North Dakota Law Review

Volume 32 | Number 1 Article 3

1956

Real Property - Recording Acts - Recordation of Unacknowledged Instruments

K. R. Yri

NOTES

REAL PROPERTY — RECORDING ACTS — RECORDATION OF UNACKNOWLEDGED INSTRUMENTS — In *Messersmith v. Smith*,[1] a recent North Dakota case, A executed a quit claim deed to B in May, 1946 which was not recorded until July, 1951. A executed a mineral deed to the same property to C who did not record. This deed, although containing a certificate of acknowledgment, did not comply with North Dakota statutes[2] because the acknowledgment was taken over the telephone rather than personally. C later conveyed to D and in May, 1951, C's deed and D's deed were recorded. In an action to quiet title the court held for B. Because C's deed had not been properly acknowledged it was not entitled to be recorded. Therefore, its actual record was not notice to D of its execution, and D was not a bona fide purchaser without notice.[3] The effect of this is to say that D must view the record as if the conveyance from A to C was not present.

Jurisdictions in this country that have statutes similar to those of North Dakota consistently hold that the recordation of an unacknowledged instrument does not give constructive notice to subsequent purchasers.[4] The impact of such holdings on the recording acts of this country is far reaching and leads to the discussion of: (1) the effect and purpose of recording acts, (2) the effect of acknowledgments upon the recording acts, and (3) the results of curative legislation.

The Effect and Purpose of the Recording Acts

The recording of land transactions dates back to biblical times when Abraham purchased the field of Ephraim.[5] However, these ancient deed recordings were not public and only showed the title as between the parties involved.[6] The purpose of the first American recording act, which was adopted in Massachu-

1. 60 N.W.2d 276 (N.D. 1953).
2. N.D. Rev. Code § 47-1903 (1943) (Before an instrument can be recorded, . . . its execution must be established: 1. If executed by an individual, by acknowledgment by the person executing the same . . . .); N.D. Rev. Code § 47-1927 (1943) (Indicates the proper form of the certificate of acknowledgment and it states that the grantor was personally before the notary.).
3. See note 1 *supra* at 281. (Court inferred that if A would have had title at the time of the conveyance to C and if the action had been between A and D the outcome would have been different.).
4. McDonald v. Norton, 123 Ark. 473, 185 S.W. 791 (1916); Harris v. Reed, 21 Idaho 364, 121 Pac. 780 (1912); Baum v. Northern Pac. Ry. Co., 55 Mont. 219, 175 Pac. 872 (1918); Pease v. Magill, 17 N.D. 166, 115 N.W. 260 (1908); Kees v. Beardsley, 190 Cal. 466, 213 Pac. 500, 502 (1923) (dictum).
5. 28 Geo.L.J. 307 (1939).
6. *Ibid.*

setts, was to make it possible for every man to ". . . know what estate or interest other men may have in any houses, lands or other hereditaments . . . that they deale in . . . ."[7] Recording acts, now common in every state, are of four types:[8] (1) race-notice, (2) notice, (3) race, and (4) period of grace. In states that have adopted the race-notice type statute the purchaser is protected only if he records first.[9] If the notice statute is employed, emphasis is not on the race to the recorder's office and a subsequent bona fide purchaser is protected whether he records first or not.[10] Under a race statute the premium is placed on recording first regardless of the fact that the purchaser has notice of an outstanding claim.[11] In the few jurisdictions that utilize the period of grace statute the grantee has a certain period in which to record, and a subsequent purchaser is protected only if the prior grantee fails to record the instrument in the period granted by the statute.[12]

With the exception of those states having "race" type statutes, the law concerns itself only with the protection of bona fide purchasers and those persons who acquire real property through such purchasers.[13] It appears that to achieve the status of a bona fide purchaser three elements must be shown: (1) the payment of a valuable consideration, (2) good faith, and (3) absence of notice of outstanding rights of others.[14]

Consideration—It is generally conceded that the payment of a purely nominal consideration,[15] such as one dollar[16] or love and affection,[17] will not constitute one a bona fide purchaser for

---

7. Bayse, Clearing Land Titles 532 (1953).
8. Casner and Leach, Cases and Text on Property 783 (1950).
9. Cal. Civ. Code Ann. § 1214 (West 1953) (Every conveyance of real property, other than a lease for a term not exceeding one year is void as against any subsequent purchaser or mortgagee of the same property or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded and as against any judgment affecting the title less such conveyance shall have been duly recorded prior to the record of notice of action.); Idaho Code § 55-812 (1947); Mich. Comp. Laws § 565.29 (1948); Mont. Rev. Code § 6935 (1935); N.D. Rev. Code § 47-1941 (1943); S.D. Code § 51.1620 (1939); Utah Code Ann. § 57-3-3 (1953).
10. Ariz. Code Ann. § 71-414 (1939); Fla. Stat. § 695.01 (1953); Iowa Code § 558.41 (1946) (No instrument affecting real estate is of any validity against a subsequent purchaser for a valuable consideration, without notice unless filed in the office of the recorder of the county in which same lies.); Ky. Rev. Stat. § 382.270 (1953); Tenn. Code § 7596 (1932); W.Va. Code Ann. § 3993 (1955).
11. Casner and Leach, Cases and Text on Property 783 (1950).
12. Del. Rev. Code § 3680 (1935) (Required to record within three months after sealing and delivery of the deed before protection is given against a subsequent purchaser for value.)
13. Burby, Real Property 490 (1954).
14. United States v. California and Orgon Land Company, 148 U.S. 31, 42 (1893) (dictum).
15. Morris v. Wicks, 81 Kan. 790, 106 Pac. 1048, *Id.* at 1049 (1910 (dictum).
17. Alexander v. O'Neil, 77 Ariz. 91, 267 P.2d 730 (1954).

value. However, in the case of *Strong v. Whybark*,[18] love and affection plus five dollars was considered a sufficiently valuable consideration to entitle the grantee to the rights of a bona fide purchaser for value. The views are conflicting as to whether a pre-existing debt is sufficient consideration. Some jurisdictions hold that as the purchaser parts with nothing at the time of the purchase he is, in a technical sense, not a purchaser for value, and hence, not entitled to protection under the recording acts.[19] Under a compromise rule, used in at least one jurisdiction, if the purchaser can show that subsequent to the purchase his rights as a creditor have been adversely prejudiced he is a purchaser for value.[20]

Good Faith—This element, although difficult of definition, is present when the purchaser has an honest intent[21] and purpose,[22] and a mere error in judgment alone will not impeach this good faith.[23]

Notice—Generally speaking, notice may be either actual or constructive.[24] If a purchaser has knowledge which in the exercise of common reason would put a man on inquiry, it will be presumed that such inquiry has been made and notice of what the inquiry would have revealed will be charged.[25] Notice need not be given to every member involved in a transaction before all members are deemed to have had notice. Notice to one of two parties to a joint transaction is notice to both parties.[26] Similarly, a purchaser is deemed to have received notice if notice was given to his agent.[27] However, a mere want of caution, or a small suspicion or rumor[29] of an interest in another will not constitute notice.

Generally it appears that a purchaser is chared with notice of anything that appears in his grantor's chain of title.[30] That is, he is charged with notice of all matters referred to in any convey-

18. 204 Mo. 341, 102 S.W. 968 (1907).
19. *E.g.*, Swann v. Rotan State Bank, 115 Tex. 425, 282 S.W. 789 (1926); Ellis v. Nickle, 193 Ark. 657, 101 S.W.2d 958 (1937); Dietsch v. Long, 72 Ohio App. 349, 43 N.E.2d 906 (1942).
20. Luschen v. Stanton, 192 Okla. 454, 137 P.2d 567 (1943).
21. Cooper v. Flesner, 24 Okla. 47, 103 Pac. 1016, 1019 (1909) (dictum).
22. Miller v. Tidal Oil Co., 161 Okla. 155, 17 P.2d 967 (1933) (dictum).
23. *Ibid.*
24. Willard v. Bringolf, 102 Ind. App. 16, 5 N.E.2d 315, 321 (1936) (dictum).
25. Fluegel v. Henschel, 7 N.D. 276, 74 N.W. 996 (1898); Anthony v. Wheeler, 130 Ill. 128, 22 N.E. 494, 495 (1889) (dictum).
26. Northern Ill. Coal Corp. v. Cryder, 361 Ill. 214, 197 N.E. 750, 756 (1935) (dictum).
27. Stanley v. Schwalby, 162 U.S. 255, 276 (1896) (dictum).
28. Anthoney v. Wheeler, *supra* note 25.
29. See note 27 *supra*.
30. Ochoa v. Hernandez Y. Morales, 230 U.S. 139 (1913); Williams v. Harris County Ship Channel Nav. Dist., 128 Tex. 411, 99 S.W.2d 276 (1936).

ance which is necessary to support his title, and it immaterial that there is no actual notice of the conveyance.[31] This could include instruments referred to in the instruments on record regardless of whether the former instruments have been recorded.[32]

On text writer[33] states, "The interpretation of the American rceording statutes, according to a majority of the decisions, is to the effect that recording statutes afford a means of maintaining priority and that recordation is constructive notice of the interest the interests created by the recorded instrument." Thus, if a person is a good faith purchaser for value without notice of an outstanding claim, protection should be afforded under the recording acts.

The Effect of Acknowledgments on the Acts

The act of acknowledgment[34] appears to have come into existence in England during the seventeenth century.[35] Its purpose was probably to satisfy the enrolling officer not only that the instrument involved had been duly executed but also to prevent impersonation.[36] The requirement that an instrument be duly acknowledged is purely statutory,[37] and while in some states acknowledgment is needed in order to make the conveyance effective between the parties,[38] it is usually merely a prerequisite to recording the conveyance.[39] Litigation arises not only where an unacknowledged deed is recorded[40] but also where a defective certificate of acknowledgment is placed on record.[41] These

31. Myers v. Berven, 166 Cal. 484, 137 Pac. 260 (1913) (Case involved a reservation of a right away. P's deed contained no reservation of the right away but the court held that P had notice of it because the reservation was in an instrument in P's chain of title.); Baldwin v. Anderson, 103 Miss. 462, 60 So. 578 (1913) (Deed to purchaser's grantor indicated inadequate consideration. This was held sufficient to constitute notice.); Lyon v. Gambert, 63 Neb. 630, 88 N.W. 774 (1902).

32. Weigel v. Green, 218 Ill. 227, 75 N.E. 913 (1905); Duval v. Crawford, 73 W.Va. 122, 80 S.E. 833 (1914).

33. Burby, Real Property 488 (1954).

34. Jemison v. Howell, 230 Ala. 423, 161 So. 806, 808 (1935) (dictum) (Acknowledgment is the formal admission, before an officer, by the person who executed the instrument that such was his act.); Commercial Credit Corp. v. Carlson, 114 Conn. 514, 159 Atl. 352, 354 (1932) (dictum).

35. 4 American Law of Property § 17.31 (Casner ed. 1952).

36. *Ibid.*

37. Munsey Trust Co. v. Alexander, 42 F.2d 604, 605 (5th Cir. 1930) (dictum).

38. Lewis v. Herrera, 10 Ariz. 74, 85 Pac. 245 (1906); Parrott v. Kumpf, 102 Ill. 423 (1882).

39. Harris v. Reed, 21 Idaho 364, 121 Pac. 780 (1912); Kitchen v. Canavon, 36 N.M. 273, 13 P.2d 877 (1932) (dictum); Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 551 (1897) (dictum).

40. See note 4 *supra.*

41. See Kielig v. Hoyt, 31 Neb. 453, 48 N.W. 66 (1891) (Acknowledgment did not indicate that mortgagor executed the instrument voluntarily.); Childers v. Wm. H. Coleman Co., 122 Tenn. 109, 118 S.W. 1018 (1909) (Acknowledgment failed to contain the words "for the purposes therein contained."); South. Penn. Oil Co. v. Blue Creek Development Co. 77 W. Va. 682, 88 S.E. 1029 (1816) (Acknowledgment was not signed by notary, therefore the recorded instrument was held not to be constructive notice to a subsequent purchaser.)

infirmities in the numerous instruments that are entered in public records are definitely jeopardizing our recording system.[42]

It is the generally accepted rule that the recordation of a deed containing patent defects in the certificate of acknowledgment does not constitute constructive notice to a subsequent bona fide purchaser.[43] Defective certificates of this type include those where the certificate of acknowledgment does not contain the signature of the notary,[44] comply with the exact words of the statute,[45] indicate that the acknowledgment was voluntary,[46] or that the officer was sworn.[47]

There are cases however where statutes have been violated because of existence of latent rather than patent defects, as where the acknowledging officer was interested in the conveyance[48] or where the officer acknowledged an instrument outside his jurisdiction.[49] It is obvious that defects of this type are not apparent on the face of the instrument, and the prevailing rule is that the recordation of instruments containing (latent) defects in the certificate of acknowledgment constitutes constructive notice to a subsequent bona fide purchaser.[50] With respect to this latter rule the Wyoming court in *Boswell v. First Nat'l Bank of Laramie* stated:[51]

> "This rule is sustained by abundant authority and is founded on public policy to carry out the purpose of the recording acts and preserve the reliability of the public records of transfers and conveyances. It is readily seen that a contrary rule would render unsafe any reliance upon the record of deeds or instruments requiring acknowledgment to entitle them to be recorded."

It would seem plausible to apply this reasoning to a case where the deed was unacknowledged although containing a

---

42. Bayse, Clearing Land Titles 378 (1953).

43. Greenwood v. Jenswold, 69 Iowa 53, 28 N.W. 433 (1886); Cannon v. Deming, 3 S.D. 421, 53 N.W. 863 (1892); Abney v. Ohio Lumber & Mining Co., 45 W.Va. 446, 32 S.E. 256 (1898); Patton, Titles 685 (1938).

44. South Penn Oil Co., v. Blue Creek Development Co., 77 W.Va. 682, 88 S.E. 1029 (1916).

45. Childers v. Wm. H. Coleman Co., 122 Tenn. 109, 118 S.W. 1018 (1909) (Acknowledgment failed to contain the words "for the purposes therein contained.").

46. Keeling v. Hoyt, 31 Neb. 453, 48 N.W. 66 (1891).

47. Abney v. Ohio Lumber & Mining Co., 45 W.Va. 446, 32 S.E. 256 (1898).

48. Harjo v. Collins, 146 Okla. 131, 293 Pac. 179 (1930) (The interest howveer cannot be apparent on the face of the instrument.).

49. See Peterson v. Lowry, 48 Tex. 408 (1874).

50. Peterson v. Lowry, *supra* note 49. (Court stated, ". . . Nor are we prepared to hold that a certificate regular upon its face upon which an instrumnet was recorded, could be set saide as a nullity by extraneous facts so as to prevent the record of the instrument from being notice to subsequent purchaser . . . ."); Harjo v. Collins, *supra* note 48; Lankford v. First Nat'l Bank of Lawton, 5 Okla. 159, 183 Pac. 56 (1919) (Court held that acknowledgment by an interested party was a latent defect.).

51. 16 Wyo. 161, 92 Pac. 624, 628 (1907).

complete certificate of acknowledgment. However, there is an obvious distinction between the two situations. In the former situation there was an acknowledgment and the defect was in the certificate itself, while in the latter the instument was not in fact acknowledged. In this latter situation the latent defect was that the officer was not authorized to sign the certificate because the grantor had not in fact appeared before the officer for the purpose of acknowledgment. In other words the latent defect went straight to the essence of the act of acknowledgment while in the former situation that was not true. To apply the rule set forth in *Boswell v. First Nat'l Bank of Laramie* to this later situation would probably foster impersonation while under the former damage would be improbable.

In *Titus v. Johnson* it was stated:[52]

> "When an instrument with the certificate of acknowledgment or proof of execution as required by law is presented to the recorder it is made his imperative duty to record it."

Although supporting authority is lacking it would seem that if the recorder is obliged to record a perfectly valid appearing deed, constructive notice to a subsequent purchaser would logically follow.

In *Dixon v. Kaufman*,[53] a deed was recorded without being acknowledged. The instrument however, did contain a valid appearing certificate of acknowledgment. In an action between the grantor, who had title when the deed was conveyed, and the subsequent purchaser from the grantor's grantee, the court granted relief to the bona fide purchaser on the ground that the grantor should not be granted relief from consequences of his own act which would result in a loss to an innocent purchaser. This same reasoning should be applicable where a previous grantee of the grantor fails to record his instrument and a subsequent bona fide purchaser of the grantor sustains a loss. The previous grantee, having "slept on his rights", should be estopped to enforce his interest.[54] It is this failure to record that misleads innocent purchaser.

In the absence of fraud or duress certificates of acknowledgment

---

52. 50 Tex. 224, 240 (1878).
53. 58 N.W.2d 797 (N.D. 1953).
54. Marling v. Milwaukee Realty Co., 127 Wis. 363, 106 N.W. 844 (1906) (Plaintiff in this case was estopped to enforce a mortgage because of his failure to record it. Court stated that plaintiff was bound to know that the parties dealing with the title to the land would rely on the records.).

have been held conclusive of the facts stated.[55] Security of title is obviously the reason for such a rule.[56] However, this rule not been extended to cases where the grantor has never appeared before the officer for the purpose of acknowledgment[57] except by a minority[58] of the jurisdictions which apply this principle to instances where the acknowledgment is given over the telephone.[59]

Results of Curative Legislation

The accumulation of defective acknowdgments and their effect on marketability of land has caused such a deplorable condition that many states have found it necessary to pass curative legislation in order to give much needed relief to land owners.[60] Although it has been argued that curative statutes exercise judicial powers[61] and take property without due process of law,[62] courts treat these curative statutes as valid.[63] States have passed such legislation to validate instruments defective because of acknowledgments taken by an unauthorized person,[64] acknowledgments by officers outside their jurisdiction,[65] acknowledgments by interested parties,[66] and acknowledgments of married women not taken separately.[67] There are states that have validated acknowledgments defective for any reason.[68] Often the legislation only pertains to instruments recorded for a designated number of years[69] or

---

55. White v. Union Producing Co., 140 F.2d 176 (5th Cir. 1944); Jemison v. Holwell, 230 Ala. 423, 161 So. 806 (1935).
56. City Bank and Trust Co. v. Planters Bank and Trust Co., 176 Ky. 500, 195 S.W. 1124, 1125 (1917) (dictum).
57. See Bauder v. Bauder, 195 Okla. 85, 155 P.2d 543 (1945); Potter v. Steer, 95 N.J. Eq. 102, 122 Atl. 685 (1923).
58. 26 Mich.L.Rev. 564 (1928).
59. Abernathy v. Harris, 185 Ark. 22, 34 S.W.2d 765 (1931); Logan Gas Co., v. Keith, 117 Ohio St. 206, 158 N.E. 184 (1927). *Contra,* Hutchinson v. Stone, 79 Fla. 157, 84 So. 151 (1920).
60. Bayse, Clearing Land Titles 359 (1953).
61. See Chestnut v. Shane, 16 Ohio 599 (1947).
62. See Eckles v. Wood, 143 Ky. 451, 136 S.W. 907 (1911).
63. Bowne v. Ide, 109 Conn. 307, 147 Atl. 4, 6 (1929) (dictum).
64. Ark. Stat., § 49-213 (e) (1947); Del. Rev. Code § 3675 (18) (1935); N.D. Rev. Code § 1-0403 (1943) ("The acts of every notary public, justice of the peace or other officer done in good faith in taking or certifying to the acknowledgment of any instrument mentioned in § 1-0401 whether within or without the state, and whether such officer was qualified by law at the time to do so or not, hereby are declared legal and valid for all purposes".).
65. Me. Rev. Stat. c. 154 § 40 (1944).
66. Iowa Code § 534.86 (1946); N.D. Rev. Code § 47-1934 (1943).
67. Del. Rev. Code § 3665 (1935); Ore. Rev. Stat. § 93.810 (5) (1953).
68. Del. Rev. Code § 3675 (1935); Fla. Stat. § 95.26 (1953); N.D. Rev. Code § 1-0401 (1943) (Makes valid instruments recorded prior to January 1, 1943 regardless if the acknowledgment was defective.).
69. Williams v. Butterfield, 77 S.W. 729 (Mo. 1896) (Requires recording for one year before a defective acknowledgment is deemed valid.); Bledsoe v. Haney, 139 S.W. 612, (Tex. 1911) (If defectively recorded deed has been recorded for ten years it will be given the same effect as if it were not defective at all.).

to those instruments recorded prior to a certain date.[70] A study of these statutes makes it obvious that they are not the answer to the problem because there will always be a certain lapse of time during which the recordation of an instrument bearing a defective acknowledgment will not constitute constructive notice to subsequent bona fide purchasers.

Conclusion

Possibly it can be stated that acknowledgments have outgrown their purpose and that their only accomplishment is to add formalism and ritualism to our conveying instruments.[71] The present unstable position of our recording acts because of the acknowledgment requirement can not be entirely cured by the courts. The requirement of an acknowledgment as a prerequisite to recording is statutory,[72] therefore any remedial measures are the responsibility of the legislature. Until such time as adequate remedies are instituted the marketability of titles in North Dakota will remain questionable.

K. R. YRI

70. N.D. Rev. Code § 1-0401 (1943) (Pertains to instruments recorded prior to January 1, 1943.).
71. Bayse, Clearing Land Titles 358 (1953).
72. See note 39 *supra*.