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DOES A PURCHASER FOR VALUE WITHOUT NOTICE EVER TAKE LAND IN INDIANA SUBJECT TO AN UNRECORDED DEFEASANCE?

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The present Indiana Statutes relating to the recordation of instruments affecting the title to land are traceable to Chapter 23 of I Revised Statutes—1852. On page 233, section 11 is set forth as follows:

“No conveyance of any real estate in fee simple, or for life, or of any future estate, and no lease for more than three years from the making thereof, shall be valid and effectual against any person other than the grantor, his heirs and devisees, and persons having notice thereof, unless it is made by a deed recorded within the time and in the manner provided in this act.”

On page 234, section 16 is set forth as follows:

“Every conveyance or mortgage of lands, or of any interest therein, and every lease for more than three years, shall be recorded in the recorder’s office of the county where such lands shall be situated; and every such conveyance or lease not so recorded within ninety days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration.”

On page 235, section 17 is set forth as follows:

“When a deed purports to contain an absolute conveyance of any estate in lands, but is made, or intended to be made, defeasible by force of a deed of defeasance, bond, or other instrument for that purpose, the original conveyance shall not thereby be defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded, according to law, within ninety days after the date of said deed.”

Neither section 11 nor section 17 as above set forth have been amended. They are now found as sections 13390 and 13393 respectively in Burns Revised Statutes of 1926.

The above section 16, however, has undergone four changes since 1852. The first amendment is found in the Acts of 1875, Chapter 62, page 94, and provided in effect that conveyances, mortgages and leases should be recorded within forty-five days from the time of their execution. The second, third, and fourth

* See p. 622 for biographical note.

amendments are found in the Acts of 1913, 1921, and 1923 respectively. The changes effected in 1921 and 1923 are immaterial to the present discussion and we may properly say that the present form of this section dates from Chapter 82, page 233 of the Acts of 1913. As amended section 16 of Chapter 23 of I Revised Statutes 1852 is now found as section 13391 Burns 1926 as follows:

“Every conveyance or mortgage of lands or of any interest therein, and every lease for more than three years, shall be recorded in the recorder’s office of the county where such lands shall be situated; and every conveyance, mortgage or lease shall take priority according to the time of the filing thereof, and such conveyance, mortgage or lease shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration, having his deed, mortgage or lease first recorded.”

Section 16 of the Revised Statutes of 1852 and the Amendment of 1875, each containing provisions for a period of time within which a deed, mortgage or lease should be recorded, were similar to recording statutes enacted in many other states at about the same time.¹ Bad roads, isolated farming communities, and the more leisurely commercial practices of those times did not make for a public policy that would demand a race to the court house as a factor in determining priority among grantees, mortgagees, and lessees. Substantially, the effect of such provisions was that if an instrument were recorded within the time limited it would be effective as against all persons as of the date of its execution and delivery, and that if it were not recorded within the time limited it would be effective as against subsequent purchasers for value without notice only as of the date of recording.² The operation of section 16 may be seen from the following assumed situation. A, the owner of certain land, by deed conveys his land to B on April 1. On April 30 A by deed conveys the same land to C who has no knowledge or notice of the prior transaction and who gives a valuable consideration for his deed. Immediately and on April 30 C records his deed. Under this set of facts B’s deed would nevertheless take priority over C’s deed providing B placed his deed on record on or before

¹ “Jones on Mortgages”—7th Edition; Sec. 458.

² “Jones on Mortgages”—7th Edition; Sec. 458.

Carson v. Eickhoff, 148 Ind. 596.

Meni v. Rathbone, 21 Ind. 454.

Trisler v. Trisler, 38 Ind. 282.

June 30 under the statutes of 1852, or on or before May 16 under the amendment of 1875. The same principle held true as to mortgages and leases for more than three years.

This situation gave rise to the following practice on the part of certain grantees and lessees, and more especially on the part of mortgage loan companies engaged in the business of lending money on mortgages. After receiving the deed, lease or mortgage such persons would immediately place the instrument on record. They would then wait ninety days under the act of 1852 or forty-five days under the amendment of 1875. At the end of this time they would make a search of the records in order to learn if prior instruments had been recorded. If the search showed that no prior instruments had been recorded they would then pay over the consideration for the grant or the mortgage moneys.

It has been supposed that the amendment of 1913 eliminated all necessity for the cautious investor to wait for the expiration of any statutory period of time before paying the consideration to the grantor, lessor, or mortgagor. It has been supposed that the investor need not worry about the possibility of any unrecorded instruments taking priority over his recorded instrument if he himself had no knowledge of such unrecorded instrument, if he gave a valuable consideration for the grant or mortgage, and if he immediately placed his instrument on record.

It would seem that neither section 16 of the Revised Statutes of 1852 or any of the four amendments thereto in any manner relate to or affect the recording of instruments of defeasance. Although in the absence of section 17 the language of section 16 might possibly be construed from the use of the words "conveyance," "mortgage," and "lease" to include a "defeasance," it must be clear when section 17 is considered in connection with section 16 that the legislature intended no such inclusion. The legislature must have regarded a "defeasance" as something entirely different from a "conveyance," "mortgage," or "lease" and not to be included in section 16 because section 17 relating solely to "defeasances" was enacted as a separate section to immediately follow section 16.

For the purposes of this inquiry it is unnecessary to consider pro and con the kinds of instruments which may be classified as "defeasances" within the meaning of section 17 and which

may or may not be recorded under this section.³ No case has been found squarely on this point, but dicta seem to indicate that an instrument providing that the grant should be void on the happening of an event,⁴ an agreement to reconvey on the happening of an event,⁵ and a declaration of trust⁶ may all be recorded under and are defeasances within the meaning of this section. In the majority of the cases found the defeasance or agreement made the entire transaction one of mortgage, and as the cases for the most part involved as parties only the grantor and the grantee the effect as to third persons of recording or lack of recording was not an issue.

Seven Indiana cases have been found where the owner conveyed land and took back a defeasance or agreement to reconvey, the defeasance or agreement not being recorded, where the issue in some way involved the rights of the original grantor and a third person. In two cases⁷ a purchaser from the grantee for value and without notice of the agreement for reconveyance took title to the land free of the agreement. In another case⁸ the grantee conveyed to a third person who had no notice of

³ The following cases seem to indicate that a true defeasance must contain language substantially to the effect that the grant shall be void if the grantor pays a certain sum of money or performs certain acts within a certain time,—in contrast with an agreement whereby the grantee agrees to reconvey in the event that the grantor pays a certain sum of money or performs certain acts within a certain time. *Ferguson v. Boyd*, 169 Ind. 537; *Sinclair v. Gunzenhauser*, 179 Ind. 78; *Raub v. Lemon*, 61 Ind. App. 59.

To the writer these cases do not make clear whether the difference between a so-called technical defeasance and an agreement to reconvey is one of substance or of procedure. It would seem that in the case of a technical defeasance the title reverts in the grantor on the happening of the event stated, while in the case of an agreement to reconvey the grantor would have as his remedy a bill for specific performance which, being in equity, would be subject to the defense of laches, innocent purchaser for value, etc.

Quere: Is the grantor's right in the first case legal, the deed and defeasance together being in the nature of a grant on condition, and if so, and in the absence of recording statutes, could the doctrine of innocent purchaser for value apply?

⁴ *Raub v. Lemon*, 61 Ind. App. 59; *Sinclair v. Gunzenhauser*, 179 Ind. 78; *Ferguson v. Boyd*, 169 Ind. 537.

⁵ *Crassen v. Swoveland*, 22 Ind. 427.

⁶ *Weeks v. Hathaway*, 45 Ind. App. 196.

⁷ *Crassen v. Swoveland*, 22 Ind. 427; *Loeb v. McAlister*, 15 Ind. App. 643.

⁸ *Wilson v. Wilson*, 86 Ind. 472.

the defeasance but who gave no value, and the original grantor prevailed over the third person, the court reading into section 17 the word "volunteer." In another case⁹ the grantee conveyed to X who had notice of the agreement and who gave no value. X conveyed to Y who gave value but who had notice of the agreement. The original grantor prevailed over Y. In another case X obtained a judgment against the grantee and filed a transcript in the county in which the land was located. X sold the judgment to Y who gave value and who had no notice of the grantor's right. Y prevailed over the original grantor. In another case¹¹ the facts are not entirely clear but the court indicates that a purchaser from the grantee for value and without notice would take free of the agreement to reconvey. In another case¹² after the grant and agreement to reconvey, X, a stranger, went into possession and then conveyed to Y who gave value and had no notice. The original grantor prevailed over Y.

The writer has found no case where the effect of recording a defeasance has been decided. Section 17 in substance says, "When a deed . . . is made . . . defeasible . . . by force of . . . instrument for that purpose . . . the original conveyance shall not thereby be defeated . . . as against . . . (purchasers for value without notice) . . . unless the instrument of defeasance shall have been recorded . . . within ninety days after the date of said deed." The section does not say that a defeasance shall be effective if recorded but merely says that it will not be effective unless recorded.¹³ Nevertheless the meaning must be clear that it shall be effective if recorded, for otherwise the section would be entirely meaningless.¹⁴

⁹ *Weeks v. Hathaway*, 45 Ind. App. 196.

¹⁰ *Tuttle v. Churchman*, 74 Ind. 311.

¹¹ *The Greenwood Bldg. & Loan Assn. v. Stanton*, 28 Ind. App. 548.

¹² *Parker v. Humble*, 75 Ind. 580.

¹³ Section 17 is worded after the manner of sections 11 and 16 where legal relationships are created and where in the absence of recording statutes transfers rank according to time. Tiffany "Modern Law of Real Property" section 475. If defeasances create mere equitable rights in the grantor (see Jones on Mortgages, 7th Ed. sec. 241-242-244) should not the statute providing for their recordation merely have provided that their recording should give constructive notice?

¹⁴ Opinions which cite section 17 seem to take for granted that the defeasance is effective if recorded. *Weeks v. Hathaway*, 45 Ind. App. 196; *Crassen v. Swoveland*, 22 Ind. 427; *Wilson v. Wilson*, 86 Ind. 472. See

As the period of time within which a defeasance should be recorded under section 17 (ninety days) is identical with the period of time within which a conveyance, mortgage or lease should be recorded under section 16, the legislature by enacting sections 11, 16, and 17 of Chapter 23 of the I Revised Statutes of 1852 must have intended to create a well-rounded and uniform method of and time for recording instruments affecting the title to real estate. As, under section 17, a defeasance is void as against subsequent purchasers for value without notice unless recorded within ninety days of the execution of the deed it is to defeat; and as under section 16 a conveyance, mortgage or lease not recorded within ninety days from the date of its execution was void as against subsequent purchasers or mortgagees for value without notice,—it would seem that the ninety day provision in section 17 should apply in the same manner as did the ninety day provision in section 16.¹⁵ If this is true, a defeasance, recorded within ninety days after the date of the execution of the deed it was intended to defeat, would relate back as of the date of the execution of such deed and be effective as against all persons acquiring an interest in the land subsequent to that date.

As an example of the practical working of section 17 let us assume the following situation. A, the owner of land worth \$6,000, borrows \$1,000 from B and as security for the loan conveys the land by deed to B on February 1. At the same time B executes and delivers to A a separate defeasance which recites the deed and the indebtedness and provides either that the deed shall be void or that B shall reconvey if A repays the \$1,000 with interest on or before two years from date. B immediately records the deed. On April 15 B fraudulently mortgages the property to C who knows nothing of the defeasance, for the sum of \$5,000. C records the mortgage on April 15. Later, on April 25, A records the instrument of defeasance. It is submitted that under these facts the defeasance held and recorded by A would take priority over the mortgage held by C.

If the conclusions arrived at are correct, it would seem that

also *Cogan v. Cook*, 22 Minn. 137, where under a similar statute the defeasance was recorded but was not acknowledged.

¹⁵ "Jones on Mortgage"—7th Edition; Sec. 458.

Carson v. Eickhoff, 148 Ind. 596.

Meni v. Rathbone, 21 Ind. 454.

Trisler v. Trisler, 38 Ind. 282.

the cautious person who is about to accept a deed, mortgage or lease to land that had previously been conveyed within ninety days should wait until such ninety day period had elapsed before paying over the consideration. He should then make a search of the record to assure himself that a defeasance had not been recorded in the meantime. He could then and only then pay over the consideration for the grant, mortgage or lease with the assurance that he was not taking his instrument subject to a defeasance.¹⁶

¹⁶ In the above situation C, before completing his transaction with B, might insist that B furnish him with an affidavit to the effect that he (B) did not take the deed from A subject to a defeasance. This might subject B to a charge of perjury but surely could not affect the rights of A.

A similar affidavit made by A might estop A from setting up the defeasance against C. Quere: Could an affidavit by A to the effect that the grant from A to B was indefeasible work an estoppel against a third person who had previously obtained the defeasance from A by assignment? Quere as to the effect of a release or quitclaim deed from A to C on rights of a third person who previously had obtained the defeasance from A by assignment? Would the form of the defeasance ("technical defeasance" in contrast to agreement to reconvey) affect the answer to the last quere?