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Conveyancing

M. M. Osche

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CONVEYANCING*

Conveyancing has become one of the most important phases of contemporary legal practice. Large companies have been organized for the purpose of dealing solely in the transferring of real property.

When one considers the amount of realty and the value thereof, he necessarily realizes the importance of accurate conveyancing. Much of the total wealth of the United States is evidenced by real estate and the appurtenances thereto, and sound dealing requires security of the vendee's rights in such property. The nature of the business done in this country, of which over ninety percent is done on credit, by necessity requires that much of the realty be utilized as security for the extension of such credit. The value of such realty securing credit depends upon the validity of the respective conveyances in the chain of title of said security.

Sums aggregating billions of dollars are expended annually in the transference of real estate, and statistics evidenced by controversy and litigation disputing titles are proof of the thousands of mistakes made in the transference of property. Many of these mistakes could have been avoided by cautious construction of deeds, mortgages, liens, leases, and other interests in real estate.

The following notes are published for the purpose of aiding and guiding prospective conveyancers in preparing valid transfers relating to realty.

MARITAL STATUS

The marital status of the grators should be definitely described, for example, a man who has not been married, a bachelor, a woman not married, a spinster. The term single man or single woman should not be used, as there are cases in which they might have been married at some one time, but are now single in that there is a probability of having been divorced or the husband or wife, as the case may be, is dead.

A party who has been divorced should not be described as a widow or a widower but as divorced and not married. The rea-

Editors note—

*Report of the lecture submitted before the Notre Dame Law Club by Judge Oshe of the Chicago Title and Trust Company as reported by J. R. Harrington.

son is obvious. In examining a conveyance, if nothing appears to the contrary, we must accept the recitals therein as true. For instance, in examination of an abstract, we find instruments reciting that the grantors, John Jones and Mary Jones are husband and wife. This, together with their acknowledgment as husband and wife, is sufficient proof of that statement, and so when William Smith conveys as a widower, we understand that his wife is dead. But when he conveys as *divorced* and *not remarried*, the party examining the conveyance immediately has knowledge of the divorce. In most states the general rule is that if the decree of divorce is rendered for the fault of the husband or wife owning the property, the decree will not bar the rights of the one obtaining the decree. Oftentimes, the divorce decree has been obtained in a state other than that in which property is located and the only possible notice is by a proper recital in the decree.

Parties who have been divorced should not be permitted to convey as unmarried, although Mr. Webster defines unmarried as never having been married. Many parties are of the opinion that the effect of the divorce is to unmarry them. My experience has been that nine times out of ten where this term is used the party has been divorced. In examining an abstract where we find John Jones conveying as unmarried, we should immediately call for information as to when and where he was divorced.

UNDER WILLS, BY EXECUTOR OR TRUSTEE

A conveyance by a Trustee or an Executor should refer to the will and to the portion thereof giving the Executor or Trustee the power and the authority to sell "*and since a power to sell is not a power to give away*" the full consideration should be recited.

Trustees under a will or any instrument of trust under which they hold title to real estate can only deal with the property in accordance with the specific powers given them under the will or trust agreement. For instance, such general terms in a will as "do everything I might do if living" does not create a power to sell; nor does giving a trustee "full power to lease" give him authority to make a 99 year lease.

Power to sell in an executor only means for the purpose of administering the estate and on the settlement of the estate, the power is gone. In many states during the time of administra-

tion, the mere power to sell in an executor, not coupled with an interest, and with no specific direction to sell, can only be exercised when absolutely necessary in order to settle the estate.

Before devisees under a will probated in one state can convey good title to property of the decedent lying in another state, it is necessary that the laws of the state where property is located relative to the admittance of a foreign will be complied with. This being statutory, it is absolutely necessary that every provision of the statute be complied with, otherwise the devisee conveys no title.

GRANTEES

If a husband and wife take title, describe them as such—describe the tenancy under which your grantees, if more than one, are to hold. In this matter you will have to be entirely guided by the statutes of your respective states. For instance, in Indiana a conveyance to a husband and wife without any designation as to the estate they take, creates a tenancy in the *entirety*, while in Illinois a similar conveyance would result in a tenancy in common.

Joint tenancy estates are usually created by words showing the intention of the parties although under the common law a conveyance to two or more persons was construed as a joint tenancy.

As to corporations, practically every state has its own laws relative to the rights of a foreign corporation to do business, and until these laws are complied with, the foreign corporation has no capacity to do business and acquires no title to the real estate. This has led to numerous decisions as to whether the acquiring of one parcel of property by a foreign corporation constitutes doing business. Assume for instance that a corporation, not authorized to do business, is named as grantee in a deed. What happens, there being no corporate entity capable of taking the legal title? It remains in the grantors, the equitable title passing to the stockholders of the corporation. So when your corporation attempts to convey its title, it is necessary to procure deeds from all the stockholders and from the former owner of the property.

And from time to time, we find many unincorporated clubs and associations formed. At the time of organization no con-

sideration is given to the proposition that some day that club will take title to real estate. And consequently no attempt is made to comply with the statutes, even though you will find numerous ways, requiring little difficulty, for corporation organization.

An association or club of this kind takes title (or attempts to take title), there being no corporate entity to take the equitable title, in all the members of the association or club, the legal title remaining in the grantor.

In a conveyance to a trustee, the trust instrument, or deed in trust must be complete in itself as far as powers of the trustee are concerned and should vest in him both the equitable and the legal title, the rights of the beneficiaries being merely personal property.

Where a conveyance is made to a trustee, the party directing the conveyance in that manner evidently does not want to be known in the transaction. He may have various reasons, for instance—assembling in parcels a large tract of land—judgments against him—threatened matrimonial difficulties. His purpose is to vest that title in the trustee in order that the title may be conveyed by the trustee. A mere conveyance to John Jones, trustee, gives Jones no power or authority over that title. It only vests him with the legal title, with no power to sell or convey, the equitable title being vested in the beneficiaries under the trust, and the only way a good title under such circumstances can be made is to require deeds from the trustee and the beneficiaries under the trust; many times they are minors or there are contingent beneficiaries. In this case a suit to clear up the title will be necessary.

OMISSION OF GRANTEE'S NAME

Delivery of an executed deed with the name of the grantee omitted "to be filled in at a later time" was, at the common law, void, the theory being that the agent filling in the name of the grantee should be clothed with the same formal authority as that under which the deed was executed. That, of course, meaning an instrument under seal. The law today seems to be that in those states where a deed is executed under seal, the deed would be void. While in those states not requiring a seal for the execution of a deed, an agent might insert the name of the grantee without making the deed void. Again, this is entirely dependent

on the laws of your own state. This is a bad practice regardless of what the decisions may be.

And it must not be forgotten that all official writings and all proceedings shall be conducted, preserved and published in none other than the English language. This is a provision contained in the constitutions of many states.

CONSTRUCTION OF DEEDS

Description—If the party requesting you to draw a deed leaves his abstract with you, take the description used in the caption or headings of the abstract. Do not turn to any deed in the abstract and use it as that deed may not convey all the property and then again, as we all know, abstracts often contain deeds having defective descriptions. The abstractor, as a rule, will use sufficient care to insure a correct heading for the abstract.

Copying old deeds—Many times you will be requested to draw a deed using for your description, etc. an old deed presented by the parties. If that description is defective, the deed you draw will be defective, regardless of the fact that the parties assure you that the description is good because old Judge Smith drew the deed many years ago, (possibly some old Justice of Peace). When the defective deed comes to light, you will be blamed for the error.

Copying old deeds carries restriction forward—The deed from the sub-divider, made in 1865, provided that for 20 years *after date* that no building should be erected on the lot within 30 feet of the front line of the lot and further, that the building, when erected, should not be used as an apartment building. Fifteen years later, being within five years of the time the said restriction would expire, the owner finds a buyer and takes his deed to an attorney. The new deed, except for the change of the names as to the grantors and the grantee, is the same as the old and again reads "for 20 years *after date*, etc." That restriction has been imposed on the property for another 20 years. There have been many instances of this kind in which a restriction has been renewed for several years.

Protect warranty—A grantor may protect himself on his warranty by making his deed subject to the *restriction*; if, however, he incorporates the restriction into his deed, he is creating a new restriction.

Describe by lot number rather than by metes and bounds—Where property has been subdivided always describe the same by the lot number rather than by a metes and bounds description.

There are many reasons for this. Although a plat of a subdivision show as block divided into lots of 25 feet or 50 feet or 75 feet there is no certainty that the lot actually contains that number of feet; the makers of our early plats were neither as accurate nor were there instruments as perfect as today. It is no strange thing to find a shortage of one half foot in a purported 25 foot lot and the larger the lot the greater the shortage or surplusage that may be found. Describe by lot number, in order that your purchaser will get the ground which is actually there.

TITLE TO LOT EXTENDS TO CENTER OF STREET OR LOT

In most states a conveyance of the lot abutting a street carries with it the ownership of half the abutting street or alley, subject only to the easement of the public in the street or alley. A conveyance by the lot number will carry this ownership to the middle of the street whereas a conveyance by metes and pounds restricts the property to that which is actually conveyed, and would not carry with it the title to half the street.

The first plats to be laid out did not contemplate sites necessary for the buildings that are being erected today. Of course, this is not important until the public lose their rights by a proper vacation proceeding. But consider for a moment every large industrial development—every large railroad station, public buildings, churches, theaters, etc. can only acquire sites large enough for their purposes by vacating streets and alleys and it is mighty important to have the title to that vacated alley. One of the most recent cases of this description is the Hotel Stevens of Chicago which occupies an entire block of that city. In order to build this immense building it was necessary to vacate an alley, title to which property it was necessary to determine before erecting the structure.

In many cases it is necessary to condemn a portion of a lot for street purposes.

In most states when the city condemns for a street or an alley, it does not get the fee. The effect of the condemnation is merely to give the city an easement for the public in that portion

of the lot conveyed, and the moment the city ceases to use that street or alley, and the same is vacated, the title of the city is gone.

Therefore, *after condemnation*, in conveying the lot do not except from your conveyance that portion condemned; rather, convey your entire lot and protect your warranty by making it subject to the rights of the city acquired by said condemnation proceedings.

U. S. GOVERNMENT SURVEYS

Sections of land—Plats are many times incorrect. You can never depend upon the measurements shown upon a map or plat when you propose to divide a certain tract or lot into parcels. It was not uncommon in making Government Surveys for the chainman to drop a chain or add a chain. Then too, instruments were not accurate. The result is that it is not uncommon to find a shortage or surplusage running all the way from one-half an acre to eight and ten acres.

Shortage and surplusage—This can best be explained as follows: The U. S. Government Survey gives a lot as 90 acres, but on a resurvey we find that the tract actually contains only 85 acres, or perhaps 95 acres. In one case, we have a shortage of five acres, while in the other, a surplusage of 5 acres. The normal quarter section is 160 acres. However, by actual measurements we often find a shortage or surplusage.

How does this affect us in conveyance? In our first case, the government map shows the lot 90 acres. I convey the North 45 acres to John Jones. Later, I convey the South 45 to Bill Smith. If there is a shortage, the grantee on the second conveyance only gets what is left, and I am liable on my warranty for the shortage. The proper way would have been to convey the North 45 acres of Government Out-Lot 1 in the first conveyance. The second conveyance should be Government Out-Lot 1 except the North 45 acres. The same method should be followed where a lot is split. For instance, a 25 foot lot—first conveyance, the East 10 feet—second conveyance, all of the lot except the East 10 feet, etc.

EFFECT OF CONVEYANCE OF LOT AFTER VACATION

Although we have agreed that the conveyance of a lot carries with it the title to the center of the street or alley and that

on vacation the title to half the abutting street goes to the abutting property owner, what is the effect of a conveyance after vacation? In Indiana, by virtue of statute, a conveyance of the lot after vacation carries with it the title to the abutting street. In Illinois (we have no decisions or statutes covering same), we feel a specific description of the strip is necessary. In *Jefferson v. White*, 110 Minn. the Supreme Court of that state said that after vacation proceedings it was necessary to convey the abutting strip by definite description.

GRANTING CLAUSE, HABENDUM, CONSIDERATION

At common law such was necessary in order to convey the fee to "A" and his heirs. Today, the statutes in most states provide that a Fee Simple Title is conveyed by a conveyance to "A" unless the same is specifically limited or restricted.

The Habendum Clause cannot cut down the granting clause and in case of a conflict on the part of the two clauses, they will, if possible, be construed together.

Consideration, either actual or nominal, or by recital in most states is not required. A deed is not a contract and there is no reason why a man cannot give away his property if he so desires. In many of those states requiring a consideration, the court will permit the consideration to be proved by extrinsic evidence.

RESERVATIONS AND EXCEPTIONS

There are many decisions drawing a fine distinguishing line between an exception and a reservation. For practical purposes I can best illustrate the importance of the necessity of making this distinction by giving you an example. "A" owns two adjoining lots, Lot 1 and Lot 2; he sells Lot No. 1 to Bill Smith. However, in order that "A" may have access to a garage on the rear of his lot, it is necessary in conveying the title to Smith, that "A" reserve a right of way over the south 15 feet of the said lot. There is no question as to the ownership of the entire lot by Smith, subject only to the right "A" has reserved for an easement. Smith later sells the lot to another party. However, in making the second conveyance, Lot 1 is conveyed as Lot 1, except the south 15 feet thereof taken for an alley. The second conveyance, of course, does not convey the title to the 15 feet. Several years later, the title to both Lots 1 and 2 are united to

the same party, so that there is no longer a necessity for the easement. The easement may be gone but the title to the 15 feet is outstanding for the simple reason that the same was excepted and did not pass with the conveyance.

PROTECTING WARRANTY

In most instances you will be required to make warranty deeds. In order to properly protect the grantor in these deeds, it is almost necessary that you know the condition of his title. It is true that you may protect him by reciting that the conveyance is subject to all mortgages, trust deeds, party walls, encumbrances, building line and building restrictions, if any, of record. Many people however will not accept the deed subject to such general provisions. They insist that it be specifically subject. They insist that the warranty cover everything, except those specific encumbrances which in their contract of purchase they have agreed to take the title subject to. The proper practice in making your warranty deed is to recite, subject to a certain party wall agreement, describing it, subject to a certain building line restriction or condition, describing it, subject to the rights of the public in the portion of the property that may be taken or used as a public highway or street, subject to certain mortgages specifically identifying the mortgages referred to. A common mistake in conveyance often happens in circumstances such as these. The record shows a mortgage for \$15,000.00 on the property, at the time of the sale and conveyance of the property. The mortgage has been reduced to \$10,000.00. The warranty deed is made subject to a mortgage for \$10,000.00. No further attempt is made to identify that mortgage. Later on, the title to the property is examined. The examiner finds the deed reciting that the same is subject to a ten-thousand dollar mortgage. He finds no encumbrance of record for \$10,000.00. The recital has given him notice of a mortgage for \$10,000.00. He immediately raises the objection that there is an outstanding mortgage of \$10,000.00, and before a careful attorney will pass that title, it is necessary to go out and procure evidence of the various parties to that deed in which they explain the mistake. The conveyance should have been, subject to a mortgage dated such and such a date and recorded such and such a date, the deed

running to so and so, mortgagee, for \$15,000.00, the said mortgage being reduced at the present time to \$10,000.00.

SEALS AND ACKNOWLEDGEMENTS

In those states requiring seals or witnesses, the statutes must be complied with and if the deed is not witnessed, the same is absolutely void and does not convey the title. In most states an acknowledgment is required. The reason, in most instances, statutes provide for an acknowledgment. The purpose of acknowledging the deed is in order that the record of that deed may be produced in evidence, if necessary for the purpose of proving said instrument. The deed itself, without the acknowledgment, will pass the title, and it often happens that even though the acknowledgment is defective, if the original instrument can be produced and held so that said original instrument, if necessary, may be produced for proof in the court of law, that acknowledgment may be absolutely omitted. The requirement, however, of a seal or witnesses to the signature goes to the execution of the deed itself and cannot be omitted. I might suggest, however, that in those certain states which make it a requirement for passing homestead or dower that the homestead and dower be specifically waived in the acknowledgment to the deed itself; that the defective acknowledgment, of course, although passing title to the real estate, would not be sufficient to convey the dower and homestead. Of course, this is all statutory and dependable upon the laws of your particular state.

CORRECTIVE CONVEYANCE

Where the description in a deed is defective, for instance, the block number is omitted or the entitlement of a subdivision is not shown and the same has been recorded, the deed cannot be corrected by merely inserting the block number or the portion of the description left out, but must also be re-acknowledged by the grantors. This re-acknowledgment should be evidenced by another certificate of acknowledgment attached to the deed. As for another example, suppose for instance, "A" intends to convey Lot 8 to Bill Smith. Through inadvertence and mistake, "A" conveys the property to John Jones. Regardless of the fact that "A" made a mistake in the name of his grantee, nevertheless, "A" has conveyed all the right, title and interest he had in the lot. It is too late for him to execute a corrective deed. It is necessary

that he get his title from Bill Smith before any corrections can be made. Perhaps a better example would be where "A" intends to convey a certain tract of land by the metes and bounds description and incorporates too much ground into his conveyance. "A" cannot execute the corrective deed until the title has been re-invested in him by a re-conveyance.

DELIVERY OF DEED

The deed should be delivered, accepted and recorded just as soon as possible after the close of the deal. In most states, a judgment against an individual becomes a lien upon his real estate and as a protection to judgment creditors without notice of a conveyance that judgment becomes a lien upon the property up until the time the deed is recorded, for example, X sells you his property to day, takes your money, and gives you a deed. You withhold that deed from record for two or three days and tomorrow a judgment is rendered against him for \$5,000.00. That judgment is a lien on that property.

POWER OF ATTORNEY

One with power of attorney, acting as such, should record his power. He should sign that deed by the name of his principal, and then by so and so, power of attorney. He cannot sign it John Jones, attorney in fact, for M. M. Oshe. Furthermore, the power of attorney, unless coupled with an interest, expires on the death of the principal. Therefore, Bill Smith, the real owner of the property, gives me a power of attorney to convey and sell the property and leaves for Havana or Canada, and I negotiate the sale and execute the deed but one minute before I deliver that deed, Bill Smith is killed in an aeroplane accident. The deed is absolutely void. You are never safe in accepting the deed from the party acting under a power of attorney unless you know the principal is alive at the time the deal is closed. For that reason, parties many times enter into an escrow or deliver the deed and money in escrow and then send a wire to ascertain whether their principal is alive.

CHAIN OF TITLE

Probably the most difficult subject to explain and understand in the topic of conveyance is that of the chain of title. All deeds must be in the chain of title. In almost every jurisdiction, deeds are indexed in the Recorder's Office in what is known as the

grantors and grantees index. This means that I record a deed tomorrow under the name of Oshe. You would find that on March 22nd, I was the grantor in a deed to Bill Smith. The index would then refer you to the book and page of the record in which this deed is copied or you knew that Bill Smith was the grantee, you could go to the grantees index and under the name of Smith, you would find on March 22nd, that Oshe conveyed a piece of property to him. You will also find in that Recorder's Office the mortgagors and mortgagees index; you will possibly find a lessor and lessees index, also a miscellaneous record for various instruments. The attorney in examining the title is only compelled to examine from the date shown on that index on which Oshe acquired title, for conveyances made by Oshe, for mortgages made by Oshe, for leases made by Oshe, that is, if I came into title on March 22nd. An examiner of the records only starts to search the record from March 22nd to find what I have done with that title. He does not go back beyond March 22nd. He does not look back to see if Oshe made a conveyance on March 20th or March 21st, so that if Oshe, in anticipation of the fact that he was going to acquire title to this certain piece of real estate had, on March 21st, placed a mortgage on that property or had conveyed it to a friend, that conveyance placed on record prior to the date, would not be in the chain of title. So if on March 23rd, I sold that property to a purchaser for value, he would take it free and clear of the mortgage which I placed of record on March 21st. It is a common practice for a party in anticipation of acquiring the title to first make a mortgage and record it and later acquire the title. However, the deed should be dated back to the date of the mortgage. In that way an examiner of the records on finding the deed to me, dated March 21st, would have to begin his search of the record on March 21st and consequently would discover the mortgage which I made.