North Dakota Law Review

Volume 32 | Number 3 Article 3

1956

Five Steps toward Sounder Record Title

Charles Liebert Crum

FIVE STEPS TOWARD SOUNDER RECORD TITLE

CHARLES LIEBERT CRUM*

THE precise terms and operation of the various statutes providing for the recordation of interests in land vary widely from state to state in this country, but it is safe to say that the basic purpose and theory which underlies the various enactments is common to all jurisdictions. When one boils the subject down to fundamentals, the purpose of any recording act is to protect a potential purchaser of real property against the risk that he may be paying good money to someone who does not actually own the property he is purporting to sell. The theory may be simply stated. Recording acts[1] operate by making the history of the title involved in a real estate transaction available to the prospective buyer, at the same time imposing a sanction for ignoring the history and a reward for consulting it. To insure that the history will be carefully examined beforehand, it is uniformly provided that a prospective purchaser ignores the record at his peril. The sanction to which the purchaser is subject is that if he buys without consulting the record, the record nevertheless binds him. He takes whatever title his vendor has to offer subject to any defects which an examination of the record would have revealed as being in existence and affecting the title to the property. The reward which complements this sanction is that if the prospective buyer finds in the record evidence of a valid title in his vendor, pays value for this title to his vendor in good faith reliance on the record, and records his document of title before any other instrument showing an interest in a third party is placed of record,[2] he will in most cases[3] take precisely the interest the record indicates his vendor possesses whether the record is accurate or not.

There are, to be sure, other purposes underlying the recording acts besides that of protecting prospective purchasers. The recording acts also serve to protect landowners in their ownership by enabling them to give notice binding upon all the world of the interests they claim. And in a larger sense, the recording acts serve

* Associate Professor of Law, University of North Dakota.

1. The discussion in this paper excludes consideration of potential applications of the Torrens title registration system, which is technically not a recording act at all.

2. This is what is required in North Dakota, which has a so-called "race-notice" type of recording act. In states which possess "notice," "race" or "period of grace" statutes, the conditions for prevailing as a subsequent bona fide purchaser are of course different. See Aigler, *The Operation of the Recording Acts*, 22 Mich. L. Rev. 405 (1924); Philbrick, *Limits of Record Search and therefore of Notice*, 93 U. Pa. L. Rev. 125, 259, 391 (1944).

3. Except in cases of serious defects such as forgery of a vital link in the title.

the public interest generally by keeping property freely alienable and in the stream of commerce, since their operation tends to keep land titles definite and certain. But the protection of prospective purchasers is easily their most important function, both from the standpoint of the general public and from the standpoint of the lawyer. The laymen who purchases land must invest his money on the basis of what the record tells him, and the lawyer who advises the prospective purchaser must equally assume a personal and financial responsibility on the same basis.

When a recording act shows signs of becoming ineffective, therefore, it is a matter of considerable concern. And the North Dakota recording act shows signs of precisely this tendency. In a number of recent cases, the North Dakota Supreme Court has handed down decisions uncovering some significant new[4] weaknesses in the North Dakota statute. In *Casey v. Corwin*[5] it ruled that a person purchasing land from the losing party in a quiet title action was in privity of estate with the losing party and hence bound by the judgment in the action though it was neither docketed nor recorded and hence outside the bounds of normal record search. In *Messersmith v. Smith*[6] it ruled that the recordation of an instrument was invalidated by a defect in the acknowledgment which could not be detected by examination of the record. And in *Northwestern Improvement Company v. Norris*[7] it ruled that the correct copying of an instrument into the official records was essential to the valid recordation of the instrument—a thoroughly sound result—but left open, of necessity, the far more vexed question of whether correct indexing is also essential.

The implications of these decisions are explored hereinafter, but it should be said immediately that they deserve thoughtful attention. When read together, they illuminate some fundamental weaknesses of the North Dakota recording act and indicate that it stands in need of strengthening.

What needs to be done? Essentially, five steps should be taken. These are listed below.

1. AMENDMENT OF § 47-1946 OF THE CODE

A primary step in any effective program for the strengthening of record title in this state is the amendment of § 47-1946 of the

4. The defects are "new" in the sense that until the court handed down the decisions mentioned, their existence had not been generally recognized.
5. 71 N.W.2d 553 (N.D. 1955).
6. 60 N.W.2d 276 (N.D. 1953).
7. 74 N.W.2d 497 (N.D. 1956).

Revised Code of 1943. That section provides that an unrecorded instrument is "valid as between the parties thereto and those who have notice thereof," but adds that *"knowledge of the record of an instrument out of the chain of title does not constitute such notice."* (Emphasis supplied).

The operation and effect of this statute have been discussed previously in the *North Dakota Law Review*,[8] but a restatement of what this section does and how it operates will indicate why the italicized portion is undesirable. A brief look at its origin is indicated.

The recording act of North Dakota was borrowed from the statutes of California and was intended, in its inception, to be a modern and highly advanced type of statute. When the recording act was adopted, most jurisdictions in this country utilized only grantor-grantee and mortgagor-mortgagee indexes as the chief aids in title search. These indexes, of course, require an attorney searching the title to commence with the name of the owner of the land at the time the title search is made. He must then run the name of that person in the grantee index until he picks up a conveyance to him and then run the name of the grantor in the conveyance thus located to ascertain how that grantor obtained title, repeating the process again and again until the title is traced back to its origin. In this way a "chain" of conveyances is built up, and the attorney then examines each of these conveyances to determine whether they are in proper form, valid, and legally effective.

This is, of course, a cumbersome way of digging out the history of the title to a given piece of land. Consequently, an additional aid to title searches was included in the North Dakota statutes when the recording act was first adopted. This is the so-called numerical or tract index, wherein all conveyances affecting a given tract of land are indexed under the description to that land, thereby enabling an attorney interested in determining the state of title to a specific piece of property to locate all recorded instruments affecting that title much more readily than would otherwise be the case. Few attorneys today utilize the grantor-grantee or mortgagor-mortgagee indices in making title searches in this state. It is simpler and faster to use the tract index. In some counties, indeed, the grantor-grantee and mortgagor-mortgagee indexes are being maintained only in the most cursory fashion.

8. See Maxwell, *The Tract Index and Notice in North Dakota*, 25 N.D. Bar Briefs 176 (1949); and see also Crum, *A Commentary on North Dakota Tax Titles*, 29 N. Dak. L. Rev. 225, 246 (1953).

Unfortunately, the tract index appears to have been too advanced for its time. This is illustrated by the early case of *Doran v. Dazey*[9] and its sequel. In that controversy, an attorney advised his client that he could safely disregard a mortgage on land he wanted to purchase which had been given by a person who did not hold record title to the land. On this advice the client completed the purchase, buying from the apparent holder of the record title. It was held that he took the land subject to the lien of the mortgage. The mortgagor held a conveyance which he had not recorded, and the Court ruled that knowledge of the mortgage placed the purchaser on inquiry and gave constructive notice of any facts which could have been ascertained by asking the mortgagor about his interest.

It is clear the Court was on thoroughly sound ground in its disposition of the case. The holding was inescapable. Unfortunately, however, the opinion of the Court was loosely written and contained dictum which was to result in highly unfortunate consequences. The Court stated, after first ruling against the purchaser, that if the purchaser had been ignorant of the fact that the mortgage was of record, he would not have been bound by it, "the recording of an instrument out of the chain of title does not constitute . . . constructive notice."[10]

This last statement was supported by the citation of a legal encyclopedia and a text-book, both of which were based on the authority of cases decided in states which did not have a tract index. Quite obviously, the dictum was of a highly questionable nature. To speak of the "chain of title" in a state possessing a tract index is inappropriate in the first place; the logical rule is that if an instrument is of record and appears on the tract index, inquiry should be made concerning its validity even if it is given by someone having no apparent connection with the title. At the time *Doran v. Dazey* was decided, moreover, the statute provided expressly that an unrecorded instrument was "valid as between the parties and those who have notice thereof."[11] What sort of notice was required the statute left undefined; logically, actual notice, constructive notice, or *notice of facts which would cause a reasonably prudent man to make inquiry* should have sufficed.

Apparently *Doran v. Dazey* brought the effect of the tract index

9. 5 N.D. 167, 64 N.W. 1023 (1895).
10. *Id.* at 169, 64 N.W. at 1024.
11. This was N.D. Comp. Laws § 3927 (1895), the predecessor statute to § 47-1946, N.D. Rev. Code (1943).

to the attention of the legal profession in a sharp fashion for the first time, and it is clear the holding was poorly received. At the time of the decision, most attorneys had been trained in states possessing less advanced systems of recording; and the result of the holding was the passage of an amendment to the statutes at the next session of the legislature intended to reinstate what was conceived to be the familiar rule. This was the italicized portion of § 47-1946 quoted above.

But the important point is that the Court was right in its holding in *Doran v. Dazey,* and the amendment is thoroughly wrong in principle in undertaking to change the rule of that case. As amended, the provisions of § 47-1946 constitute a serious defect in the North Dakota recording act. The effect of the statute, as Professor Richard Maxwell pointed out many years ago,[12] was to incorporate into the law of North Dakota many of the subtleties and technicalities of recording acts in use in states possessing less advanced systems of recordation than North Dakota.

Simply put, the amendment creates a serious pit fall for conveyances. A good illustration of the danger is found in a typical practice of lending agencies in this state. It often happens that persons who desire to purchase a tract of land will contract a lending agency to secure a loan with which to consummate the purchase. Many of these lending agencies—banks, building and loan associations and the like—customarily have the borrower sign a mortgage on the property he intends to purchase *before* he acquires title.[13] This mortgage is then recorded immediately and it may not be until several weeks or months have passed that the purchaser will actually obtain a deed to the property involved.

Is such a mortgage in the chain of title? It is manifest that so long as the purchaser does not actually have title, the mortgage is not in the chain. Equally, it is clear that even when the purchaser has secured his title, the mortgage is not binding on subsequent bona fide purchasers until the deed is recorded.[14] The important inquiry is whether the mortgage becomes binding on subsequent bona fide purchasers after the deed is recorded, and this is an unsettled question. The great weight of authority in this country holds that a conveyance by a man prior to the time he has acquired

12. Maxwell, *supra* note 8, at 180.

13. The explanation given the writer for this practice, when inquiry was made, is that very often the prospective purchaser is "shopping aronud" among lending agencies to see which one will give him the best terms. In this situation it helps to "tie the deal down" if the purchaser can be induced to sign the mortgage before he signs the promissory note.

14. McCoy v. Davis, 38 N.D. 328, 184 N.W. 951 (1897).

title is not in the chain of record title for the reason that a subsequent title examination cannot be expected to survey the grantor index under the name of a man prior to the time that man acquired title.[15] A minority view would hold that the subsequent recordation of the deed would place the prior conveyance in the chain.[16] The question is open in this jurisdiction, and the practice of prudent conveyancers appears to be to rerecord such a mortgage as the one described above after the purchaser records his title in order to avoid any question.

It is submitted that the present rule with respect to the effect of instruments recorded out of the chain of title is insupportable. It undermines the effectiveness of the tract index as a method of giving notice, making it merely an aid to search rather than the integral and vital part of the recording act it ought to be. It is suggested that § 47-1946 should be amended to read as follows:

An unrecorded instrument is valid between the parties thereto and those who have notice thereof. In the event an instrument is recorded out of the chain of title but a notation of such recording appears in the numerical index, subsequent purchasers shall be deemed to possess constructive notice of all facts which might be ascertained by reasonable inquiry of the parties to such instrument.

2. AMENDMENT OF SECTION 47-1908 OF THE CODE

Section 47-1908 of the North Dakota Revised Code of 1943 reads as follows:

"An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the register's office with the proper officer for record."

On its face this statute is clear and unequivocal. However, the need for amendment of the statute can be easily demonstrated. The reader is invited to attempt a mental exercise. For purposes of illustration, assume that on September 1, 1956, John Doe, a North Dakota attorney, enters the office of the register of deeds of his county bearing is his hand a deed which he wants to record. Entering the office, Doe pays the recordation fee to the register of deeds and hands the deed across the counter to that official.

Is the deed recorded? Section 47-1908, above, says unequivocally that it is. One would think John Doe was entitled to return to his office secure in the conviction that he had accomplished his purpose.

15. See authorities cited in Crum, *supra* note 8, at 180.
16. Ayer v. Philadelphia & Boston Face Brick Co., 159 Mass. 84, 34 N.E. 177 (1893).

But if one examines the matter carefully, the conviction that delivery of the deed to the register of deeds constitutes all that is necessary vanishes completely.

In the first place, § 47-1908 is not the only statute dealing with the question of when recordation is accomplished. Section 11-1812 declares by implication that mere delivery to the register of deeds does not complete the process of recordation; it states that "The affixing of the signature of the register of deeds to a recorded instrument shall complete the record thereof. . . "[17] Hence Doe cannot rest fully satisfied that the recordation has completed until the register of deeds places his signature on the record of document he has tendered. Normally this occurs only after the instrument has been transcribed into the official records. Obviously there is a serious conflict of statutory language between the two statutes.

But if this were not enough, there are other considerations which must be taken into account. In *Northwestern Improvement Company v. Norris, supra,* the North Dakota Court considered the effect of § 47-1908 at length and gave it a rather restrictive interpretation. In that case a grantor had made a conveyance to a grantee in which all coal, iron, oil and gas rights were reserved to the grantor, but when the deed was tendered for record an error was made in transcribing it whereby only the reservation of rights to coal and iron appeared in the official record. The court ruled that a subsequent bona fide purchaser from successors of the original grantee took the land free and clear of the un-copied reservation of oil and gas rights, despite the argument advanced by the successor of the original grantor that § 47-1908 made recordation of the total reservation complete upon delivery of the deed to the registry.

The argument on behalf of the grantor was simply that every duty the grantor possessed had been discharged when the deed was delivered for record, and that the recording was consequently complete by virtue of the specific terms of § 47-1908. The response of the court was that the statute in question had to be construed in conjunction with other provisions of the code before its effect in providing constructive notice could be accurately determined. The Court pointed particularly to § 47-1945:

"The deposit and recording of an instrument proved and certified according to the provisions of this chapter are constructive notice of the execution of such instrument to all purchasers and encumbrancers subsequent to the recording."

17. The North Dakota Supreme Court has never construed this statute.

Discussing this section and § 47-1908 the Court stated:

"These sections must be construed together in determining their effect in providing constructive notice. Their proper construction is that an instrument gives only temporary constructive notice of its contents when deposited in the office of the register of deeds and that when the instrument is recorded the record for purposes of constructive notice relates back to the date of deposit and as of that time is constructive notice of the contents actually and correctly recorded."[18]

It is clear, therefore, that even if Doe ignores the provisions of § 11-1812, *supra*, he must still take care that the register of deeds correctly copies the instrument into the official records. A subsequent purchaser will be entitled to rely upon the language of the instrument as quoted in the records, and hence a check of accuracy must be made, if complete compliance with the requirements of North Dakota law is to be made.

Assuming that Doe (a) delivers the deed to the register of deeds, (b) pays the required fee,[19] (c) verifies the accuracy of the transcription of the deed into the official records, and (d) checks to see that the register of deeds has signed the recorded instrument, can he be satisfied that he has given constructive notice? The answer is, amazingly enough that it depends. There still remains the process of indexing to consider. The names of the grantor and grantee must be transcribed properly into the grantor-grantee index and the transaction must also be noted in the tract index. Suppose the register of deeds makes an error in indexing?

In *Northwestern Improvement Company v. Norris* the Court did not consider this question because it was not present in the facts. It stated, however, that the verb "record" meant the transcription or copying of the instrument deposited with the register of deeds "so that a copy of the instrument is made a part of the permanent records of the office."[20] This is obviously a definition which implies that indexing is not a part of the process of recording.

On the other hand, remember that § 47-1946 requires that an instrument be in the chain of title before it can be said to give constructive notice. Is an improperly indexed deed in the chain of

18. 74 N.W.2d at 506.

19. In Hanson v. Johnson, 42 N.D. 431, 177 N.W. 452 (1918), the Court held that where an instrument is deposited with the register of deed but not entered in the reception book or spread upon the records, and the fee is not paid, the instrument is not recorded. Conversely, where the instrument is spread on the records or entered in the reception book, the Court ruled that recordation had taken place.

20. 74 N.W.2d at 506.

title within the meaning of that statute? No case has been found in this jurisdiction dealing with the question and it must be considered open. On grounds of policy, it is to be hoped that when the issue finally arises the Court will follow the line of reasoning it employed in the *Northwestern Improvement* case, and hold that proper indexing is also a part of the process of recording. The opposite holding would tend to make the record unreliable, since without an index to lead one to an instrument filed for record, there is no practical way of locating the instrument in the course of the normal record search.

To summarize, under the present judicial construction of § 47-1908,[21] the deposit of an instrument with the register of deeds for recording establishes the time from which the instrument will be deemed to give constructive notice of its contents. But (1) there is a seeming conflict of statutory language between § 47-1908 and § 11-1812; (2) the provisions of § 47-1908 give protection if, but only if, the delivery of the deed to the registry is followed within a reasonable period by an accurate coyping of the instrument into the official records; and (3) it is arguable that § 47-1908 will only give protection if the delivery of the deed and its accurate transcription are also accompanied by correct indexing.

It is suggested, therefore, that § 47-1908 should be amended to reflect accurately the present holding of the court and also to deal with the suggested problem of proper indexing. One form of a statute to deal with the situation might read as follows.

An instrument shall be deemed to be recorded for the purpose of affording constructive notice of its contents from the time of its delivery to a proper person in the office of a register of deeds for recording, provided that there after such instrument is transcribed into the records accurately, that such transcribed copy is signed by the register of deeds, and that such instrument is indexed correctly. When an instrument is improperly transcribed into the records, such recordation shall furnish notice only of the contents of the record as transcribed.

It will be noted that as redrafted above, the statute would say nothing about the acknowledgment, proof, or certification of an instrument. This is intentional, as indicated below.

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21. But compare Atlas Lumber Co. v. Canadian American Mortgage & Trust Co., 36 N. D. 39, 161 N.W. 604 (1917).

3. ACKNOWLEDGMENTS AND RECORDATION

In *Messersmith v. Smith*[22] the North Dakota Supreme Court ruled that where an acknowledgment proper on its face had in fact been taken over the telephone without personal appearance before a notary public, the defect in the acknowledgment invalidated the recordation of the instrument. Hence a subsequent purchaser of the land did not receive constructive notice of the contents of the instrument although it was plainly spread upon the record and readily locatable by a normal search.

The practical problem the case poses for the title examiner is that it is no longer possible to rely upon the face of the record so far as acknowledgments are concerned, thus enlarging the necessary area of uncertainty surrounding any title opinion. It is, of course, a truism that a title opinion cannot guarantee a prospective purchaser against every defect in title, no matter how thorough the title search may have been. A forged document, for instance, is undetectable by search of the record alone, and yet it is logical and thoroughly accepted law that a bona fide purchaser for value without notice can not prevail over an owner of land on the basis of a forged instrument.

But it is submitted that where parties to a deed, mortgage, or other instrument have in fact executed the instrument with the intent that it shall transfer title, a defect in an acknowledgment should not be deemed a matter of such seriousness as to invalidate the recordation of the instrument. The considerations applicable to forged instruments are not relevant to the situation where the acknowledgment is defective for want of some relatively minor formality.

Hence it is suggested that the question of the sufficiency of an acknowledgment be divorced from the question of the validity of a recordation. California has already taken this step by a statute providing that defects in acknowledgments do not detract from the effectiveness of a recordation. The adoption of such a statute in this state would simplify the task of the title examiner and lessen the number of potential defects to which a given title is subject quite markedly.[23]

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22. 60 N.W.2d 276 (1953).
23. The title standards committee of the State Bar Association has already gone on record as favoring such a move.

4. JUDGMENTS IN QUIET TITLE ACTIONS

In *Casey v. Corwin*[24] the Court ruled that where a man purchased the estate of a county in a certain tract of land, being unaware that the county had previously lost a quiet title action with respect to the land involved, he was bound by the judgment in the quiet title action on the theory that he was in privity of estate with the county although the judgment had neither been docketed nor recorded.

A discussion of this case has already appeared in the *North Dakota Law Review* and the reader is referred to it[25]. The holding poses the same sort of problem for the title examiner that *Messersmith v. Smith* posed; it uncovers a defect in title which the attorney searching the records cannot hope to unearth. Protection of the client against such a defect is therefore extremely difficult and in most cases impossible.

The Title Standards Committee of the State Bar Association has already gone on record as favoring an amendment of the statutes to require the recordation of such judgments before they are to be considered binding on subsequent bona fide purchasers for value. This is self-evidently a logical and desirable proposal and should be adopted.

5. TAX DEEDS

In a paper appearing several years ago, the writer undertook to discuss the effect of the recording act on tax deeds.[26] The holding in this state has been that if *A* has record title to Blackacre and conveys to *B*, who pays value, takes in good faith, and promptly records his instrument, the holder of a tax deed will nevertheless prevail over *B* even though the tax deed is unrecorded.[27]

The rule is based on the reasoning that the recording acts operate to cut off interests derived from unrecorded conveyances only when the same grantor or his successor made both the unrecorded conveyance and a later recorded conveyance. Since a tax deed is deemed to constitute an entirely new title, derived from an independent source instead of the original owner of the land, the reasoning of the Court has been that no recordation of a tax deed is necessary to protect the grantee therein against the risk of a later conveyance from the original owner to a bona fide purchaser.

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24. 71 N.W.2d 553 (N.D. 1955).
25. 32 N. Dak. L. Rev. 66 (1956).
26. Crum, *supra* note 8, at 178-180.
27. Bumann v. Burleigh County, 73 N.D. 655, 18 N.W.2d 10 (1945).

This is plainly an exception to the general policy of the recording act to the effect that conveyances of interests in land should be forced onto the record. While it is not a weakness comparable in seriousness to those already discussed, there seems no reason why the exception should be permitted to continue. A simple legislative declaration that failure to record a tax deed will subject the holder thereof to the provisions of § 47-1941 of the Code in the event of a subsequent conveyance by the prior owner of the affected land should be sufficient to remedy the matter.

NORTH DAKOTA LAW REVIEW

Member, National Conference of Law Reviews

VOLUME 32 JULY, 1956 NUMBER 3