

## TITLES BASED ON FIDUCIARIES' DEEDS—CARE AND CARELESSNESS IN EXAMINING THEM.

Some title examiners are too prone to minimize the possible effect of various defects which result from the careless preparation and execution of fiduciaries' deeds. This tendency, it can easily be realized, makes for the future trouble, annoyance and oftentimes financial loss of the client who has relied upon such deeds for a good and marketable title to his property. His real hardship is usually not in the subsequent claim of any lien of the fiduciaries' deceased, or cestuis que trust, to an interest in the property, but through the refusal of a subsequent purchaser to take title under a contract of sale, or through the refusal of a lending institution to accept a mortgage on the property. Because questions arising from this source now seem to be so prevalent, we feel that this is an opportune time to discuss the problem.

The three most ordinary and troublesome situations arising with regard to such deeds are, first, that arising from the omission of a statement of the true consideration in the fiduciaries' deed; second, that arising from the fact that the fiduciary has signed as an individual instead of in the capacity in which he was described in the premises of the deed; and third, the situation arising from the fact that the trustee grantor although executing the deed as trustee, previously took title as trustee without any reference in his deed of title to the power, duties or extent of his trust. We shall treat with these situations in their respective order and attempt to discover the present state of the law in this state as to their effect.

First, then, as to the effect of the omission to state the true consideration in a fiduciary's deed. Is a title based on such a deed questionable? Before proceeding with the answer, it is well to recall the fundamental rule that whatever puts a party upon inquiry amounts in judgment of law, to notice,

provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. Thus, it will readily appear that a purchaser accepting title based on a fiduciary's deed which recites a nominal consideration only, is put upon his guard that there *may* have been something done to the disadvantage of the heirs or cestuis que trustent. Following this conclusion a logical step further, the purchaser has now upon himself the burden of inquiry and in case of a subsequent action the further burden of proving an adequate consideration. Obviously, no one would care to purchase or loan money on property which possesses the threat of saddling him with such a burden for so doing. Any party who inadvertently contracts to purchase property based on such a title, will be advised that the heirs of the executor fiduciary or the cestuis que trustent of the trustee fiduciary have a right to demand a proper accounting of the sale from such beneficiary. If they do, there will, of necessity be litigation. A vendee is entitled to a clear and perfect title and should not be compelled to take over a law suit, to prove his title.

There is but one case in New Jersey on this point.<sup>1</sup> It was decided by Vice-Chancellor Church, and is based on the reasoning above set forth. In that case, the Vice Chancellor says plainly, "My conclusion is that an executor's deed, stating a consideration of one dollar, is not of itself sufficient to pass a marketable title. It puts any purchaser on notice that there may have been fraud or inadequacy of consideration, and it becomes his duty to discover the true consideration and whether it was sufficient." This case has never been appealed to the Court of Errors and Appeals, and at the present time stands as the law of the State. Consequently, the most advisable course to pursue, upon the discovery of such a deed in the title is to obtain a corrective deed, if possible.

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1. Tzses v. Green, 105 N.J.Eq. 12, 146 Atl. 593 (Ch. 1929).

However, as a practical matter, in the case of an executor's deed which is deficient because of the lack of a statement of the true consideration, if the executor has filed an accounting in the surrogate's office showing the true consideration for the sale of that particular property to the grantee in the deed, then it would appear that there should be no reasonable objection to the title, inasmuch as the grantee, having seen the statement in the accounting, will have been presumed to have made a satisfactory inquiry as to the true consideration. Furthermore, the accounting is filed on notice and sworn to; and is always available as a public record. The purchaser need not see to it that the consideration money has in fact been turned over to the beneficiaries or applied to the purpose for which it was intended.<sup>2</sup>

As to the effect of laches in these cases, there is a question. There is no case directly on point in New Jersey. Although the writer feels that with the expiration of the time in which any cestuis or beneficiary may claim an accounting or interest in the property, the question in the title should be cured, nevertheless in the absence of a case or statute, it is, as a practical matter, more advisable to clear the matter up otherwise. In any event, it should be remembered that laches is only a defense to and not a bar to a law suit, and that every case involving laches must be determined according to its own peculiar circumstances, and in the discretion of the Chancellor.

Before leaving this subject, it may be suggested that an affidavit stating the true consideration of itself would not be sufficient to clear the title, as affidavits are not effective to cure defective titles.<sup>3</sup>

We now approach the situation where a fiduciary is described in the premises of his deed in his official capacity, but signs individually. Although there is no New Jersey case

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2. R. S. 1937, 3:14-2; 3:17-15.

3. See *Are Affidavits a Cure for Unmarketable Titles* by the writer. II N. J. L. R. 48. See also *Tzeses v. Green*, *supra*, note 1.

directly in point, by the weight of authority a deed which describes the grantor as executor or trustee (and by analogy as any other fiduciary) is not invalid because not signed by him as executor or trustee.<sup>4</sup> This is especially so where the fiduciary has no individual estate in the property or where the acknowledgment recites him in his fiduciary capacity, as the person who executed the deed. This rule is similar to the broader rule that if the variance is between the name written in the body of the deed and the signature it may be generally stated that the deed is not vitiated if it sufficiently appears that the same person is intended.<sup>5</sup>

Thus it may be seen that such a discrepancy is not fatal to the marketability of title to property based on such a deed.

The final situation which we shall discuss now is that in which a conveyance has been made to a named grantee, as trustee, without naming the cestuis que trust or reciting the terms of the trust, and the grantee-trustee conveys as such trustee. Does the purchaser from the trustee take title subject to the possible limitations of the unexpressed terms of the trust, or does he obtain a marketable title free of any such limitation?

At the outset, it may be stated that there is nothing in the statute of frauds which prevents a trustee as such from receiving a conveyance of lands without a particular description of the trust in the conveyance and without signing by the grantee-trustee.<sup>6</sup> The important question now arises whether the purchaser from such a grantee-trustee, has not notice, from the mere use of the word trustee in the deed, of the existence of a trust, and having such notice, whether or

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4. 24 C. J. 177, sec. 666, note 69 and cases therein cited. Among other authorities upon which this conclusion is based the reader is referred to Restatement of the Law of Trusts published by the American Law Institute Publishers, page 904, sec. 297; and Vol. 2 of Scott on Trusts, page 1632 et seq., secs. 297 et seq. published by Little, Brown and Company; Bogert on "Trusts and Trustees," Vol. 4, ch. 42, sec. 897; and cases therein cited, 65 C. J. 766, sec. 637, notes 61 and 62.

5. 18 C. J. 174, sec. 55, note 16.

6. *Zubler v. Porter*, 98 N.J.L. 444, 120 Atl. 194 (E. & A. 1923).

not the terms of such trust and the power of the trustee to sell unless indicated by the trust agreement itself, will not always be a cloud on the title of the prospective purchaser unless they are contained in the deed of trust itself, or the trust agreement is made a matter of record as to be always available in the future. The State of New Jersey has never decided this case on point. However, the great weight of authority is to the effect when the deed of title is held in the name of a party as "trustee" anyone proposing to deal with such property would have notice of the existence of a trust and the terms thereof. An early case,<sup>7</sup> applied this principle to stock held in the name of a party designated as "trustee," which stock was pledged to a bank. The court held that the bank had notice of the terms of the trust, even though not expressed, upon which the stock was held.

Of course, the entire particular rule in this case, is deduced from the general rule that a third person has notice of a breach of trust, (or in fact of any matter in pais) not only when he actually knows of it, but also when he is aware of facts or circumstances which would lead a reasonably, intelligent and diligent person to inquire whether there is in fact a trust and if so what the terms of it are, so as to be certain that there is no breach thereof. Unfortunately, in the matter of titles to real estate, the inquiry of itself, practically speaking, would be insufficient to secure the title against any future question being brought up as to the marketability of the title, due to the possible terms of the unexpressed trust. This is so because the nature of inquiry is not such as can be preserved as future evidence of the fact that there has been no breach of trust. Therefore, the wisest course, in such a matter would be to insist upon a new deed to the trustee, expressly reciting the terms of the trust, or other than that, a reduction of the trust agreement to writing, to be recorded as a permanent record.

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7. *Gaston v. American Exchange National Bank*, 29 N.J. Eq. 98 (Ch. 1878).

There are states which provide by statute that where the word "trustee" is added to the name of the grantee in a deed of conveyance of land in which no beneficiaries are named and the purposes of the trust are not set forth in the deed and no other instrument showing a declaration of trust is recorded, a purchaser of the land does not take it subject to any trust. It is to be regretted that New Jersey statutes contain no such provision. Such a statutory provision is an admirable one, which would at once eliminate the confusion, risk and trouble which, as the law now stands in this state, this situation often creates in matters of title. The introduction of such a statute in the near future, provides a worthy and useful task for one of our juridical minded senators.

The reader may offer the often extended proposition that despite the existence of any of the situations stated above, the title to the property is good in fact, and therefore should be accepted. Although trite and well established, it is well at this point to restate the oft settled legal proposition, that despite the fact that a title may be good in fact, this of itself does not make it marketable. Thus, Voorhees, J. in the Court of Errors and Appeals, said, "So it is the uniform rule in this state to decline to decree performance where such (i.e. a reasonable) doubt exists, though rested on grounds merely debatable, but which might visit upon the purchaser, litigation in that regard, and that too, where at law the title might in fact be declared good."<sup>8</sup>

In conclusion, may the reader be reminded that it is usually easier, and less expensive to clear objections to a title before acquiring it, than afterwards, when it is unfortunately often too late.

MILTON N. LIEBERMAN.

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8. Van Riper v. Wickersham, 77 N.J.Eq. 232, 76 Atl. 1020 (E. & A. 1910). For numerous cases bearing on the same point, see those cited in the above decision, in the case of Barger v. Gery, 64 N.J.Eq. 263, 53 Atl. 483 (Ch. 1902); Heller v. Sweeney, 100 N.J.Eq. 150 at page 153, 135 Atl. 264 (Ch. 1926), and in the article entitled *Marketability of Titles* by J. Mark Jacobson, II N. J. L. R. 27.