North Dakota Law Review

Volume 42 | Number 4 Article 6

1966

Abstract of Title - Duties and Liabilities of Abstracters - Effect of Adjoining Property

Douglas R. Grell

RECENT CASES

ABSTRACT OF TITLE—DUTIES AND LIABILITIES OF ABSTRACTERS—EFFECT OF ADJOINING PROPERTY—Plaintiffs purchased one lot from a tract for the purpose of establishing a service station. A 40 foot right-of-way easement of indeterminate location over this tract existed prior to plaintiffs' purchase. Also, prior to plaintiffs' acquisition this easement was partially released. The partial release clarified the original faulty description and also described that portion, 20 feet, remaining under the easement. The 20 foot right-of-way that remained ran along and between plaintiffs' property line and the paved part of a city street. Plaintiffs contend that defendant should have included notice of the 20 foot right-of-way in their abstract. Defendant contends it does not have a duty to show matters of record of adjoining property. The Arkansas Supreme Court, with two justices dissenting,[1] *held* that an abstract company had no duty to show an easement over a right-of-way adjoining property purchased by the owner. *Little Rock Abstract Company v. Keaton*, 395 S.W.2d 327 (Ark. 1965).

The Arkansas court in the principal case comes to grips with two separate issues, namely, is an abstracter required to include the present status of an encumbrance affecting title, and is an abstracter required to show matters of record concerning adjoining property that might affect property under consideration. With the exception of the dissent as to the first issue, the court finds no difficulty in answering both issues in the negative.

An abstract of title has been defined as a methodically written history of title to a specific tract of land.[2] This written history is composed largely of the documents and instruments of record which affect the title.[3] Accepting this definition, a partial release of an easement should be considered an instrument in the chain of title which affects title to be included in an abstract. A nineteenth century English case held that every portion of each instrument in the chain of title affecting title should be included in the abstract.[4] This belief has been expounded by some of the more notable authorities in their various works on abstracts and titles,[5] and one author extended this further by stating that all instruments that might clear up and explain the title should be included in the abstract.[6] Since the abstracter decides what to include in an abstract, the

1. Ward & Johnson, JJ., felt the abstracter had a duty to include the partial release in the abstract.
2. MCDERMOTT, LAND TITLES & LAND LAW, 4, § 1.11 (1954).
3. Leath v. Weaver, 202 S.W.2d 125 (Mo. Ct. App. 1947).
4. Burnaby v. Equitable Reversionary Interest Soc., 52 L.J. Ch. 466 (Eng. 1885).
5. *E.g.*, 1 FITCH, ABSTRACTS & TITLES TO REAL PROPERTY, 167, §95 (1954); THOMPSON, EXAMINATION OF TITLES, 90, § 75 (1929).
6. Ruemmele, *How to Examine an Abstract and Implication of the Marketable Titles Act*, 1952 N.D. Ass'n. Sec. Programs 9.

employer who has procured an abstract should be justified in depending on the abstracter to show all instruments bearing on the title, as at least two authors, one in a foreign jurisdiction[7] and one in North Dakota,[8] have expressed. If this were not true then every employer would be obligated to investigate the records himself, thus defeating the very purpose of hiring an abstracter.[9]

There are cases which have regarded an easement of any kind as an encumbrance,[10] and, though not specifically included in the definition of an encumbrance in North Dakota's Century Code,[11] North Dakota's courts, in interpreting the statute relative to easements[12] have held an easement to be a burden upon the servient estate[13] and, therefore, would conceivably find an easement such an encumbrance as necessary to be shown by the abstract. Since North Dakota's statute states that the word encumbrance applies to mortgages,[14] a court holding an abstracter negligent for not including a partial release of a mortgage[15] should by analogy do the same in the case of a partial release of an easement since both mortgages and easements are properly regarded as encumbrances.[16] Thus, assuming that abstracters are required to include releases of easements, not including them would be a deficiency in the abstract.[17] Most states have enacted statutes such as a South Dakota provision which provides for the liability of abstracters of any and all damages for "any error, deficiency, or mistake."[18] A South Dakota decision[19] has allowed recovery under the predecessor to this provision for a deficiency in failing to include a lien in the abstract. North Dakota, which has a similar provision in its code[20] but apparently has no decision interpreting its statute, has a decision[21] which cites the South Dakota decision with approval, and since a lien is an encumbrance[22] this would seem to indicate that North Dakota would find an abstracter liable for failing to include a release of an easement if injury resulted from this failure.

An absolute statement that an abstracter has no duty to show matters of record concerning title to adjoining property, such as made by the court in the principal case, lacks validity in some

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7. Ledwith, *The Rights & Duties of an Abstracter of Title,* 5 Neb. L. Bull. 452 (1926-1927).
8. Ruemmele, *supra* note 6.
9. Hillock v. Idaho Title & Trust Co., 22 Ida. 440, 126 Pac. 612 (1912).
10. *E.g.,* Krotzer v. Clark, 178 Cal. App. 536, 174 Pac. 657 (1918); Lavey v. Graessle, 245 Mich. 681, 224 N.W. 436 (1929).
11. N.D. CENT. CODE § 47-10-17 (1960). "The term 'encumbrances' includes taxes, assessments, and all liens upon real property."
12. N.D. CENT. CODE § 47-05-01 (1960).
13. Johnson v. Armour & Co., 69 N.D. 769, 291 N.W. 113 (1940).
14. N.D. CENT. CODE § 35-01-01 (1960).
15. Wacek v. Frink, 51 Minn. 282, 53 N.W. 633 (1892).
16. *Supra* notes 10 and 14.
17. *E.g.* Attebery v. Blair, 244 Ill. 363, 91 N.E. 475 (1910); Vangsness v. Bovill, 58 S.D. 228, 235 N.W. 601 (1931).
18. S.D. CODE § 1.0107 (1939).
19. Goldberg v. Sisseton Loan & Title Co., 24 S.D. 49, 123 N.W. 266 (1909).
20. N.D. CENT. CODE § 43-01-11 (1960). ". . . any negligent act, error or omission. . . ."
21. Commercial Bk. of Mott v. Adams County Abstract Co., 73 N.D. 645, 18 N.W.2d 15 (1945).
22. *Supra* note 11.

situations as is shown by courts which have held that an abstracter is chargeable with knowledge of the use to which the abstract will be devoted and becomes liable for damages from defects contained therein.[23] Thus, if the use to which the employer intended to put the property, as in the principal case, depended on the access to a public street over adjoining property, the abstracter would seem to have a duty to inform the employer of matters of record of the adjoining property which affected that use. In the only North Dakota decision relating to matters not in the chain of title there was dicta that suggested that an abstracter might have a duty to examine the records more completely than usual if the circumstances so warrant it.[24] Apparently, a North Dakota court would hold the abstracter to a more diligent duty of examination when the use of the land is known.

The North Dakota Bar Association in 1950 adopted standards, and the general introductory standard stated that all irregularities or defects which impair title or can reasonably be expected to expose the purchaser or lender to the hazard of adverse claims or litigation impress upon an abstracter the duty to inform his employer. This standard is supported in theory by one notable authority in his treatise on abstracts and titles.[25] Applying the proposed effect of this standard inferentially, since apparently there are no North Dakota decisions adopting this standard, an abstracter in North Dakota would probably be held to what a reasonable man could have foreseen and be obligated to include in the abstract notice of such.

Notably, if an employer has expressly contracted with the abstracter to furnish specific information, such as matters affecting adjoining property, various courts would obligate abstracters to supply this information.[26] In addition, an abstracter should be held to the duties of an agent to his principal, because the relationship between a person hired to do certain acts for or in relation to rights or property of another person, has been characterized as an agency.[27] Consequently, an abstracter would have the duty to notify his principal of all material facts, regardless, of whether they affect title to the specific property in question or not.[28]

Though practicing abstracters in North Dakota and elsewhere might say it is absurd to hold abstracters to examine records of

23. *E.g.*, Crook v. Chilvers, 99 Neb. 684, 157 N.W. 617 (1916); Cole v. Vincent, 229 App. Div. 520, 242 N.Y.S. 644 (1930).

24. Turk v. Benson, 30 N.D. 200, 152 N.W. 354 (1915).

25. 1 FITCH, ABSTRACTS & TITLE TO REAL PROPERTY, 168, § 97 (1954).

26. *E.g.*, Adams v. Greer, 114 F. Supp. 770 (W.D. Ark. 1953); National Bk. of Garland v. Gough, 197 S.W. 1119 (Tex. Civ. App. 1917).

27. Kunz v. Lowden, 124 F.2d 911 (10th Cir. 1942).

28. N.D. CENT. CODE § 3-03-05 (1960). "As against a principal, both principal and agent are deemed to have notice of whatever either has notice and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Dauzat v. Simmesport State Bk., 167 So. 2d 681 (La. Cit. App. 1964); Carluccio v. 607 Hudson St. Holding Co., Inc., 139 N.J.Eg. 481, 52 A.2d 56 (1947).

adjoining property, the weight of reason would indicate the contrary under facts similar to those of the instant case. Actually, there are very few cases in the area of abstracting from which one could draw for authority either way. Also, when one considers the purpose of an abstract, the use the abstract will be put to, the dicta of the North Dakota decision, the citation of a foreign jurisdiction's decision with approval holding an abstracter to a duty of examination beyond first glance, the duties of an agent toward his principal, and the North Dakota Standards of Title, a sound argument is made for holding an abstracter to a duty to examine records of adjoining property in situations such as in the instant case.

DOUGLAS R. GRELL

PARENT AND CHILD—ACTIONS BETWEEN PARENT AND CHILD—AN ABROGATION OF THE IMMUNITY DOCTRINE — The adminisator of the deceased father's estate brought an action for wrongful death, and the mother for personal injuries, against the couple's unemancipated minor son for his negligence in driving the family automobile. The Supreme Court of New Hampshire *held* that immunity does not exist where the parent and child relationship has been terminated by death and personal liability suits by a parent against the child are not so disruptive of family unity as to preclude their maintenance. *Gaudreau v. Gaudreau,* 215 A.2d 695 (N.H. 1965).

The instant case is an extension of an earlier 1965 New Hampshire case in which a widow recovered in an action brought individually and as next friend for her three minor children against her deceased husband's estate.[1] Few jurisdictions have gone as far as New Hampshire in abrogating the original parent-child tort immunity doctrine, however, notably a similar result is found in Wisconsin where recovery is allowed except where the negligent act involves an exercise of parental authority over the child or an exercise of ordinary parental discretion in providing necessities.[2] Also, in a 1932 Missouri decision, a mother was allowed recovery in an action for personal injury against her unemancipated minor child,[3] but this case has since been overruled[4] apparently leaving Wisconsin and New Hampshire as the only jurisdictions which allow an unemancipated minor to sue or be sued by his parents in a case involving ordinary negligence when the tort feasor was not fatally injured.

1. Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965).
2. Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193 (1963).
3. Wells v. Wells, 48 S.W.2d 109 (Mo.Ct.App. 1932).
4. See Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953).