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THE RECORD TITLE TO REAL ESTATE IN MISSOURI

Some Practical Suggestions for the New Practitioner

Most of the real estate questions which confront the practitioner revolve around the inquiry as to whether the title to a certain piece of property is commercially good or "perfect." The recent graduate who has passed with flying colors his examination in Real Estate Law, based on "Washburn" or "Tiedeman," may find himself thoroughly confused when it comes to advising his client whether he may safely accept a quitclaim deed from John Doe or a deed of trust from Richard Roe and wife—while a practical clerk in some real estate office may handle the situation without difficulty. In no other subject will the practitioner find more difficulty in applying his theoretical knowledge to the practical facts of an actual case.

Having felt the truth of the above observations upon several embarrassing occasions and having had some experience in solving title problems, I have thought it might prove of interest to those beginning their practice to give a few concrete illustrations of the way title questions arise and of their solution. Without claiming that the actual solution in these cases was always correct, or the only correct way, it may be stated that the methods specified have actually been followed in the business world and that substantial sums of money have changed hands in reliance upon the action taken.

It will be in order, first, to say a word as to present methods of searching for titles. While the country lawyer still has to examine and translate long abstracts of title prepared by the local abstract company, the lawyer practicing in a big city is now relieved of this laborious job by the work of the title companies who issue their Certificates or Guarantees of Title. It is comparatively seldom nowadays that city property changes hands on the strength of a lawyer's opinion based on an abstract.

A "Certificate of Title" is the formal report of a title company as to the condition of title based on its examination of all available public records, including Recorder's office, Tax offices, local courts, etc. The accuracy of this report is not guaranteed but the title company is liable for any loss caused by negligence in its work.

A "Guarantee of Title" may also be obtained. This goes further than the Certificate and legally guarantees that the title is as shown.

Naturally, it costs more to get a guarantee than a certificate of title. Whether to use one or the other depends upon the practical situation—if some formal defect appears on the records and it is impractical to remove or cure that defect, and yet it is impossible to close the deal with that defect appearing in the certificate, the Title Company may be persuaded, for a consideration, to take a chance on that point and issue its Guarantee of Title, whereupon the prospective purchaser or lender of money will be satisfied and close the deal. Other circumstances also may call for the Guarantee rather than a Certificate of Title.

Therefore, in practice, when a question of title arises, the first thing for the city lawyer to do is to call for a Certificate of Title. If he is presented with one that is several years old, he should insist on its being extended down to date. This costs less than having a new one prepared and it is of course important that the report cover the title at the present time.

Now, for a few practical cases:

FIRST: Assume the case of an ordinary real estate loan. The borrower presents a Certificate, or in street parlance, a "title," showing the fee simple title to be in *himself*, subject to (1) general and special taxes for the last three years, unpaid; (2) a lien judgment of Circuit Court; (3) an existing deed of trust to secure a note now about a week past due. The borrower claims that the above judgment is not against him but against someone with the same name. If you were advising a man who proposes to make a new loan on the property, how will you proceed?

You should have the new deed of trust (and of course the new notes) executed and record the new deed of trust; then have the title again extended so as to include the new instrument. This will show whether the borrower has placed any unexpected liens on the property during the negotiations. You will then know exactly what liens are ahead of your deed of trust and you can now proceed to remove those liens, knowing that when they are removed your deed of trust will become a first lien. You will accordingly require the borrower to pay the delinquent taxes and present to you the receipted tax bill. Then, as to the judgment, you will obtain an affidavit from the borrower that he is not the person against whom the judgment was obtained; you will, if possible, locate the real judgment debtor and obtain his affidavit, and in general you will have to present the Title Company sufficient evidence to satisfy them on the question and persuade them to eliminate the judgment notation from their Certificate. Having accomplished so much, the only remaining prior lien is the old deed of trust.

If the client is loaning enough money to pay off the old loan, you then call on him for his check, locate the bank holding the old notes, pay them and get together all the principal and interest notes described in the old deed of trust and present same with the old deed of trust, all duly canceled, to the Recorder for release. When this is done your new deed of trust is a first lien and the title should again be extended down so as to show it in that condition. In addition, you should see to it that the mortgagee clauses on the insurance policies are transferred to the new trustee.

You have then performed your full duty to your client; but you will find that the foregoing is not considered a difficult transaction and usually a lawyer's services are dispensed with entirely. However, it is an easy matter to bungle if you are not familiar with the matter of handling record liens.

SECOND: Assume the case of a real estate loan made to a Missouri business corporation. The loan is to be for \$100,000, we will say, and to be in the form of bonds of \$1,000 each. You find that according to the Certificate of Title, the fee simple title is in the borrowing corporation, "provided said corporation has complied with the corporation statutes of Missouri." What does this mean? By inquiry at the Title Company you find that this proviso is intended to raise the question whether the corporation has made its annual report to the Secretary of State and thereby has not forfeited its charter, so you will insist on the production of the latest annual receipts from the Secretary of State and satisfy the Title Company on that point. Upon examination of the corporation's charter, By-Laws, etc., you find that its authorized capital stock is only \$50,000 and that the charter does not specifically authorize it to borrow money and issue bonds. However, Section 29081 R. S. Mo. 1909 authorizes any business corporation to borrow money and issue bonds, so that point is covered. But the same Section limits the amount of bonded indebtedness to the amount of the authorized capital of the Company and requires the consent of a majority of the stockholders before bonds can be issued. These are points not covered by the Certificate of Title. You will, therefore, require an increase of capital stock to at least \$100,000, and proper stockholders' and directors' meetings to authorize the issue of bonds and you will probably consider it advisable to prepare yourself the minutes for such meetings. When the loan is put in the form of ordinary notes—not bonds—it is current practice not to require the capital stock to be as large as the debt. This seems a technical distinction, but it is actually observed, probably for the reason that even a bond issue would hardly be held void merely

because it exceeded the capital stock, when in fact the Company got the money.

In all other respects, you proceed as in the loan to an individual.

THIRD: A, being a married man with one minor child, owns a homestead. He and his wife join in a mortgage upon same to secure a note for money borrowed. He then dies, devising said property to his widow. The widow desires to make some improvements on the property and to borrow additional money for that purpose. Your client is willing to make her the loan provided she can convey a good title and consults you on that point. The Certificate of Title shows title in the widow subject to (1) the existing deed of trust; (2) administration debts of her husband's estate in the Probate Court; and (3) the homestead rights of minor children, if any.

You are, of course, expecting to take care of the existing deed of trust with your new loan, and the husband's estate is soon to be settled and all debts paid (as we assume), so those points do not bother you. But you find this one minor child, 10 years old, is given some very definite rights in this property—Section 6708 R. S. Mo. 1909—and being a minor he cannot convey those rights away. His joining in the new deed of trust will therefore do no good. This is a serious situation and you may conclude to play it safe and advise your client a good title cannot be obtained. However, the following procedure has been taken in such a case and, it is believed, with the desired effect: The old deed of trust executed by the husband (in his lifetime) and wife was a perfectly good lien; the note secured by it is now coming due. The widow fails to pay same and the holder at once forecloses under the old deed of trust. Some third party (by prearrangement) buys the property at said foreclosure sale. His title is good. He then executes a new note for the new loan upon the property, and the deed of trust securing it, and thereafter conveys the property back to the widow. This not only cuts out the minor's homestead right, but also any administration debts of the husband's estate, and a good title results.

FOURTH: Cleaning up a bothersome trust.

A wealthy real estate owner dies in St. Louis, leaving a will devising his real estate to his three children as trustees for themselves and their descendants, with some very complicated and long drawn out provisions for the future. Two of the three children desire to buy out the third's interest in the real estate and to effect a loan upon the property to raise the purchase price. The condition of the title proved a stumbling block, but was finally worked out as follows:

Being advised by counsel that the trusts established by the will

were void because they offended the rule against perpetuities, suit was filed in the Circuit Court by some of the beneficiaries against all of the others for a construction of the will, and adjudication of the rights of the parties thereunder: the interests of minors being entrusted to guardians ad litem and the interests of unborn remainder-men being protected under the doctrine of representation. The result of the suit was a decree declaring the trusts void on the ground above mentioned—the legal effect being that as to such property, decedent died intestate and the three children took same absolutely by inheritance. They then jointly conveyed the property to a corporation which made the necessary loan and enabled the two purchasing children to buy off the third's interest, they retaining all the stock of the corporation.

FIFTH: Effect of delay in recording a deed.

Desiring to purchase a certain valuable corner in St. Louis, your client seeks your advice on the matter of title. The old Certificate shows title in John Smith, a single man, but when continued down to date the new Certificate shows title in three brothers of John Smith—William, Henry and James: such title existing by virtue of a general warranty deed from John dated three years earlier, but just recently recorded. The Probate Court records indicate that John had died about a month *before* the date of record—*intestate*, leaving two sisters as heirs, in addition to the three brothers above named. The property in question is not inventoried as part of John's estate and the three surviving brothers claim to be the owners of it by virtue of said deed, which they say was delivered to them by John *before* his death and was kept off the record by mutual agreement so that John might appear to be the owner of the property for reasons of convenience in handling it.

Your client asks your advice as to whether he may safely accept a deed from the three brothers. The situation above described arouses suspicion in the minds of the Title Company,—“Was the deed to the brothers actually delivered *before* John's death?” If not, it was ineffective as a deed. Or, was it actually delivered before John's death, but intended to take effect only in the event of his death? If so, it was likewise ineffective, or, if effective, for any purpose, it certainly left the property subject to inheritance taxes (under recent Federal and State statutes) and other administration expenses.

With these things in mind, the Title Company now reports the title to be in William, Henry and James—*provided* said deed from John was delivered prior to his death, and *subject* to inheritance taxes imposed during the administration of John's estate, if any.

You at once see that you have some legal work ahead and in-

wardly rejoice, as this will give you an opportunity to convince your client of the importance of consulting you.

This case was, in fact, handled as follows: The three brothers signed an affidavit that they had actually owned the property several years and that title had been carried in John's name simply for convenience; that the deed from John to them had actually been delivered to them long before John's death. This affidavit was filed of record.

In order to take care of the possibility that this property was part of John's estate and therefore descended to his two sisters and three brothers in equal parts, a quitclaim deed from the two sisters to the three brothers was obtained and recorded.

So far as debts and administration expenses were concerned, the closing of the deal was postponed until the time for proving claims in the Probate Court and assessing inheritance taxes had expired.

Thereafter the Title Company was willing to issue a "clean bill of health," and the deed from the three brothers was accepted and the money paid.

This case illustrates the importance of recording real estate conveyances promptly. The brothers kept this deed off the records, so they thought, for their "convenience." It turned out to be greatly for their *inconvenience*. This is nearly always the result, and, in the absence of conclusive reasons to the contrary, lawyers should advise their clients to record real estate conveyances at once. The very suggestion that a deed should be kept off record is enough to arouse suspicion. *Record your deeds.*

SIXTH: Defects of Title not apparent on the Record.

It is not always possible to ascertain every lien on real estate by examination of the public records. The title will, in some instances, be controlled by questions of fact whose existence will only appear from an independent investigation. I have already referred, in Section Third above, to a case of a minor child having homestead rights in a tract of land. The existence and age of such a child would in all probability not be disclosed by an examination of the public records. Sometimes the Title Companies in such a case certify to the title "subject to the homestead rights of minor children, if any." This is sufficient, of course, to put you on guard and start your investigation.

Another lien not apparent on the records sometimes exists in the case of a former divorced wife. If a husband owning real estate were divorced by his wife for his fault, she retains her marital rights in the real estate. He may then marry again and undertake to convey

the real estate by having his second wife join with him in the deed. This document, of course, would not convey the rights of the first wife, and if the divorce proceedings happened to take place in some other jurisdiction there would be no local record available to disclose the facts. Not long ago, in one of the large cities of this State, a wealthy man died leaving a great deal of real estate and devising all of same to his widow and making her Executrix. During the course of administration another woman appeared on the scene and presented a claim for one-half of the real estate on the ground that she was the first wife of the deceased and that he had gone to North Dakota, or some other distant state, and obtained a divorce from her without her knowledge and by fraudulent practices. It developed that the facts alleged by her were true. The result was that it became necessary to make a settlement with her which cost the second wife a very large sum of money. Until this claim was presented, however, there was absolutely nothing on the records to show any such cloud on the title, and the property might easily have been conveyed by the second wife to some innocent purchaser whose rights would have been subordinate to that of the first wife. There is no way to absolutely safeguard your client against such a possibility, and about all you can do, in important deals, is to bear these contingencies in mind and, where circumstances justify, make some investigation of earlier history.

SEVENTH: Conveyance of Title through will of non-resident deceased.

It frequently happens that real estate in one state will be owned by a resident of another state who dies at his residence and his will is probated over there. Occasion may then arise to perfect the title in the state where the land lies, and this often leads to complications. It seems to be pretty well settled now that a properly authenticated copy of the will of the deceased as probated in the foreign court may be filed in the local Recorder's office and thereupon the title companies will report the title as transmitted through the will, subject to any local claims against the estate of the deceased, until such time as the statute of limitations has run against those claims. This may be easily a period of ten years, so that in such a case it is undoubtedly better to take out a local, or ancillary, administration so as to give local creditors an opportunity to prove up any claims against local assets. In this way the title will be cleared as soon as the period of administration has elapsed.

EIGHTH: Lis pendens.

Another possible lien upon real estate titles is that resulting from

the recording of a notice of a pending suit, or *lis pendens*. In Missouri there is a statute, Section 8211, R. S. 1909, which especially permits this and provides that in any civil action based on any equitable claim designed to affect real estate, the plaintiff shall file for record a notice of such suit, which shall thereafter be constructive notice to third parties of the result of that suit. The practical effect of such a notice is to tie up the transfer of the real estate until the pending suit is determined. It is quite easy to abuse this right, and those lawyers who indulge in sharp practices are frequently unable to resist the temptation. It can be used as a club to force a settlement out of a defendant by tying up the title to his real estate.

The following will illustrate what has just been stated: A was persuaded to lend money to B, solely for the latter's accommodation, taking as security a mortgage upon real estate. B was unable to pay the loan at maturity and succeeded in borrowing some more money from A on the same security, and finally, after unsuccessful efforts to collect the money, B proposed to convey the property to A in satisfaction of the debt instead of forcing A to foreclose the mortgage, and this was done. Within the following year, however, B filed a suit alleging that the conveyance to A had not been intended as an absolute transfer of the property but simply as additional security for the debt, and that A had orally agreed to collect the rents and hold them for B, provided the debt was paid off, and demanding that his right of redemption be recognized and enforced. A *lis pendens* was immediately filed in the Recorder's office, which resulted in tying up the title to the property so that A could not dispose of it, and the result was a settlement whereby B got a few more thousand dollars. This particular case leads me to remark that if your client has a past due note secured by a mortgage it is usually better to advise him to foreclose, observing all the legal formalities, than to simply accept a deed from the debtor in cancellation of the debt. The latter course is theoretically all right and results in a perfect title, but the courts are a little bit suspicious of it and are inclined to lend an ear to the complaining debtor if he can drum up any explanation of the transaction inconsistent with a complete transfer.

It is likewise possible to abuse such remedies as execution and attachment. In one actual case, a corporation held title to a valuable piece of city real estate, and a third party acquired a judgment against one of the stockholders of this company and ordered execution issued upon such judgment and directed the sheriff to sell "all the right, title and interest of" said stockholders in said real estate. The plaintiff's theory was that the stockholder really owned all of the stock

through third parties and thereby really owned the real estate, and his action at least resulted in putting a cloud on the title to the property and thereby furnishing a club to force a settlement.

I am referring to these instances of abuse of legal remedies simply to call attention to the possibilities which certain facts may present, so that the practitioner may have them in mind in closing transactions.

The foregoing is not offered as a learned treatises on the subject of real estate law, but simply as a few practical suggestions as to handling title problems. Possibly the main theme is this: in real estate matters the *record* title is just as important as the legal or equitable title, and a working knowledge of the *records* is essential to the lawyer who desires to be thoroughly equipped.

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