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# Real Property - Recordation - Effect of an Unrecorded Judgment as Constructive Notice to Bona Fide Purchasers

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is prevented by statute[13] from so conveying except in accordance with the express terms of the trust agreement.

It is submitted that the decision in the instant case places a desirable limitation upon business trusts which, if not so limited, could perpetuate with impunity the evils which our statutes were designed to prevent.[14]

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REAL PROPERTY — RECORDATION — EFFECT OF AN UNRECORDED JUDGMENT AS CONSTRUCTIVE NOTICE TO BONA FIDE PURCHASERS — In 1932 the defendant Corwin acquired title to land in Burleigh County, North Dakota, by an unrecorded deed from the county. In 1933 he brought an action to quiet title to the property and was awarded a favorable judgment. This judgment was likewise not recorded, nor was it docketed. Thereafter Burleigh County made a second conveyance of the proprety to Casey, a bona fide purchaser for value, who placed his deed of record immediately. Corwin then recorded both his deed and his judgment. Learning of Corwin's interest, Casey brought suit to establish his title to the property, contending that as a bona fide purchaser for value who recorded his conveyance without notice of prior unrecorded rights he was entitled to prevail over Corwin. It was *held* that Corwin prevailed. His unrecorded, undocketed judgment quieting title constituted constructive notice of his interest in the land to subsequent purchasers. *Casey v. Corwin,* 71 N.W.2d 553 (N.D. 1955).

The decision is supported by the opinions cited by the court,[1] and is cretainly in accord with the common law rule that the bringing of an action in court, without more, furnished notice to the entire world of the action's subject matter.[2] It is submitted, however, that in some respects the holding is inconsistent with the policy underlying the North Dakota statutes and that it may very well be in contravention of specific language in the code. Difficulty is experienced, for instance, in reconciling the result with the statutes regarding:

A. *Lis pendens.* Under § 28-0507 of the North Dakota Revised Code of 1943, the pendency of an action affecting title to real property is not effective as notice to an innocent purchaser unless a statutory notice is placed in the registry of deeds.[3] Thus the common law doctrine that actions in court automatically give constructive notice of the proceedings to the entire world has, in this state, been abolished with respect to real property by specific statute.[4] The decision of the court in *Casey v. Corwin,* while technically consistent with this statute, nevertheless appears inconsistent with its underlying theory. It

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13. N.D. Rev. Code § 59-0319 (1943).

14. See Scott, Trusts § 62.10 (1939); Whiteside, *Restrictions on the Duration of Business Trusts,* 9 Cornell L.Q. 422 (1924).

1. Sheridan v. Andrews, 49 N.Y. 478 (1872); Steinman v. Clinchfield Coal Corp., 121 Va. 611, 93 S.E. 684 (1917); I Freeman, Judgments §439 (5th ed. 1925).

2. *Ibid.*

3. N.D. Rev. Code §28-0507 (1943) "In a civil action . . . affecting the title to real property, the plaintiff at the time of filing the complaint . . . or the defendant when he sets up in his answer an affirmative cause of action affecting the title to real property . . . may file for record with the register of deeds of each county in which the real property is situated a notice of the pendency of the action . . . From the time of filing only shall the pendency of action be constructive notice to a purchaser or encumbrancer of the property affected thereby . . .".

4. *Ibid;* Patton Titles §§324, 986 (1938).

makes the *result* of a case constructive notice to innocent purchasers, even though such result may be, for practical purposes, impossible to locate, while the *pendency* of the action itself – a thing much more likely to come to the attention of prospective purchasers – must by statute be made a matter of record in the registry of deeds before it constitutes constructive notice.

B. *The statutory definition of the term "conveyance."* The recording act of the State of North Dakota requires that "conveyances" of real property must be placed of record in order to afford the owner of property protection against subsequent bona fide purchasers who first recorded.[5] But as used in that statute, the term "conveyance" has received a specialized and extremely comprehensive statutory definition. For purposes of the recording act, a "conveyance" includes "every instrument in writing . . . *by which the title to any real property may be affected,* except by will or power of attorney."[6] Among the intsruments which have been construed as conveyances within the terms of the recording acts in states possessing similar statutes are mortgages[7] and mortgage assignments,[8] certificates of sale issued by a sheriff to the purchaser at an execution sale,[9] tax deeds,[10] and contracts for the sale of real property.[11] Patton, in discussing quiet title judgments states that "The effect of such a decree is in all respects equivalent to a deed executed by the party whom the decree divests of title and in favor of the party thereby invested . . ."[12] In view of the foregoing it would seem that the holding in *Casey v. Corwin* excluding judgments in quiet title actions from the operation of the recording acts, although apparently supported by at least one decision,[13] is difficult to justify.

An additional problem raised by the decision concerns the operation of § 28-2009 of the Revised Code of 1943, which provides, in effect, that in certain situations a judgment quieting title may, in the discretion of the court, be regarded as constituting the actual transfer of the title.[14] What now becomes of the judgment which the court determines will act as the instrument of transfer under the provisions of this section? Is this judgment within the compulsory[15] provisions of the recording act, or is it also

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5. N.D. Rev. Code §47-1941 (1943), "Every conveyance of real estate not recorded . . . shall be void as against any subsequent purchaser in good faith, and for valuable consideration . . . whose conveyance . . . first is recorded . . .".

6. N.D. Rev. Code, §47-1942 (1943).

7. O'Brien v. Fleckenstein, 180 N.Y. 350, 73 N.E. 30 (1905); Merrill v. Luce, 6 S.D. 354, 61 N.W. 43 (1894).

8. Putnam v. Broten, 60 N.D. 97, 232 N.W. 749 (1930); Larchmont Nat. Bank & Trust Co. v. Bayshore Bldg. & Const. Co., 228 App. Div. 640, 238 N.Y. Supp. 87 (1929).

9. Lepper v. Home Ranch Co., 90 Mont. 558, 4 P.2d 722 (1931); Dipple v. Neville, 82 Mont. 280, 267 Pac. 214 (1928).

10. Hiles v. Atlee, 80 Wis. 219, 49 N.W. 816 (1891); *Contra,* Baird v. Stubbins, 58 N.D. 351, 226 N.W. 529 (1929).

11. Keese v. Beardsley, 190 Cal. 465, 213 Pac. 500 (1923).

12. Patton, Titles §§279, 882 (1938).

13. Wilcoxson v. Miller, 49 Cal. 193 (1874) (The term "conveyance" as used in a statute requiring all conveyances to be recorded *held* not to include judgments). It is to be noted that the judgment before the court was a judgment lien. Present California statutes, as do those in North Dakota, require the docketing of judgments before they shall be a lien on real property.

14. N.D. Rev. Code, §28-2009 (1943) "In all actions arising under Chapter 17 of the title Judicial Remedies . . . the court, by its judgment and without any act on the part of the defendant, may transfer the title to real property and remove or discharge a cloud or encumbrance thereon, and a certified copy of such judgment may be recorded in the office of the register of deeds of the county in which the property affected is situated."

15. N.D. Rev. Code, §§47-1941, 47-1942 (1943).

binding without recordation? It would seem clear that such a judgment ought to be considered an "instrument . . . affecting the title to . . . real property" within the meaning of § 47-1942,[16] *supra,* and thus a "conveyance" within the meaning of the recording act.[17]

C. *The statute concerning judgment liens.* Under the North Dakota statutes, a judgment does not constitute a lien on real proprety until it is docketed.[18] Under *Casey v. Corwin* a judgment may completely transfer the title to real property — even as against the claim of a bona fide purchaser — though it has not been docketed. The discrepancy seems too plain to require argument.

The court in *Casey v. Corwin* cites Freeman on Judgments as authority for the proposition that the docketing and recording of judgments and statutes providing for the filing of notice of lis pendens have no application to the situation.[19] Mr. Freeman cites as authority for this position the cases of *Sheridan v. Andrews,*[20] and *Steinman v. Clinchfield Coal Corp.*[21] The New York court in the Sheridan case held that a statute requiring the docketing of a judgment lien did not effect the right to set up an adverse judgment renedered against a grantor as an estoppel against one claiming title through such grantor.[22] Conceding this point, the effect of recording acts and statutes requiring the filing of notice of lis pendens on the problem remains.

The *Steinman* case supports the position that the recording acts have no bearing upon the question of a judgment itself being constructive notice.[23] The court states, however, that such judgments are notice *in the absence of a statute requiring recordation.* It must be pointed out that the applicable Virginia statutes at the time of the *Steinman* case were of the notice type, and were specific in stating those instruments which were included under the statute.[24] The recording statutes of Virginia did not include language such as that used by the Legislature of North Dakkota, making the provisions thereof applicable to all instruments affecting the title to real property.[25]

The Virginia court in the *Steinman* case takes a rather unique position with respect to its statute governing the filing of lis pendens notice.[26] The court there states that the common law doctrine of lis pendens made pending actions notice to the whole world, and "Of course, if the mere pendency of a suit bound the parties, the final judgment entered in the case necessarily bound them."[27] Yet, they state that when the legislature passed an act

16. N.D. Rev. Code, §47-1942 (1943).
17. 3 American Law of Property §13.10, 518 (Casnered. 1952) "In all cases where the transfer is yb decree, the latter is a muniment of title and one of the links in the chain of title."
18. N.D. Rev. Code, §28-2013 (1943), "On filing a judgment roll upon a judgment which, in whole or in part, directs the payment of money, the clerk of the district court in which such judgment was rendered shall docket the same . . . The judgment shall be a lien on all the real property, except the homestead, of every person against whom any such judgment is rendered, which he may have in any county in which such judgment is docketed at the time of docketing . . .".
19. 1 Freeman, Judgments §439 (5th ed. 1925).
20. 49 N.Y. 478 (1872).
21. 121 Va. 611, 93 S.E. 684 (1917).
22. 49 N.Y. 478 (1872).
23. 93 S.E. at 691 "The Court is often of the opinion however, that parties to judgments and their privies are, in the absence of statute requiring recordation, bound by said judgments and decrees without any other notice than that furnished by the proceeding itself."
24. Va. Code Ann. §2465 (1904).
25. N.D. Rev. Code §47-1942 (1943).
26. Va. Code Ann. §3566 (1904).
27. 93 S.E. at 694.

requiring the docketing of a lis pendens before it would be a notice to an innocent purchaser, the final judgment remains unaffected by such a statute. Thus Virginia takes the anomolous position that although specifically abbrogated by statute, the doctrine of Common Law Lis Pendens remains the basis for the rule that judgment is of itself notice.

It is obvious that the existence of unrecorded and undocketed judgments in actions to quiet title will not, as a practical matter, be apparent to a lawyer searching the records unless the records of the court in which the judgment was rendered are included within the scope of his search. It is suggested that a search of such records would be extremely burdensome, if not impossible, task for several reasons, some of which are:

(1) The concealed defect in the title under examination may crop up anywhere in the entire chain of conveyances.

(2) The name of *every* grantor and grantee will apparently have to be "run" in the court records, and the records in question are commonly not kept in alphabetical order.

(3) May quiet title actions involve numerous defendants but only the principal defendant's name appears in the captions by which the case is listed for index purposes.

(4) The indexes which exist are not designed for the task of facilitating a title search.

The effect of the decision is therefore to expose a serious defect in our recording statutes. It is apparent that remedial legislation is necessary.

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TAXATION — INCOME TAX — LIQUIDATION OF DISSOLVED CORPORATION BY TRUST — Plaintiff, a trust which was originally created as a liquidation vehicle for the assets of a dissolved corporation, was taxed by defendant, Collector of Internal Revenue, as a corporation with its consequent higher tax rate. In sustaining the lower court's affirmative decision for defendant's tax ruling it was *held,* that activities of the trustees were demonstrative of an entrepenurial intent and of a commercial nature comprising more than mere incidents of liquidation. *Anderson v. Lamb,* 222 F.2d 176 (8th Cir. 1955).

Problems of determining whether trusts are, for the purposes of federal taxation, business trusts or "associations", and hence taxable as corporations,[1] have perplexed the courts ever since *Hecht v. Malley.*[2] There, the Supreme Court ruled that the trusts before them were business trusts or associations, and subject to the tax levied upon corporations because their trustees were, "associated together in much the same manner as directors in a corporation for the purpose of carrying on business enterprises",[3] this being true "independently of the large measures of control exercised by the beneficiaries".[4]

The Circuit Court, although not citing *Hecht v. Malley,* joined with a majority of the courts in ruling that control was not the primary test but

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1. §7701 (a) (b) Int. Rev. Code 1954, Public Law No. 591 (83rd Cong. 1954).
2. 265 U.S. 144 (1924).
3. *Ibid.* at 161.
4. *Ibid.*