53A(9), without examining a transcript of Court proceedings which are less than 10 years old. If the presumptions under §53A are allowed to be relied upon in establishing "marketable title", many title insurers may refuse to insure titles based upon a marketable title standard, because of the lack of finality associated with these presumptions.

2. Prospective and Retroactive Application. Can we use the presumptiions for documents recorded before H. B. 2783 became effective on September 1, 1994? H.B. 2783, as adopted, contained no express provisions for any retroactive application of its provisions. Generally, a statute will not be applied retroactively if it alters the rights and duties under an existing contract, or if the result would be to impair an obligation of a contract unless such retroactive application is expressly intended by the Legislature.[12]

An exception to this rule exists for a remedial or procedural statute which does not create, enlarge, diminish or destroy vested rights. In that case, such statutes may be applied retroactively. Most of the H. B. 2783 presumptions have a remedial affect on recorded documents, and tentatively resolve technical defects in documents intended to be what they are. Arguably H.B. 2783 should be applied retroactively in these instances, if no substantive rights are affected.

With regard to the amended statutes governing the manner and persons authorized to execute real property instruments on behalf of banks and corporations, the same set of issues exist, at least as to instruments recorded in the last 5 years, and thus not cured by 16 O.S. §27a. Suppose a corporate mortgage filed prior to the effective date of H.B. 2783, is less than 5 years old. It is signed by the chairman, and has neither an attestation nor a corporate seal affixed. Then a properly executed mortgage from the same corporation to a different creditor is subsequently recorded. Under prior 16 O.S. §§16, 92, 93 and 94, the first mortgage may not

constitute constructive notice, and may be subordinate to the second filed mortgage. By retroactively applying the remedial presumptions of amended 16 O.S. §93, these defects may be cured, but the lien priorities may change, and substantive rights of the parties could thus be altered. Under these facts, these amended Sections should not be applied retroactively. Prior to H.B. 2783, 16 O.S. §§92, 93 and 94 suggested that corporate instruments of conveyance "must" be executed by an appropriate officer, with attestation and seal affixed to be valid and binding as against third parties. Thus, arguably, instruments executed by banks or corporations prior to September 1, 1994, should still follow the technical statutory requirements of signature by appropriate representative, attestation and the affixing of a corporate seal, as per Oklahoma Title Standard 9.2, unless they have been of record for 5 years. On the other hand, if a title examiner makes a requirement on such a deed filed before H.B. 2783, because it lacks a corporate seal, he would require a new deed to be executed to correct the old. Using H.B. 2783 standards, the correction deed would likely not have a seal affixed either, since that requirement is now abolished.[13]

3. Impact on Oklahoma Title Standards. A brief review of the Oklahoma Title Standards and comparison of same with H.B. 2783, makes it clear that our Oklahoma Title Standards will need to be carefully reviewed. More than half of the current Title Standards will need to be modified to some extent to incorporate changes created by this Bill. In conducting a title examination, when the examiner refers to his Title Examination Standards, the examiner

should likewise review H.B. 2783 insofar as it may impact the title issue in question.

4. Shifting of Risk to the Purchaser. If an attorney relies on the changes under H.B. 2783, and gives an opinion that title appears "marketable" in someone based upon presumptions created under H.B. 2783, the examiner may be shifting the risk of title problems with the property from himself and the seller, to the purchaser. The Bill was intended to make it easier for a layman to purchase land and understand what he is purchasing, by relying solely on the record title, and the presumptions from same under H.B. 2783. Unfortunately, loss of title by an unsuspecting layman who receives an opinion saying that the last owner had "marketable title", but which was based on presumptions that are later rebutted, can only lead to frustration on the part of a purchaser with not only his lawyer, but also a legal system which allows such things to happen. At a minimum, an examiner who relies on such presumptions would be wise to make comments in title opinions as to the specific presumptions relied upon in the particular chain of title. This may also cause concern for mortgage lenders and title insurers. A title insurer, attempting to insure a "marketable title", wants assurance that the "marketable title" is, in fact, a title which can be defended, rather than a title on which apparent title is one way, but could later be determined to be in another, based upon later rebuttal of a presumption originally relied upon. For the title insurer, this risk will not be shifted to the purchaser, unless a new or different type of title exception is created under the title insurance policy.

5. No Need to Examine Court Proceedings Authorizing Title Transactions? By the presumptions created under §53A(9), one would no longer need to look behind a Sheriff's Deed, quiet title judgment, deed from a Personal Representative in a probate case, or other conveyance arising out of a judicial or administrative proceeding. The instrument, standing alone, creates the presumption that all is in order. If the instrument has been of record for 10 years or more, the SLTA will cure most jurisdictional defects. If the instrument has been recorded less than 10 years, there is only a presumption as to same. At a minimum, even if the entire transcript of proceedings is not examined, an examiner would be wise to at least examine the Court or administrative Order authorizing the instrument of conveyance. This presumption may save clients the expense of reproducing transcripts of court proceedings, and the title examiner the additional time otherwise required to review same, to determine the validity of the judicially authorized instrument of conveyance arising out of that proceeding. However, if one chooses not to examine such Court proceedings, an examiner should recognize that he or she is deciding not to look at a proceeding which has effectively deprived a previous owner of certain rights in the property, and has authorized a grant or conveyance to place that former title into the name of a new and different party. The author believes that there is considerable risk in allowing one to presume from the face of a single instrument that the Court had jurisdiction, and that all steps in the litigation prior to the instrument were properly taken.

6. Use of Affidavits as Substitutes for Judicial Decrees Determining Death, Intestacy and Heirship. Amended 16 O.S. §82 allows affidavits to serve as prima facie evidence of the facts stated therein. This creates a presumption of the truth of affidavits identifying the death, intestacy and lawful heirs of a decedent whose estate has not been probated. In amending §82, the Legislature removed the express prohibition against affidavits being substitutes for judicial proceedings, judgments or decrees. If the presumptions under H.B. 2783 are allowed to be relied upon for determining marketability of title, then an affidavit may possibly serve as a substitute for a judicial decree making that same determination. If so, this could simplify problems and reduce costs for mineral owners whose oil and gas proceeds are suspended due to unmarketable title under 52 O.S. §540 for lack of a probate. If it is ultimately decided that one should not rely on certain presumptions under H.B. 2783 to establish "marketable title", perhaps 52 O.S. §540 could be modified to require a standard of either marketable title or a defendable title which relies upon presumptions created under H.B. 2783. This could meet the same goal for frustrated mineral owners.

E. CONCLUSION

In many ways, House Bill 2783 will resolve many minor title defects and reduce the title information an examiner has to examine. To that extent, it is should be a help to not only the title examiner, but to the clients who pay them to examine and deal with titles to real property. On the other hand, there are some changes under this Bill which will require study and careful

consideration before they are actively relied upon by those examining real property titles. The most immediate issue is how the Bill will affect, or possibly change, what we call "marketable title". Regardless of their legal effect, some of these changes may also create a variety of potential situations which could leave clients unhappy, and could have potentially catastrophic impacts on certain title transactions for uniformed purchasers, mortgage lenders and title insurers. Until H.B. 2783 has been further analyzed and tested, reliance on particularly some of its presumptions should be approached with considerable caution.

ENDNOTES:

1. Donald F. Heath, Jr. is an attorney practicing in real property and oil and gas law in Norman. He serves as the Secretary/Budget Director of the Real Property Law Section of the O.P.A., and serves on the Title Examination Standards and Legislative Liaison Committees of the Real Property Law section of the OBA, and is a member of the Oklahoma City Title Attorneys Association and the Oklahoma City Mineral Lawyers Society.

2. See: Mr. Heath's article "House Bill 2783: A Step Toward Simpler Land Titles," OBA Real Property Section Newsletter, Summer, 1994, p.7.

3. See: Heath, supra.

4. H.B. 2783, §1F.

5. 6 O.S. 1992, §414F.

6. 16 O.S. §92, 93, 94 and 95.

7. See: Heath, supra, pp. 8-9.

8. Brown v. Oklahoma Transportation Co., 588 P.2d 595 (Okl. App. 1978); 12 O.S. §2301.

9. See: Oklahoma Title Standards 2.3, 18.1, et seq., and 19.1, et seq.

10. Mistletoe Express Service v. United Parcel Service, Inc., 674 P.2d 1 (Okl. 1983).

11. See: Heath, supra, p. 9.

12. Wickham v. Gulf Oil Co., 623 P.2d 613 (Okl. 1981).

13. The author acknowledges with thanks this comment from Henry Rheinberger, of the firm Crowe and Dunlevy, in Oklahoma City. Mr. Rheinberger has worked with many of the issues addressed in H. B. 2783 through the Oklahoma Title Standards Committee of the Oklahoma Bar Association.

PERFECT TITLE IN OKLAHOMA: AN OXYMORON

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PERFECT TITLE IN OKLAHOMA: AN OXYMORON

Marketable title in Oklahoma is often misdescribed as perfect title. Out-of-state attorneys mockingly refer to Oklahoma as the land where titles are perfect.

Standard 4.1 of the Oklahoma Bar Association's Title Examination Standards is partly to blame.[1] Standard 4.1 begins by declaring that the Oklahoma Supreme Court has defined marketable title as perfect title. The Standard fails to recognize that "perfect" title has no legal meaning. The Oklahoma Supreme Court has given it legal meaning only by holding that it, and other comparative terms such as "good title,"[2] are synonymous with marketable title.[3]

The second clause in Standard 4.1 properly recites that a marketable title means a title free from reasonable doubt. If perfection were the standard, titles would be required to be free from *any* doubt instead of *reasonable* doubt. Unfortunately, this is not as catchy as saying that marketable title means perfect title. It is like a rumor that has been repeated so often it is accepted as true.

Characterizing marketable title as perfect title plays into the hands of flyspeckers and scoundrels. Flyspeckers insist upon curing defects that pose little or no risk and require substantial expense to cure.

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[1] 16 O.S., Ch. 1, App. provides as follows: "All title examinations should be made on the basis of marketability as defined by the Supreme Court, to wit: 'A marketable or merchantable title is synonymous with a perfect title or clear title of record; and is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record.'"

[2] *Sipe v. Greenfield*, 244 P. 424, 116 Okla. 241 (1926).

[3] *Pearce v. Freeman*, 254 P. 719, 122 Okla. 285, 286 (1927).

Standard 4.1 is being used as a shield by first purchasers who have taken possession of hydrocarbons but refuse to pay the proceeds to the rightful owners.[4] Some purchasers allege that scarcely any oil and gas titles in Oklahoma are perfect. Based on this dubious premise, they deny liability for interest under 52 O.S. §570.10.

The sound bite that marketable title means perfect title does injustice to Oklahoma's progressive jurisprudence. Standard 4.1 should be shorn of the references to perfect title.

Good Title and Perfect Title

The Oklahoma Supreme Court has engaged in an extended discussion of perfect title and good title in only three cases: *Campbell v. Harsh* (1912)[5], *Sipe v. Greenfield* (1926) and *Pearce v. Freeman* (1927).

The contract for sale in the *Campbell* case required the seller to deliver an abstract showing "perfect" title.[6] The Court relied on two California cases in concluding that perfect title means nothing more than marketable title:

> In *Turner v. McDonald*, 76 Cal. 177, 18 P. 262 [1888], it is said: "A perfect title is one that is good and valid beyond all reasonable doubt." In *Sheehy v. Miles*, 93 Cal. 288, 28 P. 1046 [1892], it was held to be absolutely necessary, in order to fully satisfy the covenant of a perfect title, that the title should be free from litigation, palpable defects, and grave doubts, should consist of both legal and equitable title, and be fairly deducible of record.[7]

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[4] Under 52 O.S. §570.10, first purchasers of oil and gas production must pay proceeds from the sale of production to the persons legally entitled thereto within certain time periods. Failure to timely remit proceeds creates additional liability for 12% interest if the owner has marketable title in accordance with the current title examination standards of the Oklahoma Bar Association.

[5] 122 P. 127, 31 Okla. 436, 441.

[6] The contract for sale required "delivery of a deed conveying good sufficient title to said premises, accompanied by an abstract of title, showing perfect title." 31 Okla. at 437.

[7] 31 Okla. at 441.

Ironically, the discussion of perfect title was dicta in the *Campbell* decision. The Court declined to rule on the quality of the seller's title. It found that the seller failed to satisfy the terms of the contract for sale because his title was based on an unrecorded affidavit of heirship. The Court adopted the holding from an Iowa case:[8] "One to whom an abstract showing a good title has been promised as a condition precedent is not bound to accept any evidence thereof, except that contained in the abstract."[9]

Sipe v. Greenfield[10] required the Court to interpret a contract for sale calling for a good title. The Court quoted extensively from *Thompson on Real Property*:[11]

> A good title means not merely a title valid in fact but a marketable title which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for a loan of money. . . . In a contract to convey a good title the word "good" comprehends all that the word "clear" does, and the term "clear title" as used in such contract means that there are no incumbrances on the land.[12]

The Court held that a title was unmarketable because it was subject to an unreleased mortgage, though the seller had agreed to continue making payments on the underlying note.[13]

Pearce v. Freeman adopted the dicta from the *Campbell* decision as the standard for marketability in Oklahoma.[14] The Court reviewed authorities from several jurisdictions and

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[8] *Fagan v. Hook*, 134 Iowa 381, 105 N.W. 155, 157 (1905), *modified*, 111 N.W. 981 (1907).

[9] 31 Okla. at 442.

[10] 244 P. 424, 116 Okla. 241, 242 (1926).

[11] 5 George W. Thompson, *Commentaries on the Modern Law of Real Property* §4296-A (1924).

[12] 116 Okla. at 242.

[13] *Id.* at 242-243.

[14] 122 Okla. at 286-287.

concluded that perfect title, marketable title, and merchantable title were synonymous terms. It did not try to distinguish the Oklahoma statutes on real property from other jurisdictions. It is unclear why the Court explored the meaning of perfect title since the contract for sale provided for "good and merchantable" title. It is an unfortunate choice of words that the Court should have avoided. The Court adopted the following definition from the *Turner* case verbatim: "a title to be good 'should be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record.'"[15]

This language has been cited as the definition of marketable title in Title Standard 4.1. Title Standard 4.1 prefaces this definition with the objectionable language that marketable title is synonymous with perfect title.

The *Pearce* Court applied this standard of marketability liberally. It held that a title was marketable, although it lacked a judicial determination of heirship for a four-year-old Indian allottee. The Court found that recitations of heirship in a quiet-title decree, in which the deceased allottee's parents were named defendants, "were a sufficient bridge over the hiatus in the chain of title caused by the death of the original allottee."[16] The Court decreed specific performance because the record showed the title was "reasonably good."[17]

In *Hawkins v. Wright*,[18] the Court noted that it had previously defined good title in *Sipe v. Greenfield* as "a marketable title, which can again be sold to a reasonable purchaser or mortgaged

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[15] 18 P. at 264.

[16] 122 Okla. at 287.

[17] *Id.*

[18] 226 P.2d 957, 961, 204 Okla. 955 (1951).

to a person of reasonable prudence as security." The *Hawkins* court repeated that "the terms 'merchantable title', 'good title', 'perfect title', and 'marketable title' have been generally held to be synonymous."[19]

Good Title and Perfect Title are Vulgarisms

Our prime concern as title examiners is marketable title. It is thinking backwards to say that a marketable title is a good title or a perfect title. The cases on marketable title discuss good and perfect title only because the contracts for sale at issue used these terms. The Supreme Court held that these terms mean marketable title. A court in equity is only concerned whether the title is marketable, not whether it is good or perfect. A leading commentator ridiculed the use of the terms good and perfect title:

> For purposes of comparison only, titles are sometimes classified as bad, doubtful, good and perfect: the latter being also known as a marketable title, or one which a court of equity considers so clear that it will enforce its acceptance by a purchaser. A doubtful title on the contrary being one that the court will not go so far as to declare invalid, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it. . . . It must be distinctly understood, however, that the foregoing classification represents merely convenient colloquialisms. The law knows nothing of "good" or "bad" titles. If fact, they cannot be said to have any legal existence. Title is simply title. A person is without title or he has title. His title may be perfect or impaired, but "bad" title is merely a vulgarism. Nor are there any degrees of comparison in titles, for "good" title suggests a "better," or, possibly, a "best."[20]

Thompson on Real Property, heavily relied upon by the Court in its discussion of good and perfect titles, says that there is no such thing as perfect title.[21] "Where the contract [for sale] calls for

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[19] *Id.* at 961.

[20] George W. Warvelle, *A Practical Treatise on Abstracts and Examinations of Title to Real Property* §16 (1921).

[21] *Thompson on Real Property*, §4296a.

[perfect] title, the purchaser is entitled to a title free from reasonable doubt and fairly deducible of record."[22] Good title and perfect title are relevant terms only if we are dealing with a contract for sale that uses these terms. Otherwise we should avoid them as vulgarisms and focus on the true object: marketable title.

Oklahoma Cases on Encumbrances

If we abandon this false concern with perfect title, we find that the body of Oklahoma case law that has developed on marketable title is practical and well reasoned. A review of this case law shows that marketable title has nothing to do with perfection or mathematical certainty.

Oklahoma courts are strict about liens and encumbrances; they require that the title be entirely free of liens and encumbrances to be marketable. Clear title, as used in a contract for sale, means that "there are no incumbrances on the land."[23] The purchaser may insist upon a recorded release of a mortgage or other encumbrance. Allegations that the underlying note has been paid are insufficient.[24] A mortgage that covers several tracts must be released as to the tract to be sold, despite whether the seller agrees to continue to make all payments on the underlying note.[25] The possibility that the mortgage might be foreclosed if the seller stops making payments casts a cloud on the title.[26] The Supreme Court has waffled on whether the seller may deliver a marketable title

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[22] *Id.*

[23] *Hawkins v. Wright,* 226 P.2d at 961.

[24] *Tucker v. Thraves,* 145 P. 784, 50 Okla. 691, 701-702 (1915); *Tull v. Milligan,* 48 P.2d 835, 842, 173 Okla. 131 (1935).

[25] *Sipe v. Greenfield,* 116 Okla. at 242-243; *Leedy v. Ellis County Fair Ass'n,* 110 P.2d 1099, 1101-1102, 188 Okla. 348 (1941).

[26] *Sipe v. Greenfield,* 116 Okla. at 241-242.

by paying off a mortgage with proceeds of the sale. Where the contract for sale expressly mentioned the mortgage, the Court held that the seller satisfied the contract by securing the bank's agreement to release the mortgage upon receiving the sale proceeds.[27] "To predicate a right of rescission on the part of [buyer], on such a ground, is too technical for serious consideration."[28] The Court distinguished this holding and refused to allow the mortgage to be paid from sale proceeds when the contract for sale required delivery of an abstract showing good and merchantable title and the contract failed to refer to an existing mortgage.[29] The Court apparently reversed itself by subsequently ruling that the seller produced a marketable title by providing for an escrow account to pay existing mortgages and delinquent taxes.[30]

Strict proof of the release of taxes is required. Specific performance will be denied if there are taxes due on the property.[31] The resale of property for delinquent taxes does not extinguish unpaid special assessments for paving, grading and sewers.[32]

Unreleased oil and gas leases are considered encumbrances that impair marketability. [33]The Supreme Court insists upon recorded releases because equity abhors a forfeiture and "slight

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[27] *Sparks v. Helmer,* 286 P. 306, 142 Okla. 219, 221 (1929).

[28] *Id.*

[29] *Hawkins v. Johnston,* 222 P.2d 511, 514, 203 Okla. 398 (1950).

[30] *Corvino v. 910 S. Boston Realty Co.,* 332 P.2d 15, 17-18 (1958).

[31] *Smalley v. Bond,* 218 P. 513, 92 Okla. 178, 181 (1923).

[32] *Perryman v. City Home Builders,* 248 P. 605, 121 Okla. 150, 153 (1926).

[33] *Jennings v. New York Petroleum Royalty Corp.*, 43 P.2d 762, 767-768, 169 Okla. 528 (1934).

circumstances are eagerly seized to avoid their enforcement."[34] Unreleased leases that must be judicially terminated expose the purchaser to an unreasonable risk of litigation. An early case held that an affidavit of nonproduction was insufficient to create a presumption that the lease had terminated.[35] Remedial legislation has partly overcome this objection. The filing of a certificate of nondevelopment from the Oklahoma Corporation Commission creates a presumption that the lease has terminated.[36] The Marketable Record Title Act[37] bars unreleased leases that predate a root of title.

The Supreme Court is less strict about physical encumbrances. If the buyer contracts for a title free of encumbrances, he can refuse to accept a title subject to easements and other physical encumbrances.[38] If, however, a pipeline easement is plainly visible and the buyer inspects the property before consummating the sale, the buyer cannot maintain a subsequent action to rescind the sale.[39]

Oklahoma Cases on Defects

While the Supreme Court requires that marketable titles be *entirely* free of liens and encumbrances, it will approve titles that are *reasonably* free of defects.

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[34] *Koutsky v. Park Nat'l Bank,* 29 P.2d 962, 966, 167 Okla. 373 (1934).

[35] *Wilson v. Shasta Oil Co.*, 43 P.2d 769, 772, 171 Okla. 467 (1935).

[36] Laws 1945, p.42, §2, now codified as 17 O.S. §168.

[37] 16 O.S. §71, et seq.

[38] *Matlock v. Wheeler,* 306 P.2d 325, 328 (Okla. 1957).

[39] *Id.* at 328.

Defective and incomplete probate proceedings have been fertile grounds for title litigation. *Campbell* found that the seller failed to comply with the contract for sale where the title was based on an unrecorded affidavit of intestate heirship.[40] The Court upheld an Indian title based on a missing probate where the Secretary of the Interior had approved a deed from the heirs.[41] The Court distinguished this case from *Campbell* because the contract for sale in *Campbell* required an abstract showing perfect title and the title was based on an unrecorded affidavit. *Pearce* also approved an Indian title based on a missing probate where a quiet-title judgment had been entered against the presumed heirs and the Secretary of the Interior had been served.[42] A defective acknowledgment in a probate petition produced an unmarketable title because certain procedural steps in probates are jurisdictional.[43] The admission of a foreign will to probate is insufficient to show marketable title in the heirs because the creditors could still enforce their liens in Oklahoma.[44] Similarly, even if a judicial determination of heirship has been rendered, title is not marketable until the final discharge is issued because of the possibility of creditors' claims.[45]

Judgments are presumed valid. A final decree, without an attack, is prima facie evidence of the validity of the proceedings and must be presumed valid.[46] A quiet title judgment based on service

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[40] 31 Okla. at 440-444.

[41] *Davidson v. Roberson,* 218 P. 878, 92 Okla. 161, 164-165 (1923).

[42] 122 Okla. at 287.

[43] *Ammerman v. Karnowski,* 234 P. 774, 109 Okla. 156, 159 (1925).

[44] *Seyfer v. Robinson,* 291 P. 902, 93 Okla. 156, 157-158 (1923).

[45] *Hausam v. Gray,* 263 P. 109, 129 Okla. 13, 15 (1928).

[46] *Watts v. Elmore,* 176 P.2d 220, 223, 198 Okla. 141 (1947).

by publication is presumed valid, although the statute for service by publication allows defendants to reopen the judgment for three years after the entry of the judgment.[47]

Marketability of title is not affected by a pending condemnation action.[48] The condemning authority can abandon the proceedings any time, and it has no vested right in the property until it pays the owner just compensation. The buyer has no loss because he is fully compensated for the property.[49]

A deed executed without joinder by the seller's spouse is objectionable unless compelling evidence is presented that the seller is divorced or the property is either nonhomestead or an abandoned homestead.[50] An Indian deed executed by a guardian without court approval is void.[51] A corporate deed executed without attestation and a seal can still convey marketable title if accompanied by a resolution of the stockholders approving the conveyance.[52]

If the description in a deed mistakenly overlaps a neighboring tract, the misdescription clouds the title and will support an action for slander of title.[53]

Objections must be reasonable and based on facts, not speculation. The landowner of a riparian tract need not disprove the possibility of reappearing lands. He has no burden to negative

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[47] *Gordon v. Holman,* 259 P.2d 875, 876-877, 207 Okla. 496 (1952).

[48] *Nixon v. Marr,* 190 F. 913, 917 (8th Cir. 1911).

[49] 190 F. at 915-917.

[50] *Kneeland v. Hetzel,* 229 P. 218, 103 Okla. 3, 4, (1924).

[51] *Pittman v. Cottonwood School District No. 4,* 614 P.2d 582, 584 (C.A.Okla. 1980).

[52] *Corvino v. 910 S. Boston Realty Co.,* 332 P.2d at 17.

[53] *McDowell v. Glasscock,* 672 P.2d 682 (C.A.Okla. 1983), rev'd on other grounds, *Turner Roofing & Sheet Metal, Inc. v. Stapleton,* 872 P.2d 927, 928 (Okla. 1994).

every possibility that might weaken his claim.[54] The buyer must accept the title unless his objections are reasonable. A simple allegation of dissatisfaction with title is insufficient.[55]

Differing Standards of Marketability

The quality of title to be conveyed depends upon the terms of the contract for sale. Stricter standards are applied when the contract for sale calls for the seller to deliver the buyer an abstract showing marketable title. The buyer can reject the title if the defect in title can be cured only by evidence not appearing in the abstract.[56] The seller is under no obligation to furnish an abstract unless the contract for sale specifically requires him to do so.[57] If the contract for sale is silent as to the character of title required, the law implies that a marketable title in fee simple is intended.[58]

Warranties of title and indemnification agreements are irrelevant in judging the marketability of title. A quitclaim deed can convey marketable title; a covenant of warranty is not required.[59] Conversely, an offer of indemnify cannot overcome a defect in title.[60] Purchasers of oil and gas proceeds cannot require royalty owners to execute indemnification agreements.[61] Title must

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[54] *Littlefield v. Nelson,* 246 F.2d 956, 959 (10th Cir. 1957).

[55] *McCubbins v. Simpson,* 98 P.2d 49, 52, 186 Okla. 417 (1939).

[56] *Campbell,* 31 Okla. at 442-444; *Davidson v. Roberson,* 92 Okla. at 165-166.

[57] *Bartholomew v. Clausen,* 72 P.2d 718, 721, 181 Okla. 88 (1937); *Craig v. Chisholm,* 82 P.2d 986, 990, 183 Okla. 398 (1938).

[58] *Brady v. Bank of Commerce of Coweta,* 138 P. 1020, 41 Okla. 473, 476-477 (1914).

[59] *Bayouth v. Howard,* 190 P.2d 793, 794, 199 Okla. 646 (1948).

[60] *Ammerman v. Karnowski,* 109 Okla. at 160.

[61] *Hull v. Sun Refining and Marketing Co.*, 789 P.2d 1272, 1278-1279 (Okla. 1990).

legitimately be at issue to allow the purchaser to escape liability for 12% interest under 52 O.S. §570.10 [formerly 52 O.S. §540].[62]

The contract for sale can provide for a third party to act as the final judge of title. If the contract requires that the title be acceptable to Buyer's attorney, then a good-faith opinion by Buyer's attorney is conclusive as to the quality of title, despite the actual marketability of the title.[63] The buyer is not bound to accept the property if his attorney acting in good faith disapproves the title.[64] The Supreme Court rejected a seller's argument that contracts for sale with these provisions are illusory contracts.[65] The Court held that the buyer is bound to accept the title unless his attorney presents reasonable objections.[66]

Oklahoma Legislation Affecting Marketability of Title

The Supreme Court's requirements for marketable title are strikingly similar to the statutory terms of a warranty deed in R.L. 1910, §1162, now codified as 16 O.S. §19. Several cases discussed above involved contracts for sale that called for the delivery of a warranty deed conveying marketable title. The terms for a warranty deed, as provided in 16 O.S. §19, are: (i) "good right and full power to convey . . . an indefeasible estate in fee simple," (ii) "the same is clear of all encumbrances and liens," and (iii) a warranty of "quiet and peaceable possession thereof." The judicial definition of marketable title is essentially a restatement of these terms: a title entirely clear

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[62] *Id.* at 1277; *Quinlan v. Koch Oil Co.*, 25 F.3d 936, 940 (10th Cir. 1994).

[63] *Farm Land Mortgage Co. v. Wilde,* 136 P. 1078, 41 Okla. 45, 48-49 (1913); *Curtis v. Roberts,* 230 P. 916, 104 Okla. 172, 173 (1924).

[64] *Davis v. Indian Territory Co.*, 93 F.2d 976, 980 (10th Cir. 1937).

[65] *McCubbins v. Simpson,* 98 P.2d at 52, 53.

[66] *Id.*

of liens and encumbrances and reasonably free of any defects that would subject the buyer to litigation to defend his title. There is only one significant difference between the statutory definition of a warranty deed and the judicial definition of marketable title—a covenant of warranty is not required in the latter.

The Conveyances Code, as enacted in 1910,[67] contained a few harsh provisions, which left the courts with little flexibility in evaluating the marketability of titles. Natural persons of legal age and corporations were originally the only entities that could hold legal title in Oklahoma.[68] Other entities have been authorized to hold title to property by piecemeal legislation. The courts have therefore condemned titles in joint ventures because they are not legal entities.[69] R.L. 1910, §1169, now codified as 16 O.S. §26, provides that defectively acknowledged instruments do not afford constructive notice of their contents. The courts have been forced to hold that such instruments are binding only on parties with actual notice.[70] Affidavits were viewed with antipathy because the Code failed to provide for the recording of affidavits.[71]

The Legislature in the past 40 years has enacted progressive legislation to clear land titles. A comprehensive listing of this legislation is beyond the scope of this paper, but the most significant legislation includes the following:

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[67] R.L. 1910, §1140, et seq., now codified as 16 O.S. §1, et seq.

[68] R.L. 1910, §1140, now codified as 16 O.S. §1.

[69] See authorities collected at R. Cleverdon, *Ownership and Conveyancing of Land by Joint Adventurers Within the State of Oklahoma,* 52 O.B.J. 2137 (1981).

[70] *Smith v. Thompson*, 402 P.2d 882, 885 (Okla. 1965).

[71] The Legislature addressed this problem by authorizing the filing of affidavits concerning real property titles in Laws 1985, Ch. 233, codified as 16 O.S. §82, et seq. The use of affidavits was further liberalized by Laws 1994, Ch. 238, §3, which amends 16 O.S. §82.

1. The Simplification of Land Titles Act,[72] which bars adverse claimants from raising certain defects in court proceedings more than 10 years old. This Act is to be "liberally construed to effect the legislative purpose of simplifying real estate transactions by permitting purchasers to rely upon the status of title as reflected by the county records and by the decrees and judgments of the aforementioned courts."[73]

2. The Marketable Record Title Act,[74] which bars claims that predate a root of title that has been recorded for at least 30 years. It is to be "liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in . . . this act."[75] Professor Basye has described the Oklahoma Act as follows: "Fortified by this comprehensive Marketable Title Act, following the Model Act almost verbatim, the efforts of the Oklahoma Bar have now culminated in the most modern and enlightened legislation of its kind."[76]

3. The Oklahoma Evidence Code,[77] which establishes evidentiary presumptions and liberalizes the rules for authenticating and identifying documents. Professor Whinery describes Oklahoma as "a forerunner in the legislative enactment of uniform acts in specific areas of evidence law calculated to improve the expeditious and efficient administration of justice."[78]

4. House Bill 2783[79] codifies rebuttable presumptions of fact supporting marketability. These presumptions arise from the mere act of filing an instrument of record. House Bill 2783 is based on Sections 2-301, 2-305 and 2-307 of the Uniform Simplification of Land Transfers Act.[80]

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[72] Laws 1961, p. 192, §1, et seq., now codified as 16 O.S. §61, et seq.

[73] Laws 1961, p. 194, §7, now codified as 16 O.S. §71.

[74] Laws 1963, c. 31, §1, et seq., now codified as 16 O.S. §71, et seq.

[75] Laws 1963, c. 31, §10, now codified as 16 O.S. §80.

[76] Paul E. Bayse, *Clearing Land Titles (2d Ed.)* §186, p. 446 (1970).

[77] Laws 1978, c. 285, §101, et seq., now codified as 12 O.S. §2101, et seq.

[78] 2 Leo H. Whinery, *Oklahoma Evidence, Commentary on the Law of Evidence,* §2.08 (1994).

[79] Laws 1994, Ch. 238, effective September 1, 1994.

[80] The Uniform Simplification of Land Transfers Act was approved by the National Conference of Commissioners on Uniform State Laws in 1976 and amended in 1977 and 1990.

The Marketable Record Title Act is a radical Act. It extinguishes claims that predate a root of title, whether they are vested or contingent, possessory or non-possessory.[81] A co-tenant can lose his interest unless he preserves it by filing a notice within the 30-year period.[82] Contingent remaindermen and other future interest holders are stripped of their interests unless they preserve their claims by filing.[83] The Act abolishes the common-law protection for disabilities and reverses the common-law rule that stray instruments may be ignored by the title examiner.[84] Forged deeds, which are nullities at common law, can serve as conduits of title if they predate a root of title.[85]

The repudiation of these common-law principles is justified by the need to clear the record of stale claims. The Supreme Court has recognized the beneficial effect of the Act:

> The purpose of the Act is to simplify and facilitate land title transactions by allowing persons to rely on a record title, subject only to certain statutory limitations. This is accomplished by eliminating those ancient defects and stale claims against the title to real property which are not properly preserved—to the end that the period of record search may be limited to relatively recent instruments.[86]

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[81] *Mobbs v. City of Lehigh,* 655 P.2d 547, 551 (Okla. 1982).

[82] See the second example in the Comments to Oklahoma Title Examination Standard 19.9, 16 O.S., Chap. 1, App.

[83] *ITT Rayonier, Inc. v. Wadsworth*, 346 So.2d 1004, 1011 (Fla. 1977).

[84] Justice Opala's dicta in the *Mobbs* case suggests that wild deeds can be a valid root of title. 655 P.2d at 552. This caused the Oklahoma Bar to revise Title Standard 3.1 on stray deeds. The standard previously reflected the common law rule that stray deeds may be ignored. After *Mobbs*, Standard 3.1 was revised to require the examiner to inquire and satisfy himself that the stray deed could not constitute a root of title.

[85] *Marshall v. Hollywood, Inc.*, 224 So.2d 743, 750-751 (Fla.App. 1969), *aff'd by* 236 So.2d 114, 119 (Fla. 1970).

[86] *Mobbs*, 655 P.2d at 551.

It is arguable that the judicial definition of marketable title has been superseded by the legislative definition of marketable record title in the Act.[87] The Supreme Court has not engaged in an extended discussion of marketability since it rendered *Hawkins v. Wright,* 12 years before the enactment of the Marketable Record Title Act.

Definitions of Marketable Title in Other Jurisdictions

Professor Basye has reviewed definitions of marketability from all jurisdictions. The two most prevalent definitions are similar to the definitions in *Pearce* (free from reasonable doubt) and *Sipe* (the quality of title that a reasonable buyer expects from a reasonable seller).[88] Professor Basye has submitted that the Model Marketable Title Act,[89] which has been adopted by Oklahoma at 16 O.S. §71, contains the best existing definition:

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[87] 16 O.S. §71 defines marketable record title as follows:

> Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for thirty (30) years or more, shall be deemed to have a marketable record title to such interest as defined in Section 78 of this title, subject only to the matters stated in Section 72 of this title. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than thirty (30) years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in
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> (a) the person claiming such interest, or
>
> (b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest;
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> with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

[88] Bayse, *Clearing Land Titles* §371.

[89] Lewis M. Simes and Clarence B. Taylor, *The Improvement of Conveyancing by Legislation* (1960).

> For a marketable title act to state in definite and positive terms what is to be exclusively considered in forming an opinion of land title marketability is a legislative quality of major significance; such positive statement automatically in itself extinguishes what is not to be exclusively considered, even though the act, for emphatic clarity, also states what specifically is to be extinguished. . . . [A prime virtue of the act is] the positive statement as to what does constitute marketability *after* old interests have been extinguished. This positive statement as to what *does* constitute marketability carries implications of great constructive value for the title examiner. With this positive statement the title examiner proceeds toward his goal with a tangible image rather than the indefiniteness that continues even in the presence of broad legislation that is confined to extinguishing. The tangible image is required for maximum efficiency.[90]

Title Standard 4.1 Fails to Reflect These Legislative Developments

Title Standard 4.1 has remained unchanged since it was adopted by the O.B.A. in 1946. It quotes the definition of marketability from the *Pearce* case and prefaces this definition with the misstatement that marketable title is synonymous with perfect title. Perfect title has nothing to do with marketable title. Perfect title is a vulgarism that is at issue only if the contract for sale calls for perfect title. The standard might just as well say that good title and clean title are synonymous with marketable title. These terms also lack legal significance. The Oklahoma Supreme Court construes them as meaning marketable title. Title Standard 4.1 is defective because it shifts the focus from marketable title to perfect title.

This title standard also creates the mistaken impression that Oklahoma clings to a higher standard of marketability than other jurisdictions. Oklahoma's real property code is progressive and should be construed liberally. The Oklahoma Supreme Court has never suggested that Oklahoma has a higher standard of marketability than other states. Just the opposite is true. The Supreme Court in ruling on marketability has reviewed the law in other jurisdictions and followed it.

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[90] *Id.* at §373.

Title Standard 4.1 could be improved simply by deleting the reference to perfect title. This is a truer reading of *Pearce*. This revision still leaves us with a Standard that is little more than a headnote from a single case. The Standard could be expanded to include the definition of marketable title from *Sipe*: a title that can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence. If the Standard were modestly revised to reflect the body of case law on marketable title, it would provide that a marketable title is a title entirely free of liens and encumbrances and reasonably free of defects that would expose the buyer to litigation to defend his title. Another option is to use the statutory definition of marketable record title as a base and add these judicial refinements.

Any of these changes would correct the defects in the existing standard. They would materially aid in disabusing the practicing Bar of the notion that a title must be perfect to be marketable. This would take the moron out of the oxymoron that marketable title means perfect title.

Conclusion

A more useful standard would go further. Instead of serving the limited educational purpose, it would reflect the shared values and practical experience of Oklahoma attorneys in evaluating titles.

Oklahoma attorneys tend to make requirements for all conceivable defects. The rationale is that the attorney's role is to point out all risks and let the client decide which requirements to satisfy and which to waive. This practice has developed in the past 25 years and is directly opposed to Model Title Standard 2.1, which provides: "Objections and requirements should be made only when the irregularities or defects reasonably can be expected to expose the purchaser or lender to the

hazard of adverse claims or litigation."[91] The examining attorney is uniquely qualified to assess the impact of defects on the marketability of the title. Attorneys should be encouraged to segregate their requirements into those impairing marketability and those carrying less risk. The title attorney abdicates his responsibility to the client by rendering an opinion that is nothing more than a rote listing of technical defects. There should be more opinion in title opinions.

Marketability is a concept based on the marketplace. Costs must be weighed. Experienced attorneys, in advising their clients which requirements to satisfy, consider several factors, such as the nature of the transaction, the size of the interest affected, the remoteness of any defects in title, the cost of curative action and the likelihood that the defects will expose the buyer to litigation to defend its title. Practical concerns should predominate.

Title standards should be adopted to recognize and encourage these practices. This will limit the role of the flyspecker, who quixotically seeks perfect title and insists on curing all conceivable defects. Unnecessary title curative generates work for attorneys without providing any benefit to the client. It increases the expenses of the parties and discourages land transactions.

perfect.brf

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[91] Lewis M. Simes and Clarence B. Taylor, *Model Title Standards* (1960).

Biographical profile of Donald F. Heath, Jr.

Donald F. Heath, Jr. is a member of the firm of Stead & Heath, P.C. in Norman. He examines and litigates oil and gas titles. He is the Chair-Elect of the Real Property Law Section and a Director in the Oklahoma City Title Attorneys Association. He received his J.D. in 1982 from the University of Oklahoma and his B.A. in 1979 from Grinnell College, Grinnell, Iowa.

TITLE EXAMINATION STANDARD 4.1

ADOPTED APRIL 15, 1995

A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record.

Authority: Campbell v. Harsh, 31 Okla. 436, 122 P. 127 (1912); Sipe v. Greenfield, 116 Okla. 241, 244 P. 424 (1926); Pearce v. Freeman, 122 Okla. 285, 254 P. 719 (1927); McCubbins v. Simpson, 186 Okla. 417, 98 P.2d 49 (1939); Hawkins v. Wright, 204 Okla. 955, 226 P.2d 957 (1951).

Comment: Marketable title is a title free of adverse claims, liens and defects that are apparent from the record. Any objections should be reasonable and not based on speculation. For purposes of this definition, words describing the quality of title such as perfect, merchantable, marketable and good, mean one and the same thing.