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The Tract Index and Notice in North Dakota

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THE TRACT INDEX AND NOTICE IN NORTH DAKOTA

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The present provisions of the North Dakota statutes [1] requiring the keeping of a tract index to the instruments recorded in the office of the register of deeds are older than the state itself. The system we know as a tract index was referred to in the territorial codes by the term, numerical index,[2] but the forms set out there for accomplishing this type of indexing are identical with those used today. The grantor and grantee method of indexing, which grew of necessity out of the accumulating deposit of records with the early recording officers, antedates, of course, the tract index;[3] and, in spite of the long history of the tract index in North Dakota, the register of deeds is still required to keep an index in the grantor and grantee form in this state.[4]

The tract index, set up as it is to show directly the instruments which have affected the title to a specific geographical unit of land, is especially appropriate in a state which is, as North Dakota, formed entirely from the public domain and surveyed by the rectangular system used by the General Land Office of the United States.[5] The grantor and grantee index, on the other hand, based on alphabetical entries of instruments according to the last names of individual grantors and grantees, is far less convenient [6] and is being replaced in some older areas of the United States by indexes of the tract type.[7]

The existence of a tract index in a jurisdiction has a significance that goes beyond the question of convenience to those engaged in searching the records. Many of the rules governing priorities of purchasers of real estate under the recording acts have their basis in a consideration of the difficulty of discovering instruments recorded in various situations by the

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1 N. D. Rev. Code (1943) Sec. 11-1807.

2 Dakota Code, Political Code c. 21, Sec. 58, 59 (1877).

3 Fairchild, *Improvement in Recording and Indexing Methods for Real Property Instruments*, 28 GA. L. J. 307 (1939).

4 N. D. Rev. Code (1943) Sec. 11-1808.

5 For a discussion of this system see Ruemmele, *Origin of Surveys in North Dakota*, 24 N. D. BAR BRIEFS 102 (1948).

6 PATTON, TITLES Sec. 42 (1938).

7 Fairchild, *supra* note 3.

use of the available indexing system.[8] This paper is concerned primarily with the history of the tract index in relation to the problem of priorities in North Dakota.

In the absence of a recording act, common law theory determines priorities between interests in land by the order of the time of their creation.[9] In equity the doctrine was developed that a purchaser for value of a legal interest without notice of a prior equitable interest would prevail.[10] It is usually stated that the purpose of the recording acts was to force instruments upon the record so that a complete history of the title could be gained by a prospective purchaser making a proper search.[11] The method adopted of accomplishing this end was to change the rules of priority to favor the recorded instrument. The recording statute in North Dakota, for example, makes "Every conveyance of real estate not recorded . . . void as against any subsequent purchaser in good faith, and for a valuable consideration . . . whose conveyance . . . first is recorded . . ." [12] A cursory examination of this statute will reveal that two main elements are required to bring a purchaser within its protection: first, he must have paid a valuable consideration while having no notice of a prior right; second, he must have recorded the instrument on which his right is based before the instrument representing the prior right is recorded. Provisions of this type have been characterized as "notice-race" statutes as distinguished from enactments which can be called "notice" statutes, under which a "subsequent purchaser . . . bears but one burden, that of taking his deed without knowledge of the prior conveyance . . ." [13] One more statutory element that must be included in our background for discussion of the North Dakota cases is the provision that proper recording of an instrument

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[8] For an excellent general treatment of priorities under the recording acts see Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. OF PA. L. REV. 125, 259, 391 (1944).

[9] 2 WALSH, REAL PROPERTY Sec. 216 (1947).

[10] 2 *id* n. 1. There has been a diversity of opinion as to the application of the doctrine of bona fide purchasers to successive equitable interests. Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1 (1887); MCCLINTOCK, EQUITY Sec. 26 n. 9 (2d ed. 1948).

[11] 2 WALSH, *op. cit. supra* note 9, at 489; Philbrick, *supra* note 8, at 127; see Baird v. Stubbins, 58 N. D. 351, 355, 226 N. W. 529 (1929).

[12] N. D. Rev. Code (1943) Sec. 47-1941; Enderlin Investment Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390 (1909).

[13] Philbrick, *supra* note 8, at 159.

is "constructive notice of the execution of such instrument to all purchasers and encumbrancers subsequent to the recording." [14]

The first important event in the history of the tract index in North Dakota is the case of *Doran v. Dazey*.[15] In October 1884 one Dazey was negotiating with certain Nelsons for the sale of property in the city of Fargo. When the terms of the sale were agreed upon the Nelsons executed a warranty deed to Dazey which was properly recorded. Dazey, however, did not give the agreed consideration immediately, but sought legal advice as to the state of the title. The report of the title submitted by his attorneys was not favorable. The defect which the attorneys considered important was the fact that recorded title was not in the Nelsons. This was remedied by the execution of a deed from the record owners to one of the Nelsons. There was another defect which had apparently been revealed by an examination of the tract index; one Sims had given a mortgage on the property. Since, however, there was nothing else in the record to connect Sims with the title to the property, Dazey's attorneys advised him to go ahead with the transaction. He then paid his consideration. Actually, Sims was the grantee in a deed made by the record owners in August 1883 which was unrecorded until September 1887. Doran, claiming under this deed, brought suit to cancel the deeds to Dazey as clouds on his title. In the absence of the recording act Doran would obviously prevail; the conveyance to Sims in 1883 took title out of the chain under which Dazey claims. The recording act protects subsequent prior recording purchasers for value without notice of unrecorded instruments affecting the title to realty. Dazey seems to be in that class if he can be said to be without notice of the prior unrecorded deed.

The only basis, of course, for impugning the good faith of Dazey is his knowledge of the recorded mortgage made by Sims. This was enough in the lower court and Doran prevailed. On appeal, the Supreme Court rested its affirmance on constructive notice in Dazey resulting from his failure to make the inquiry suggested by his actual notice of the recorded mortgage. The opinion accents the statement that had Dazey "not actually known that such a mortgage was on record, . . . the

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[14] N. D. Rev. Code (1943) Sec. 47-1945.
[15] 5 N. D. 167, 64 N. W. 1023 (1895).

mere recording of the mortgage would not have constituted constructive notice of it, within the meaning of the recording law." It may well be asked why the "mere recording" of the mortgage in the circumstances of this case would not have amounted to constructive notice of it within the terms of the recording act. The court gives an answer: "The recording of an instrument out of the chain of title does not constitute such constructive notice. This is well settled." The rule stated by the court *is* well settled in situations like *Doran v. Dazey* — in jurisdictions where the grantor and grantee index is the only access provided to the recorded instruments.[16] Under such circumstances the discovery of an instrument given by one who is not in the line of succession from a common grantor would be mere accident unless the searcher were required to go beyond the systematic use of his index and examine the recorded instruments one by one.[17] It seems fair to suggest that in a jurisdiction where the indexing system lists instruments according to the land which they affect rather than according to the names of their grantors and grantees, rules developed with relation to the latter type of index should not be adopted without full consideration of the reasons for them.

Since the foundation of Doran's claim was the unrecorded deed of 1883, not the recorded mortgage from Sims, actual notice of the mortgage was not enough. It was necessary for the court to go a step further, finding the actual notice of the mortgage sufficient, in the words of the statute "to put a prudent man upon inquiry as to a particular fact, and . . . constructive notice of the fact itself." [18] The statement of the court as to the nugatory effect as constructive notice of an instrument out of the chain of title seems properly characterized as a dictum, since an opposite opinion on this point would not have changed the result of the case. If the court had found that the existence of a tract index, making all instruments equally accessible to reasonable search, made the concept of chain of title as developed in relation to the grantor and grantee index inapplicable; and if the usual statutory effect of constructive notice from recorded instruments had been given to the mortgage,[19] it seems that the state of the record would

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[16] PATTON, *op. cit. supra* note 6, Sec. 44.
[17] 2 WALSH, *op. cit. supra* note 9, Sec. 221.
[18] N. D. Rev. Code (1943) Sec. 1-0125.
[19] N. D. Rev. Code (1943) Sec. 47-1945.

have been such as to place on Dazey "the duty of making inquiry regarding the rights," of Doran and the parties through whom his claims were derived.[20] *Doran v. Dazey,* with its dictum, left the tract index a mere convenience for the searcher which could be ignored with impunity, but which, if consulted, would cause the purchaser to lose his bona fide status to the extent of the information derived therefrom.

This anomalous situation was not allowed to continue long. The legislature in 1899 found that "an emergency exists in that instruments are frequently found of record out of the chain of title, which are a cloud upon such title,"[21] and proceded to amend section 3598 of the Revised Code of 1895 to read: "An unrecorded instrument is valid between the parties thereto and those who have notice thereof; but knowledge of the record of an instrument out of the chain of title does not constitute such notice." [22] Although a subsequent opinion [23] states that this amendment "adopted the rule announced in *Doran v. Dazey . . . ,*" it is obvious that the enactment had the effect "of changing the rule announced . . . in *Doran v. Dazey* . . . (in which) it was held that *actual knowledge of the record* of an instrument out of the chain of title was constructive notice of the original instrument and of the rights of the parties under it. . . ."[24] It might, of course, be said that this statute adopts the dictum in *Doran v. Dazey,* since if actual knowledge of the record of a deed out of the chain of title does not constitute notice, it can be inferred that the mere existence of such a record does no more. If this is true, the statute appears to bring into the law of North Dakota many of the subtleties of recording act priorities that have developed from the difficulties of search inherent in the grantor and grantee index. The remainder of this article will be devoted to a comparison of the results obtained in some of the reported cases in this field from other tract index jurisdictions with the

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[20] Northwestern Mut. Sav. & L. Ass'n v. Hanson, 72 N. D. 629, 636, 10 N. W. 2d 599 (1943); PATTON, *op. cit. supra* Note 6, Sec. 19.

[21] In North Dakota statutes are declared to be emergency measures to get the benefit of a constitutional provision causing them to take effect at an earlier time than ordinary enactments. N. D. CONST. Sec. 67.

[22] N. D. Rev. Code (1943) Sec. 47-1946.

[23] McCoy v. Davis, 38 N. D. 328, 337, 164 N. W. 951 (1917).

[24] See Simonson v. Wenzel, 27 N. D. 638, 645, 147 N. W. 804 (1914). (Italics are the court's.)

probable results in similar situations in North Dakota.[25]

In *Fullerton Lumber Co. v. Tinker*[26] the South Dakota court gave the tract index in that state full scope. Faced with the problem of the effect to be given to the recording of a mortgage from the holder of an equitable title not of record at the time the mortgage was given, the court found that a subsequent purchaser's title was "subject to the lien of that mortgage." The case differs from *Doran v. Dazey* in that the South Dakota purchaser had not examined the record title. There is, therefore, no question of actual notice of the recorded instrument and the case is a clear holding contra to the constructive notice dictum in *Doran v. Dazey*. Authorities cited to the South Dakota court holding "that a party purchasing property is only charged with constructive notice of conveyances made in the chain of title . . . ," were disposed of by the statement that such "decisions cannot be regarded as authority in this court, not having been made in states having provisions . . . requiring numerical indexes as in our Code." [27] *Doran v. Dazey* was apparently overlooked by our South Dakota brethren. Perhaps the *result* in the *Fullerton* case is not preferable to the contrary result which would have been reached in the present state of North Dakota law. The case does, however, place its conception of constructive notice from the record on the realities of recording and indexing as they exist in both North and South Dakota, recognizing that if convenience of title search in real estate transactions is the criteria, the rules developed under one system of indexing do not necessarily have universal application.

The Supreme Court of Wyoming in *Balch v. Arnold* [28] had to consider the problem of the tract index in relation to a recorded deed made by a grantor who was at the time of the

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[25] Oklahoma has apparently reached the same result as the North Dakota court did in Doran v. Dazey. Perkins v. Cissell, 32 Okl. 827, 124 P. 7 (1912); see Anthis v. Sandlin, 149 Okl. 126, 299 P. 458 (1931). ("While this notice filed of record when called to the attention of the subsequent purchaser he will be deemed to have actual notice, but was insufficient as constructive notice for the reason it was not executed by anyone within the chain of title"). Oklahoma provides for a tract index. Okl. Stat. Ann., tit. 19, Sec. 291 (1941).

[26] 22 S. D. 427, 118 N. W. 700 (1908).

[27] *Id.* at 432. Compare Parrish v. Mahany, 10 S. D. 276, 73 N. W. 97 (1897). See Philbrick, *supra* note 8, at 169 to the effect that " 'subsequent purchaser' " in a state having only a grantor and grantee index means "subsequent purchaser of the same land tracing title through a common grantor," while in a tract index state it means "subsequent purchaser of the same land."

[28] 9 Wyo. 17, 59 P. 434 (1899).

conveyance neither the actual owner nor the owner of record. The first conveyance in that case was a mortgage given and recorded before the mortgagor took title from the United States; a second mortgage was given after title had been acquired. The question of priority between the mortgages arose in a suit to foreclose the second mortgage. The court found the situation to be one for the application of the doctrine of estoppel by deed,[29] and the version of that doctrine applied apparently resulted in the creation of an equitable right in a purchaser from a non-owner by the non-owner's acquisition of title. The question of the standing of the second mortgagee as a purchaser without notice to cut off this equity was resolved in favor of the equity of the first mortgagee. The court found that the existence of a tract index made the failure "to search further than the vesting of the legal title in the purchaser's grantor . . . such inexcusable negligence as to amount to a willful refusal to receive any information as to the rights or interests of other claimants." It is possible that North Dakota, in spite of its negative rule as to the effect of the facilities of the tract index on notice, might reach the same result. Our code provision on after acquired title states that when "a person purports by proper instrument to grant real property in fee simple and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors." [30] This provision seems to make an estoppel by deed in North Dakota carry legal title to the grantee immediately on acquisition by the grantor of title. If the legal title, immediately upon acquisition by the grantor, passed to the first grantee, there would be no interest left in the grantor to pass to a subsequent grantee. This result was, in fact, reached in a state without a tract index, in which the effect of the application of the estoppel by deed doctrine was held to be the same as it seems to be under the North Dakota statute.[31] Any discussion of what the proper result is in these situations should be tempered by recording act provisions and policies.[32] In most cases dealing with grantor and grantee indexes alone, subsequent purchasers have not been given the

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[29] On the forms of title by estoppel see 2 WALSH, *op. cit. supra* note 9, at Sec. 226.

[30] N. D. Rev. Code (1943) Sec. 47-1015.

[31] McCusker v. McEvey, 9 R. I. 528 (1870); dissenting opinion in 10 R. I. 606 (1872).

[32] Comment, 16 CALIF. L. REV. 341 (1928).

burden of searching the record prior to the time that the grantors in their chain got title to determine if any deed or mortgage has been given prior to that date.[33] If it is an unreasonable burden on a subsequent purchaser to require such a search, the use of the doctrine of estoppel by deed to give priority to a purchaser from a grantor in the chain of title prior to acquisition of title by that grantor runs counter to the policy of the recording act to furnish a record on which reliance can be put in entering into real estate transactions. In a tract index state, such as South Dakota, the opposite result, that is, priority being given to the first purchaser, can be reached in harmony with the policy of the recording system. In reaching this result, the South Dakota court pointed out that under the numerical index system "abstracts will necessarily show all the conveyances made of the property." [34] Since in North Dakota the record of a deed found only by way of the tract index is apparently not notice, actual or constructive, it would seem incongruous to give priority to the first purchaser in the *Balch v. Arnold* situation. Although on common law principles,[35] the first taker of the legal title will prevail over subsequent purchasers regardless of notice, such a result can be squared with recognized recording act policy only if the first taker of the legal title also first records in such a manner that the required search will apprise an intending purchaser as to the state of the title. Since in North Dakota the rules applicable to grantor and grantee indexes appear to have been adopted by statute,[36] the recording of an instrument from a grantor who does not yet have title should logically be of no effect whatsoever, even though the tract index obviates the difficulties of search in this situation.

Another question of interest to purchasers relying on a tract index was decided by the Supreme Court of Utah in *Boyer v. Pahvant Mercantile & Investment Co.*[37] There the omission by the recording officer to properly enter an instrument in the tract index did not destroy the effect of recording since the court found that there had been a sufficient entry in the grantor and grantee index. A dissenting judge felt

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[33] PATTON, *op. cit. supra* note 6, Sec. 45.
[34] Bernady v. Cal. & U. S. Mortgage Co., 17 S. D. 637, 98 N. W. 166 (1904).
[35] See text to note 9 *supra, et seq.*
[36] See text to note 23 *supra, et seq.*
[37] 76 Utah 1, 287 P. 188 (1930).

that the effect of the decision was "to overlook the practice of relying on the abstract record and indices and to ignore the fundamental design of our recording acts." [38] The court in the *Boyer* case did not have to answer the question as to who would sustain the loss resulting from an omission of duty by the recording officer, or the question whether proper indexing is essential to constructive notice; [40] the decision does, however, cast considerable doubt on the safety of relying on the tract index alone in making a title search in Utah. The question of the effect of failure to enter notations of instruments in the tract index was raised in the North Dakota case of *McHugh v. Haley* [41] where a register of deeds failed to indicate the effect of an instrument as giving an easement over various lots. In an action to quiet title to the easement, the defendant interposed the defense of his reliance on an abstract compiled, apparently, from the incorrect tract index, but the court found the condition of the premises sufficient to impart notice to the defendant and did not decide the issues raised by the defense of improper indexing. The court, however, cites North Dakota cases which indicate that the loss resulting from errors of the recording officer falls on the subsequent purchaser,[42] and that reliance on the tract index alone is not such contributory negligence as would bar an action against a register of deeds for damages resulting from failure to make proper entries in such index.[43] The adoption of the dicta in these cases as the law of North Dakota would leave us in accord with the Utah court as to the result in a situation like the *Boyer* case, but the subsequent purchaser would have an action against the erring register of deeds for damages incurred by reliance on the erroneous tract index. In other words, the subsequent

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[38] *Id.* 287 P. at 199.

[39] There is considerable difference of opinion on this point. 5 TIFFANY, REAL PROPERTY Sec. 1273 (3d ed. 1939). There is authority in Utah that the subsequent purchaser is protected. Drake v. Reggel, 10 Utah 376, 37 P. 583 (1894).

[40] This question is discussed in 23 CALIF. L. REV. 107 (1934).

[41] 61 N. D. 359, 237 N. W. 835 (1931). It should be noted that as to the problem of the extent of required search in relation to conveyances by common grantors creating easements in retained land now the subject of purchase, various grantor and grantee jurisdictions have reached different results. See Philbrick, *supra* note 8, at 171. If a tract index is meticulously kept, no difficulties of overburdening search requirements appear. A deed creating a fee in one lot with an easement appurtenant in a lot retained by a grantor would be entered on the tract index in relation to both lots.

[42] See Atlas Lumber Co. v. Canadian-American Mortg. & T. Co., 36 N. D. 39, 43, 161 N. W. 604 (1917).

[43] See Rising and Isaacs v. Dickinson, 18 N. D. 478, 480, 121 N. W. 616 (1909).

purchaser would have constructive notice in spite of the error in the records, but would be considered to have made a proper search.[44]

Although portions of this paper may be interpreted as criticism of recording law in North Dakota, its purpose has been merely the exposition of what a portion of this law appears to be. It would be presumptuous to make recommendations for important changes in the land law of North Dakota based upon so slight a study as this one. It seems fair, however, to raise the question whether the development of that law has had as a basis sufficient consideration of the policies to be effectuated of all the possibilities inherent in North Dakota's advanced system for the indexing of real estate transactions.

[44] It should be noted that California with a similar statutory structure has reached a result contra to that which is here indicated for North Dakota as to the constructive notice imported by an instrument deposited with the register of deeds but improperly dealt with by that officer. See 23 CALIF. L. REV. 107 (1934).

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