MEMORANDUM

To: New Jersey Law Revision Commission
From: Staff
Re: Property (first and rough)
Date: January 11, 2010

This is a first attempt at a few chapters of Title 46. These chapters are largely archaic either in substance or in approach.

Chapter 3A

Current

46:3A-1. Survey, after approval and record, bars proprietors and successors from demands

Any survey, made of lands within either the eastern or western division of the proprietors of the State of New Jersey, and inspected and approved by the general proprietors, or council of proprietors of such division, and, by their order or direction, entered upon the record in the office of the secretary of state or in the surveyor general's office in such division, shall, from and after such record is made, preclude and forever bar such proprietors and their successors from any demand thereon, any plea of deficiency of right or otherwise, notwithstanding.

L.1951, First Sp.Sess., c. 352, p. 1463, s. 1.

46:3A-2. Newly-made partial surveys made without notice to possessor to be of no avail

Because of the fact that many ancient surveys of land, fairly made, have not, by reason of the neglect of officers or because of some casualty, been put on record, or, if recorded, the record has been destroyed by fire or lost, by reason whereof, and because of the natural decay of marked lines and corners, the ancient metes and bounds cannot, except by testimony and reputation, be clearly ascertained, and it has been found, on running the lines of many of such surveys, that they include more land or extend farther than their strict length of chain, large measures having been formerly allowed, even by the proprietors, as an encouragement to locations, thus making it possible for persons other than the owners and possessors of the lands included in such surveys to take advantage of such owners and possessors (who, supposing their titles to be indefeasible, have not resurveyed, covered and secured the lands included in their surveys), by confining their holdings to the net length of chain, thereby making vacancies of valuable improved parts, upon some of which buildings have been erected, and such persons, on causing surveys to be made of such overplus, have procured or may procure such overplus surveys to pass the council of proprietors, without legal preference or due notice to the owners and possessors of the lands covered by the ancient surveys, no such newly-made partial survey, lying within the council of proprietors, or which may be returned to the council, or made on any lands, improved or unimproved, within what has been usually taken and deemed to be the ancient reputed boundary of such lands, shall be recorded or be of any avail to any person so surveying, unless it shall be made to appear, by the testimony of at least two good and sufficient witnesses, that the possessor, holding such lands by survey, deed or otherwise, has been duly notified, at least six months previous to the making of such survey, of the intention to make the same, and has refused or neglected to resurvey and cover such overplus lands.

L.1951, First Sp.Sess., c. 352, p. 1464, s. 2.

46:3A-3. Perfection of title to overplus land under ancient survey

If the council of proprietors shall refuse or neglect to give preference to any prior survey, legally made, or to the possessor of any tract of land, enabling him to cover with rights, and secure the overplus lands which may be found within his ancient bounds, on his making a resurvey of his lands within six

months after the notice given to him as required by section two of this act, such possessor, or any person legally authorized on his behalf, may cause a resurvey to be made, agreeably to the ancient reputed lines and boundaries, either by a deputy surveyor or by a person who understands the art of surveying, and appropriate so many rights thereon as will be sufficient to include the overplus.

When the surveyor or person making the survey herein provided for shall have satisfied a judge of the Superior Court in the county wherein the affected lands are situate that the survey so made by him is just, according to the best of his knowledge, such survey may be produced to the clerk of the county or counties wherein such lands are situate, who shall on the receipt thereof, record the same in the book directed to be kept in the respective counties by the act entitled "An act for the limitation of suits at law respecting titles to land," passed at Burlington the fifth day of June, one thousand seven hundred and eighty-seven. Thereupon the survey, so made and recorded, shall give to the owner and possessor of the lands covered thereby an absolute title in fee.

L.1951,c.352,s.3; amended 1991,c.91,s.454.

46:3A-4. Construction of sections 46:3A-2, 46:3A-3

Nothing contained in either section two or section three of this act shall be construed or taken to authorize any person to make any survey within the certain or reputed bounds of any survey or resurvey made and entered on record pursuant to the provisions of the act mentioned in said section three, any large or overplus measure therein contained, notice given as required by said section two, deficiency of rights or other plea to the contrary notwithstanding.

L.1951, First Sp.Sess., c. 352, p. 1465, s. 4.

46:3A-5. Certificate acknowledging line, corners and boundaries; recording; evidence; notice

A certificate, executed by the owners of adjoining lands, certifying that any line, corners and boundaries are allowed and acknowledged by them to be the true boundary between their lands, shall be as fully conclusive and binding as to the parties thereto, their heirs, successors and assigns as though such boundary had been fixed by them by deed or otherwise, and any such certificate, when duly acknowledged or proved, may be recorded in the office of the county clerk or register of deeds and mortgages, as the case may be, of the county in which such lands lie, and, when so recorded, the record thereof shall be receivable in evidence and shall be notice in the same manner and to the same effect as though their respective deeds had been so acknowledged or proved and recorded.

L.1951, First Sp.Sess., c. 352, p. 1466, s. 5.

46:3A-6. Construction as continuation of prior statutes

The provisions of this act shall be construed as a continuation of the prior similar statutory provisions.

L.1951, First Sp.Sess., c. 352, p. 1466, s. 6.

46:3A-7. Effective date

This act shall take effect immediately but shall remain inoperative until the repeal of sections 2:25-4, 2:25-5, 2:25-6, 2:25-7 and 2:25-8 of the Revised Statutes.

L.1951, First Sp.Sess., c. 352, p. 1466, s. 7.

Sections 46:3A-1 through 46:3A-4 were moved from 2:25-4 though 2:25-7 when Title 2 was replaced by Title 2A in 1951. These sections are old, but we have not traced them back further than the compilation of 1877. They date from a time that the Boards of

Proprietors of East Jersey and West Jersey were living entities that engaged in property disputes, and their surveys by were key to proof of property rights. The passage of time and the law of adverse possession have made these sections anachronistic. The Board of Proprietors of East Jersey sold its land to the State and ceased to exist some years ago. The Board of Proprietors of West Jersey still exists, but there is no legal basis or other reason for different rules for it than for other land owners.

Sections 46:3A-6 and 46:3A-7 are transitional provisions relating to the re-enactment of this chapter and may be eliminated.

The one remaining section in Chapter 3A, 46:3A-5, is relatively recent (enacted in 1934) and has some continuing importance. It allows property owners to agree on a survey of the boundary of their lands and makes that survey as binding as a deed. While the practice allowed is uncommon, it is not inherently anachronistic. The section should be retained as redrafted.

Revised Chapter

-1. Boundary certificates

A certificate establishing the true boundary between adjoining lands executed by the owners of the lands and acknowledged by them shall be as conclusive and binding as though the boundary had been fixed by them by deed or otherwise. The certificate, when meeting the requirements for recording, may be recorded in the office of the county recording officer.

COMMENT

This section is substantively identical to 46:3A-5.

Chapter 4

Current

46:4-1. Short form deed

A deed may be made in the following form or to the same effect:

"This deed made the day of , in the year , between (here insert names and residences of parties);

Witnesseth: That in consideration of (here state the consideration), the said doth (or do) grant and convey unto the said all, et cetera (here describe the property and insert covenants or any other provisions);

In Witness Whereof the said party of the first part ha hereunto set hand and seal the day and year first above written;

Signed, sealed and delivered .

In the presence of ."

46:4-2. "The said covenants" construed

When a deed uses the words "the said covenants" , such covenant shall have the same effect as if it was expressed to be by the covenantor, for himself, his heirs, personal representatives and assigns, and shall be deemed to be with the covenantee, his heirs, personal representatives and assigns.

46:4-3. Covenant of seizing

A covenant by the grantor in a deed "that he is lawfully seized of the said land" , shall have the same effect as if he had covenanted, promised and granted to and with the grantee, his heirs and assigns, that at the time of the sealing and delivery of the deed, he, the said grantor, was seized in his own right of an absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the premises thereby granted, with the appurtenances.

46:4-4. Covenant as to right to convey

A covenant by the grantor in a deed "that he has the right to convey the said land to the grantee" , shall have the same effect as if the grantor had covenanted that he has good right, full power and absolute authority to grant, bargain, sell and convey the said land, with all the buildings thereon, and the privileges and appurtenances thereunto belonging unto the grantee, his heirs and assigns forever, in the manner in which the same is conveyed, or intended so to be by the deed, and according to its true intent.

46:4-5. Covenants as to quiet possession and freedom from encumbrances

A covenant by the grantor in a deed "that the grantee shall have quiet possession of the said land" , shall have as much effect as if he had covenanted that the grantee, his heirs and assigns, might, at any and all times thereafter, peaceably and quietly enter upon, and have, hold, use and occupy, possess and enjoy the land conveyed by the deed, or intended so to be, with all the buildings thereon, and the privileges and appurtenances thereto belonging, and receive and take the rents and profits thereof, to and for his and their use and benefit without any let, suit, eviction, interruption, claim or demand whatever of the grantor, his heirs or assigns, or any other person or persons whomsoever, lawfully claiming or to claim the same.

If, to such covenant, there be added "free from all encumbrances" , such words shall have as much effect as if the words "and that the said premises are free and clear, and freely and clearly acquitted and discharged of and from all former mortgages, judgments, executions, and of and from all other encumbrances whatever" .

46:4-6. Covenant as to grantor's acts

A covenant by the grantor in a deed "that he has done no act to encumber the said lands" , shall have the same effect as if he covenanted that he had not done or executed, or knowingly suffered to be done or executed, any act, deed or thing whereby the lands and premises conveyed, or intended so to be or any part thereof, are or will be changed, charged, altered, affected, defeated, or encumbered in title, estate or otherwise.

46:4-7. Covenant of general warranty

A covenant by the grantor in a deed "that he will warrant generally the property hereby conveyed" , shall have the same effect as if the grantor covenanted that he, his heirs and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever.

46:4-8. Covenant of special warranty

A covenant by the grantor in a deed "that he will warrant specially the property hereby conveyed" , shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives,

will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of the grantor and all persons claiming or to claim by, through, or under him.

46:4-9. "With general warranty", "with special warranty" construed

The words "with general warranty" in the granting part of any deed shall be deemed to be a covenant by the grantor "that he will warrant generally the property hereby conveyed" . The words "with special warranty" in the granting part of a deed shall be deemed to be a covenant by the grantor "that he will warrant specially the property hereby conveyed" .

46:4-10. Covenant as to further assurances

A covenant by the grantor in a deed "that he will execute such further assurances of the said lands as may be requisite" , shall have the same effect as if he had covenanted that he, his heirs or personal representatives, will, at any time, upon any reasonable request at the charge of the grantee, his heirs or assigns, do, execute, or cause to be done or executed, all such further acts, deeds and things for the better, more perfectly and absolutely conveying and assuring the said lands and premises thereby conveyed or intended so to be, unto the grantee, his heirs and assigns, in the manner aforesaid as by the grantee, his heirs or assigns, his or their counsel in law, shall be reasonably devised, advised or required.

46:4-11. Deeds or covenants not conforming to statutory short forms

Any deed or part of a deed which shall fail to take effect by virtue of sections 46:4-1 to 46:4-10 of this title, shall, nevertheless, be as valid and effectual and shall bind the parties thereto, so far as the rules of law and equity will permit, as if the sections herein mentioned had not been enacted.

Revised Chapter 4

The approach of the proposed sections is different from that of current Chapter 4. The proposed provisions express general requirements and options for deeds in place of the specified forms in current law. This change is not substantive because the forms are not required; any form that meets the case law requirements can be valid. Since any form may be used, the choice is between putting sample forms in a statute or merely stating the requirements for validity. Any sample form runs the risk of being treated at required. In addition, any illustrative forms that we draft now may be outdated in the future. Although the forms in current law were short and more modern when they were drafted, they now seem anachronistic and overly ornate.

-1. Requirements for effective deed

a. A deed or other instrument intended to convey an interest in real estate, shall be effective to convey that interest if it:

(1) identifies the parties to the transaction;

(2) identifies the property and the interest to be conveyed;

(3) evidences an intention to convey the interest through the deed or other instrument;

(4) is signed and delivered by the party conveying the interest in property; and

(5) is accepted by the party to whom the interest in property is conveyed.

b. Notwithstanding subsection (a), a deed or other conveyance of an interest in real estate shall be of no effect against subsequent judgment creditors without notice, and against subsequent bona fide purchasers and mortgagees for valuable consideration without notice and whose conveyance or mortgage is recorded, unless that conveyance is evidenced by a document that is first recorded.

COMMENT

Subsection (a) establishes the requirements for a deed that is effective to transfer an interest in land between the parties. It should be noted that this effectiveness is limited. To be fully effective, a deed must be recorded (see subsection (b) of this section), and to be recorded, a deed must meet the formal requirements of the recording statutes. See 46:15-1.1

The requirements for validity are taken in part from 46:4-1 and, in part from case law. Some provisions are so basic, such as the requirement that a deed identify the parties to the transaction, that no case appears to have voiced the requirement. On other matters there are many cases. While there must be a description of the property sufficient to identify it, that description need not be formal. Chidester v. City of Newark, 58 F.Supp. 787 (DCNJ 1945). For the requirement of delivery of the deed by the transferor and its acceptance by the transferee see, e.g. In re Lillis' estate 123 N.J.Super 280 (App.Div. 1979). The proposed section does not require consideration. Under case law there need be no economic consideration; love and affection will suffice. Cockrell v, McKenna, 103 N.J.L. 166 (1926). Moreover, even if there is no consideration, a deed is valid absent fraud or other circumstances suggesting undue influence. Den. ex Dem. Chews v. Sparks, 1 N.J.L. 56, (Sup.Ct. 1791).

Subsection (b) is based on 46:22-1. It embodies one of the basic principles underlying the recording statutes, that an unrecorded document is ineffective against later claimants who have no notice of it. See, e.g. *Cox v. RKA Corp*., 164 *N.J*. 487, 496 (2000). However, case law is not consistent on this point. One reported case, *Michalski v. U.S.*, 49 *N.J. Super*. 104 (Ch. Div. 1958), held that a conveyance, which was unwritten and so could not be recorded, is effective against a creditor without notice. *See also*, *In re L.D. Patella Construction Co*., 114 *B.R*. 53, 58-59 (Bankr. D.N.J. 1990). Subsection (b) reverses that rule. If a party makes a conveyance in a form that does not permit it to be recorded, then a subsequent bona fide purchaser, mortgagee or creditor who could not learn of the conveyance from the land records is not bound by the conveyance absent notice of it at the time he acquired the interest for value or docketed the judgment. This principle is in accord with the statute of frauds, 25:1-11, which makes unwritten conveyances enforceable as conveyances only in some cases where possession is transferred. Transfer of possession frequently is notice to prospective purchasers or mortgagees.

-2. Covenants

a. A deed or other instrument intended to convey an interest in real estate may include covenants as to warrantees made by the grantor, including a covenant that:

(1) the grantor owns the property absolutely in fee simple;

(2) the grantor has the right to convey the property to the grantee

(3) the grantee will have quiet possession of the property;

(4) the grantor has done no act to encumber the property;

(5) the grantor warrant the property generally and will defend the grantee's right to the property against the claims of others;

(6) that he will warrant specially the property hereby conveyed" , shall have the same effect as if the grantor had covenanted that he, his heirs and personal

representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of the grantor and all persons claiming or to claim by, through, or under him

(7) A covenant that the grantor will provide any further assurances reasonably requested by the grantee to assure the property more perfectly and absolutely to the grantee.

b. A deed without a covenant or other equivalent provision shall be treated as a bargain and sale deed or quitclaim deed.

COMMENT

This section gathers all the covenants in current law. I do not know whether subsections (2) and (3) are necessary at all. I do not know the difference between general warranty and special warranty, so I did not attempt to rephrase the special warranty provision in subsection (a)(6). The use of the covenant in subsection (a)(7) is also unclear to me.

Chapter 6

Current

46:6-1. Transfers, leases, assurances and conveyances pursuant to letters of agency, powers of attorney or other powers or authorities

All deeds, grants, sales, leases, assurances, or other conveyances whatsoever, heretofore made by virtue of letters of agency, powers of attorney, or other powers or authorities whatsoever, and entered on the public books of records of the province of New Jersey or the public books of records of the eastern or western divisions thereof, prior to July fourth, one thousand seven hundred and seventy-six, whereby any real estate whatsoever within this state or province were granted, sold, conveyed, assured, released, or transferred to any person pursuant to such powers and authorities whatsoever, shall be, and are hereby declared as good, valid and sufficient title in law, to all intents, constructions and purposes whatsoever, unto the grantees therein, and to their heirs and assigns, as if the constituent or constituents had then and there sold and conveyed such real estate, and had executed deeds according to the true intent and meaning of such grants, deeds or conveyances, and such grants, deeds or conveyances shall be of force against, conclude and bind all and every the constituents, employers, grantors of such powers and authorities, and their and all and every of their heirs, and all and every other person or persons claiming or to claim estate from or under them, or any of them, severally and respectively and when any real estate heretofore has been or hereafter shall be sold, conveyed or disposed of by virtue of any such powers or authorities as aforesaid, such powers or authorities having been first acknowledged or proved and certified and entered upon the public records in the books appropriate therefor in the proper record offices of this state, the grants and conveyances, deeds and instruments made pursuant to the powers thereby granted shall be as good, valid and sufficient titles against all and every the constituents, employers and grantors of such powers and authorities, against all claiming or to claim estate under them severally and respectively as aforesaid, as if the constituent or constituents had then and there sold and conveyed the same real estate.

46:6-2. Informalities or irregularities in conveyances executed by agent under power

Whenever an attorney, authorized to execute and deliver conveyances of real estate has failed, prior to March twenty-third, one thousand eight hundred and eighty-three, to convey the title of his principal thereto as he was authorized to convey the same, by reason of any informality or irregularity in the recitals or subject matter contained in the deed or conveyance, or by reason of any informality or irregularity in the execution thereof, although it was the intention of such attorney to convey a good title to the same, such informality or irregularity shall not affect the title intended to be so conveyed, but such deed

or conveyance shall convey the title of the principal in and to such real estate as effectually as though such informality or irregularity did not exist, and as though the principal had himself executed such deed or conveyance.

46:6-3. Conveyances under powers of attorney not recorded

Whenever any deed to or conveyance of real estate in this state shall purport to have been executed by virtue of any letter of attorney, and such deed or conveyance shall have been properly acknowledged and recorded, the recital of the letter of attorney in such deed or conveyance shall be prima facie proof of the existence thereof, notwithstanding the same may not be recorded, but only when such deed or conveyance shall have been recorded at least ten years, and the person claiming thereunder shall take and subscribe an oath that he has seen such letter of attorney so recited, which oath shall be recorded in the office of the county recording officer of the county wherein such real estate is situate, in the book therein provided for the recording of powers of attorney.

46:6-6. Letters of attorney considered unrevoked until revoked by recorded instrument or death of principal

All letters of attorney for any sale, conveyance, assurance, lease, acquittance or release hereafter duly executed and recorded in accordance with the provisions of section 46:16-1 of the Revised Statutes shall be considered as unrevoked and as remaining in full force and effect in accordance with the terms thereof unless and until the letters of attorney are revoked by the principal by an instrument duly executed and recorded in accordance with the provisions of section 46:16-2 of the Revised Statutes, except that nothing herein contained shall continue in effect any letters of attorney revoked by the death of the principal.

L.1950, c. 306, p. 1041, s. 1, eff. July 6, 1950.

Revised Chapter

Section 46:6-1 validates deeds made by authority of a power of attorney before July 4, 1776. It appears that there was some problem with validity of such transfers under colonial law. Any such problem has been obviated by the passage of time.

Section 46:6-2 validates deeds made before March 23, 1883 under a power of attorney notwithstanding that problems with the recitals in the deed would cause it to be ineffective in transferring property. Again, the problem has been obviated by the passage of time.

Section 46:6-3 and 6 have continuing effect. Redrafts intended to be substantively identical, follow:

-3. Conveyances under powers of attorney not recorded

Whenever any deed to or conveyance of real estate in this state purports to have been executed by virtue of a power of attorney, the recital in the deed or conveyance that it was made pursuant to a power of attorney shall be prima facie proof of the existence of the power of attorney, notwithstanding the power of attorney was not recorded, provided:

a. the deed or conveyance has been properly acknowledged and recorded, and has been recorded for at least ten years, and

b. the person claiming under the deed or conveyance takes and subscribes an oath that he or she has seen the power of attorney so recited, and submits the oath for recording in the office of the county recording officer of the county where the real estate is located.

COMMENT

This section has the effect of making a deed executed by an attorney valid after ten years have elapsed even though the power of attorney was not recorded. . However, to use this provision, the grantee must record an oath that he has seen the power of attorney. The grantee whose title is otherwise questionable is the one who takes the oath. We have doubts as to whether this section should be retained.

-6. Powers of attorney considered unrevoked until revoked by recorded instrument or death of principal

A power of attorney for transfer of an interest in real estate that is recorded in the office of the county recording officer of the county where the real estate is located shall be considered as unrevoked and as remaining in full force and effect in accordance with its terms until:

a. the power of attorney is revoked by the principal by an instrument executed and recorded, or

b. the death of the principal.

Chapter 10

Current

46:10-1. Support of party or other walls adjacent to excavations eight feet in depth

Whenever excavations, for buildings or other purposes, on any lot or piece of land, shall be intended to be carried to a depth of more than eight feet below the curb or grade of the street, and there shall be any party or other wall, wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot or piece of land, the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, but not otherwise, shall, at all times, from the commencement until the completion of such excavations, preserve, at his own expense, such party or other wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced.

Proposed section

-1. Support of party or other walls adjacent to excavations

Whenever excavations that are intended to be carried to a depth of more than eight feet below the curb or grade of the street are made on a plot of land, and there is a wall, standing on or near the boundary lines of the plot of land, the person causing the excavation to be made, shall preserve the wall from injury at all times from the commencement until the completion of the excavations at his or her own expense, and support the wall by a proper foundation so that it remains as stable as before the excavations were commenced. The person who causes the excavation to be made need

not preserve and support the wall if that cannot be done without entering the adjoining land, and the owner of that land denies entry.

Source: 46:10-1.

COMMENT

While simplified in language, there is no substantive change from the source.

Chapter 11

Current

46:11-1 Right of entry to make surveys in certain proceedings

In any proceeding to lay out, alter, vacate or open a public road or street, or to determine which of the proprietors or possessors of the lands adjacent to any highway have narrowed or encroached on the same, and in any proceeding under the act entitled "An act to enable the owners of swamp or meadow ground to drain the same, and to repeal a law heretofore made for that purpose," approved November twenty-fourth, one thousand seven hundred and ninety-two, and the several supplements thereto, and in any other proceeding touching a public improvement, any practical surveyor, with the necessary assistants, employed by any person interested in any of such proceedings, may enter on the lands adjacent to such highways or streets, or the lands to be drained under the provisions of said act, or other lands, for the purpose of making necessary surveys, doing as little damage as possible to the owner or owners of such lands.

This section appears to be archaic, but it is safer to consult with the Department of Transportation to determine whether it might have continued importance. We hope to have a response by the time of the meeting.