

## THE NEGLECTED HALF OF CONVEYANCING

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### 1. CHECKING THE IDENTITY OF THE PROPERTY

It is essential to ensure that the title transferred is the exact property the client intends to buy. This is so obvious that every solicitor would protest that of course he must transfer the right property. I propose to explain why I believe that adequate steps are not usually taken to make sure that this is done. As a basis for argument let me set out the general conveyancing practice, taking a routine purchase of a house as my example. I admit that more elaborate precautions will usually be taken with a large commercial property or in other special cases.

When the client gives his instructions, he will almost certainly say that he has bought, for example, a brick bungalow at 25 Royal Crescent, Musselburgh, and he will rarely have any knowledge of section or title numbers. His solicitor then rings the vendor's solicitor for a title reference, unless it is already given in the contract. The search will be done by a law-clerk, who knows nothing about the property itself. He verifies that it is in the correct vendor's name, and copies the formal legal description which is, say, Lot 16 Block IV Musselburgh Township. He traces the small title plan, usually a simple rectangle, showing frontage to the correct street, Royal Crescent, and notes carefully all mortgages and other encumbrances so that discharges can be obtained and checked on settlement. Sometimes the search note may be shown to the client and discussed with him, but quite often even this elementary precaution may not be taken.

If no finance is needed, most likely no inspection of the property is made. If finance is needed the solicitor may inspect the property himself or engage a valuer, but in either case their attention is directed mainly to the value and condition of the property, and except for perhaps a measurement of the frontage, no other special steps are taken to check identity. The transfer is then carefully drafted and sent for signature. Next comes settlement with careful checking of documents, and with undertakings about outgoing and other details, and finally stamping and registration. As a result of all this careful work, the solicitor has transferred to his client a guaranteed indefeasible title to Lot 16 Block IV Musselburgh. The client has paid for and believes he has become the owner of No. 25 Royal Crescent. The question is whether the above procedure is adequate to ensure that these are always one and the same thing.

At first sight it might appear that there is no possibility of error. The title reference was supplied by the vendor's solicitor who must surely know his own client's property, and the vendor himself may even have produced his title for inspection. The title plan shows that the property is in the correct street and the rate account and insurance policy are also correctly in the vendor's name. It is assumed also that the title is fully guaranteed as to title and parcels, and therefore the land has been surveyed and accurately defined and pegged. The solicitor may

therefore feel that he has indeed taken reasonable precautions. However, nearly all these precautions involve relying on checks which some other person may or may not have made carefully, at some indefinite time in the past. They amount to no more than a probability or an assumption that the property corresponds accurately with the title. The identity of the property is fully as important as the state of the encumbrances and other details of title, and to rely on past enquiries by strangers to establish the all-important identity is just as inadequate as to neglect making a proper registry office search of title on every transaction.

In practice the chance of error in identity is not altogether remote. More careful reflection and a study of the reported cases will show that on account of a great variety of subtle complications, which may be entirely different and entirely unexpected in each case, errors do periodically occur, ranging all the way from slight encroachments to a complete mistake in identity involving a transfer of the wrong property to the purchaser. The simplest error is an encroachment, either by a neighbour's fences or buildings on to a client's property or by the client's fences or buildings on to the neighbour's property. Even if the section has been surveyed and pegged, this may have been done very many years ago, and even in the case of a recent survey, the pegs may have been misplaced or lost in bulldozing operations or in other ways. Mistakes are often made by owners or builders in assuming that an intermediate peg is a corner peg. Many other unpredictable errors may result in a fence or building being erected beyond the legal boundary.

Another type of error occurs where an owner has bought an extra strip or projection of land on his boundary, perhaps to widen a motor entrance or to build a garage or to correct an earlier encroachment of a wall. Until recently, such an extra title was not amalgamated with the main one, and if the solicitor uses the deed-book system of filing, it may have been entered separately in his strong-room. If the property is sold several years later, perhaps after the owner has died, it is surprisingly easy for the extra title to be overlooked. The purchaser's solicitor takes a transfer of what appears to be the title of the whole property, and the same mistake is even more easily repeated on subsequent sales. The most serious error, of transferring an entirely wrong property, can also occur more easily and more often than one would imagine. Most solicitors can recall at least one instance that they know of, either directly or indirectly, although they may feel sure it could never happen to them. Take the case of a man who owns two properties in the same street, either adjoining or some distance apart. As usually happens in older blocks, they may have similar areas and shapes, and there is nothing on the titles to distinguish them or to say which is the expensive new residence and which the old rented cottage. If he sells one, it is all too easy, although hard to believe, for the man himself or his land agent or solicitor, through some curious mistake or misunderstanding, to supply the wrong section or title number to the purchaser's solicitor. Unless the latter is in the habit of making special checks for identity, there is nothing in the title itself to alert him to the error and he may transfer a completely wrong property.

In most of these cases the error can be corrected in whole or in part by court action for rectification or by means of the newly enlarged provisions of s.129 and s.129A of the Property Law Act 1952 dealing with encroachments. Incidentally, the fact that these sections have been found necessary and have been greatly widened in their scope from time

to time, indicates how frequently such mistakes occur and how real is the problem of identification. Even if litigation can be avoided, a great deal of cost, worry and unpleasantness will be involved, which in nearly every case could have been avoided had the solicitor given more careful attention to what I have called the neglected half of conveyancing, summed up in six vital words, "checking the identity of the property."

## II. PRACTICAL SAFEGUARDS

What practical steps should you as a solicitor take for the purchaser in addition to the routine procedure outlined above? Fundamentally you should always keep firmly in mind that the Land Transfer Act 1952, for all its advantages, and even with a fully guaranteed title, can in the very nature of things only guarantee *of itself* that the proprietor is the owner of what I might call a theoretical piece of land, known by a certain lot or section number, and that it cannot *of itself*, guarantee that this is the property at such and such a street number that your client has inspected and intends to buy. With this always in mind, I suggest you should make a routine of the following checks on every transaction, with such variations and even additions as the particular circumstances may indicate.

1. It is not sufficient to search the title only. You should inspect also the Index Plan of the locality. These plans are compiled by the Registry Office and show in brief outline the latest results of all survey plans and title adjustments in each block of the city. They are of great help, not only in locating a property or a title when a reference is not available, but even more important, in giving the general lie of the land and showing if there are any peculiarities or special points you should investigate further.

2. You should then study any survey plans of the property you are dealing with, and the plans, if any, of neighbouring properties and watch specially for signs of buildings or fences encroaching either way, and also make a tracing of the shape and position of all buildings, if any are shown.

3. You should make a further sketch plan showing the relation of the property to some recognisable point of reference such as a street corner or an angle in the street or a service lane or public park. The title itself may show only a rectangle identical with a dozen or more sections in the block, and unless your property is itself at an identifiable point of reference, such as the corner of two streets, measurement from a recognisable point of reference is the only means of establishing the identity of the title with the property.

4. As an elementary precaution you should show these plans to your client and explain the necessity of checking identity, and see if the plan of the section and the sketch of the buildings correspond with his own knowledge of the property.

5. If your client is sufficiently intelligent, get him to take the plans and measure up the property. There is, however, a risk in leaving this task to the client, because the concepts are strange to him and as I have said, the possible errors are subtle and unexpected and he may miss the points he is supposed to look for.

6. I think you should preferably inspect the property yourself or send a competent clerk. It is always advisable to see the property or whatever else it is you are dealing with. A doctor could hardly diagnose and prescribe adequately if he depended on a second-hand report without examining the patient, and lawyers should surely be no less meticulous. I think this rule is wise even in a simple purchase; you may find nothing out of the ordinary but you may just happen to discover a vital point that would otherwise be missed.

7. When inspecting and measuring, keep these two fundamental points always in mind. First, check for identity; is it the same property as shown in the title? Second, watch for encroachments; are there any buildings near the boundaries and possibly over the line?

8. As a check for identity, you should measure the distance from the corner or other point of reference and count the intervening properties to see if they correspond with your locality sketch.

9. As a further check for identity and also a check for encroachments, you should measure the frontage and check the shape of the section and compare the position and shape of the buildings with the sketch made from the deposited plans.

All these checks will only give an approximate result and will only disclose gross errors. Neither a solicitor nor his client can hope to measure accurately enough to get an exact result. If valuable buildings are on or very near the boundaries or if the measurements disclose anything unusual or suspicious, you should have a survey check made by a surveyor. This costs only a few pounds in a simple case, and in proportion to the price of the property and the amount of other expenses the survey is a cheap and necessary insurance.

The steps outlined above will be varied to suit each individual case. If your client is buying a very old cottage flanked by expensive houses, you can perhaps afford to relax. A very recent survey may show all necessary information conveniently on one plan, although even in this case you must remember that the survey does not give any indication whatever of street number or other layman's means of identification, and in case you may have been given the wrong title reference in the first place, you must make sure from the shape of the section and buildings and other particulars, that you are looking at the survey of the correct property. You must also consider whether a garage or a new fence has been added since the survey, and check by measurements on the property to see that they are not over the survey boundary lines. If the property is a shop or commercial building covering the entire site, I think all solicitors would agree that it is essential to have the buildings and the section boundaries checked by a surveyor in every case. This applies whether your client is erecting a new building or buying an existing one, or even taking a mortgage, because all the above observations apply with similar force to mortgage transactions. Some valuers automatically check for identity and encroachments when valuing a property and even make their own searches and investigations at the Registry Office. Not all valuers are so thorough, and you should not assume that a valuation includes a check on identity without verifying that the particular valuer appreciates the problem and makes the necessary searches and measurements.

All this will take more time and work than the routine procedure, although not as much as might appear from the written explanation.

A search clerk can be trained to obtain the extra particulars as a routine of searching. It is the personal inspection and measuring of the property which takes the most time. In conveyancing you are dealing with titles only as a means to an end; you are essentially transferring physical properties and the title is only the legal shadow or evidence of ownership. From the nature of the registration system and its use of an artificial "legal description" limited to the land only, the title cannot guarantee the correctness of the physical property. No amount of time studying search notes while sitting in a legal office, or even the most careful search in the Registry Office, can of itself guarantee that you transfer the correct property, unless the property is inspected measured and compared with all the data available in the Registry.

### III. REQUIREMENTS OF REGISTRATION SYSTEM.

From what I have written it will be clear that an essential requirement of a good land registration system is an absolutely certain means of identification, or, in other words, a positive bond or nexus between the title and the property. A theoretically perfect way would be to make all titles in the form of a bronze plate, permanently affixed to the building, with all necessary particulars and the Registrar's signature engraved thereon. But if we are to have the convenience of a central registry and paper titles, we must rely on some form of survey and verbal description for the required nexus.

The difficulties of identification which I have outlined arise from two aspects of the "land transfer" system which we have inherited from the past, without considering whether they are suitable for present conditions. The first is that the Land Transfer Acts, in line with our general law of property, have adopted the age-old English practice of referring only to "land", and treating buildings and anything else above or below the surface as mere accessories which need not be mentioned or described. This is really just a rule of convenience, developed from the fact that land is fixed and permanent, while buildings are transitory. With huge modern buildings costing perhaps a million pounds, the relative importance of land and buildings has been reversed, and I suggest that in the case of such properties it might be more satisfactory for the title to certify that the named proprietor is the owner of the "seven storey reinforced concrete building at 147 George Street, Dunedin, known as Halsbury Chambers, together with the land on which such building stands."

The second point, closely related to the first, is the land transfer method of survey itself. This of course follows the same general practice of referring only to the land, which is shown as numbered sections or lots, but the point I wish to discuss is the method of locating the land as so many thousand links north and west, or south and east, of a trig station on a distant hill. This method is known as "cadastral" survey (by some devious derivation from the Latin *caput*, a head) in contrast to topographical survey which locates and defines the property by accurate definition of buildings and natural features. The cadastral method had special advantages in the early days of the colony when most of the land was bare and featureless, and the trig station was a satisfactory, and indeed the only available point of reference for locating the sections which were being cut up and sold. This method is still satisfactory for

farm land and possibly even suburban properties, but for large city buildings I think it would now be better to adopt the topographical method of using the building itself as the point of reference, instead of the distant trig.

Surveyors have moved a certain distance towards this change in recent years by showing the outlines of buildings on their plans, whenever the buildings are on or near the boundary, and both surveyors and the courts treat old-established buildings as evidence of ownership in the case of small uncertainties of boundary, but this is done in a rather grudging fashion; the plan is still primarily a plan of the land, measured from the distant trig, and the buildings are secondary. The whole conveyancing procedure is carried on, one might say, in two entirely different languages. Surveyors and solicitors speak the language of abstraction in section and plan numbers, while owners speak the language of reality, of buildings and of street numbers, and there is no means of translation provided by the system.

Three exaggerated analogies may reinforce the argument. Explorers searching for buried treasure in a distant and unknown island must have the pirate's map directing them by bearings and distances from a known starting point, but when they have found the treasure they no longer need the complicated directions or the distant starting point. As a further illustration, imagine the case of a surveyor and his missing gold collar-stud. It would be technically possible for him to locate the stud, if his wife told him it was 173 links north and 124.5 links west of a nail in the front door lintel, but from every point of view it would be better if she used a more direct and known point of reference and told him it was in the shaving cabinet. The third concerns a purchaser of a large building who considered that the wording of his transfer as "all that piece of land" was just as inadequate and absurd as if a bride was described in legal jargon in her marriage certificate as "all that pair of white satin shoes of size six more or less with the blonde female therein."

Problems of identification occur in various other spheres of life and a brief examination of a few may throw light on the advantages of topographical titles and also emphasise my previous argument about the necessity of personal inspection of the property.

1. Motor vehicle registration certificates use a double means of identification. There is the engine and chassis number, usually discoverable only by the garage expert, and there is the large and prominent registration plate, affixed to the vehicle and visible and intelligible to owner and purchaser — and to traffic officers. A careful purchaser will certainly inspect the registration certificate, but this will not help him unless he also looks at the car to see if the numbers correspond.

2. Sheep and cattle are identified by earmarks and brands. This is a clear and positive method, but here again it is obvious that a search of the registered marks of itself gives no protection, unless the stock are inspected to verify their identity.

3. People are ordinarily identified by name, duly recorded by the Registrar. When a greater certainty is required for travelling overseas, the passport gives a detailed physical description and a photograph. (Here is an idea for application to titles.) Even more exact identification for police purposes is obtained by recording fingerprints, but despite the accuracy of this method, it is obvious that the police cannot identify

a man merely by studying their office records, without a personal examination and comparison with the suspect's own fingerprints.

Similarly with a land registration system, we need, as I have already emphasised, a clear and positive means of identification and a routine of carrying it out in practice by personal inspection of the property. In the final section, I will explain the possible use of topographical titles for this purpose.

#### IV. TOPOGRAPHICAL TITLES.

I do not propose any wholesale or compulsory change in the existing procedure, but only a provision to enable owners of substantial buildings to change, if they wish, to topographical titles, in which the building itself will be used to define the property. Even so, I would not abandon the existing method of survey definition of the land. This would be retained as a secondary description, in case the building was pulled down or obliterated by fire or earthquake.

Imagine John Smith, the owner of a large city building, who decides to convert to a topographical title. If there is an existing survey with adequate details of buildings, this could be used, with a declaration by the surveyor that there were no changes in the buildings. Otherwise a new survey plan is required, showing external walls of Smith's building and all adjoining buildings. Smith then approaches each neighbouring owner to sign with him a Boundary Agreement accepting the junction of the walls of the legal boundary on that side. When all the neighbours have signed, Smith's new topographical title will be issued. The description of the property would be more elaborate than in the present type of title and would be worded somewhat as follows, to certify that John Smith is the proprietor of

all that piece of land occupied as at the date hereof by the four storey brick and concrete block of shops and offices situated at 147 Princes Street, Dunedin, and known and permanently marked as "Commercial Building". Such piece of land is shown approximately on the plan endorsed hereon and is also shown in detail on Deposit Plan No. 9874 with annexed boundary agreement defining the boundaries of the said property. The secondary description of the said land is Section 14 Block XXV Dunedin containing 15.4 poles more or less.

The advantage of such a title from the owner's point of view is that it is really on its face a title of what he has bought, a property at 147 Princes Street with a large and valuable block of buildings. From the solicitor's point of view, whether acting for owner or purchaser, I believe it has the following definite advantages.

1. It is a title to the exact physical area of land on which the building stands, instead of the topsy-turvy present method of issuing a title for a theoretical rectangle of land, defined as so many thousand links from a reference point at Trig J, on which the client's building may or may not be accurately situated.

2. No arguments can occur about the true boundaries or about discrepancies between title and occupation or about errors or uncertainties in survey.

3. Upon every future sale or dealing with the property, the title provides a certain and easy means of identifying the property and there can be no problem of establishing the "metes and bounds" or questions of encroachment.

4. These same advantages apply to the neighbours who signed the boundary agreement. They get equal certainty and protection with regard to their own boundaries adjoining Smith's property.

This system in the above form would hardly be appropriate for houses but some of the provisions could be used with advantage. The owner of a house could be empowered to apply to have the street number added to his title and a description of the type of building, for example, a two storied double brick dwelling with slate roof. Also I think titles could show distance from a street corner or other suitable landmark, as was often done under the old Deeds system. The title would thus bear on its face sufficient information to locate and identify the property.

This proposal raises various objections and difficulties. Obviously if the buildings are demolished or substantially altered, or if new buildings are erected, the title description will no longer be accurate, and provision would have to be made for filing an amended description. The very high cost of new buildings would fully justify a supplementary survey and an amended boundary agreement, especially if they were on or near the boundary. The title would describe the buildings as at the date of the title, and a purchaser must of course still inspect the property and compare the buildings with those shown on the title. Even a topographical title does not eliminate the need for inspection; it only makes the task easier. Substantial buildings even of the older type will almost certainly outlast the life of the title and even the life of the owner, and the need for amended description would very seldom occur.

Finally the use of photographs is worth considering. The Registry Office has already moved with the times in using photostat copies of titles with great success. The problem is to make the title a clear and positive record of the property and what better method than to use photos taken from various sides and perhaps aerial photos of the locality as a supplement to the survey and verbal descriptions. The photos would be filed with the plan or perhaps even reproduced on the title.

These suggestions for topographical titles are a matter for the future and are almost certainly debatable. I have introduced them mainly to emphasise the problem of identification and to stress the absolute necessity of an inspection of the property as a routine part of good conveyancing procedure.