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REAL PROPERTY-RECORDING--LATENT DEFECT IN ACKNOWLEDGMENT OF DEED

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REAL PROPERTY—RECORDING—LATENT DEFECT IN ACKNOWLEDGMENT OF DEED—In 1947 *A* executed a deed to *B*, which was recorded in July 1951. On May 7, 1951 *A* executed a deed of the same property to *C*, who did not record. *C's* deed bore a certificate of acknowledgment, but in fact the acknowledgment was taken by telephone and not in person as required by law to make it eligible for record. On May 9, 1951 *C* conveyed to *D*, who recorded both conveyances in his chain of title on May 26, 1951. In an action by *B* to quiet title, *held*, for *B*. Since the deed from *A* to *C* was not properly acknowledged, the deed was not entitled to record, and its actual record was not notice to *D* of its execution. Therefore, *D* was not a purchaser in good faith and was not protected against the prior conveyance to *B*. *Messersmith v. Smith*, (N.D. 1953) 60 N.W. (2d) 276.

The North Dakota recording act is of the "notice-race" type which makes void any unrecorded conveyance "as against any subsequent purchaser in good faith . . . whose conveyance . . . first is recorded. . . ."[1] The rationale of the principal case is that *D* was not a purchaser in good faith because he did not have notice of the execution of the deed to his grantor, since it was defectively acknowledged and as such not entitled to record.[2] After a deed is recorded, the record is constructive notice to a subsequent purchaser in another chain of title, so that he is deprived of his bona fide status and its consequent protection. Notice is irrelevant among those in the *same* chain of title, for notice can be operative only when there are *antagonistic* chains of title derived from a common grantor. Here, when *D* took a conveyance from *C* it would seem that he was in complete good faith. He had neither actual notice of the prior unrecorded conveyance to *B* nor constructive notice of it, since at the time of purchase that deed was unrecorded. In resting its decision on a lack of good faith on *D's* part because he purchased from one who was not record owner but who had a conveyance from the record owner, the North Dakota court appears to be incorrect.[3] But the result may be technically justified on other grounds. Under a pure "notice" statute, a grantee is preferred over a prior grantee who did not record, even though the subsequent grantee himself fails to record; a "notice-race" statute differs in that there is the further condition that the subsequent purchaser must record his conveyance first. In the principal case, *D* failed to record properly his *whole* chain of title and validly recorded only the conveyance to himself. *B* then recorded while the intermediate conveyance to *C* was in effect unrecorded. On this state of the record a purchaser from *B* would theoretically be unable to discover *D's* title even though it was recorded, since *D's* deed was isolated from the common grantor, *A*, by the failure to record the inter-

[1] N.D. Rev. Code (1943) §47-1941.

[2] To be protected, the purchaser must prove the *execution* of all conveyances in his chain of title, and in the principal case the court said that *D* had tried to do this by proving only the acknowledgment of the deed to *C*. Failing this, *D* was not in privity with *A* and was not protected. However, the decision does not appear to rest on this, but rather on the ground that *D* could not be protected as a bona fide purchaser.

[3] Quinn v. Johnson, 117 Minn. 378, 135 N.W. 1000 (1912).

mediate connecting conveyance.[4] The notice-race statute is evidently intended to avoid this situation by preventing such lapses in the record, and is in line with the policy underlying all recording acts of providing a place for a potential purchaser to determine safely the status of title. The notice-race recording act protects the subsequent purchaser only when he records not merely his immediate conveyance, but also his whole chain of title.[5] *D* in the principal case would thus not be protected against the prior grantee, *B*, who was the first to record properly his whole chain of title even though this recording was after *D* had recorded his conveyance. However, it must be noted that the intermediate conveyance to *C* actually did appear on the record, the defect vitiating its effect being a wholly *latent* one. Neither *D* nor a possible purchaser from *B* (who in examining the record would in fact discover that *D* had some relation to the property) could suspect solely from the record that the acknowledgment was defective and the record of the conveyance to *C* of no effect.[6] In view of this and of the fact that *D* in good faith did everything possible to comply with the recording act,[7] to find that he is not protected by it because his whole chain of title was not properly recorded appears to be an extremely technical result which overlooks the policy of the recording act of protecting those who attempt to comply with its provisions and who rely upon the title as it appears of record.

Eugene Alkema

[4] This assumes the normal record indexed only by grantors and grantees. Necessarily, to discover the interest of any grantee, the conveyance to his immediate grantor must also be recorded since a purchaser tracing title to that grantor and finding no recorded conveyance from him would be unable to proceed further and would assume he is the owner. With a tract index where conveyances are indexed in relation to specific land, the grantee's interest is accessible even though his grantor may not appear of record.

[5] Zimmer v. Sundell, 237 Wis. 270, 296 N.W. 589 (1941). Cf. Abbott v. Parker, 103 Ark. 425, 147 S.W. 70 (1912); Board of Education v. Hughes, 118 Minn. 404, 136 N.W. 1095 (1912); Quinn v. Johnson, note 3 supra; 4 AMERICAN LAW OF PROPERTY §17.10 (1952); annotation, 133 A.L.R. 886 (1941).

[6] Commonly, when an instrument is improperly recorded, the actual record does not afford constructive notice of that instrument. However, the courts are divided as to the effect of recording an instrument which is disqualified from record by a latent defect, many courts holding that that record does constitute constructive notice of the instrument. See annotations in 19 A.L.R. 1074 (1922); 72 A.L.R. 1039 (1931). Also, if the purchaser actually sees the record of an improperly recorded conveyance, several courts have held that he has actual knowledge of the conveyance and is not then a bona fide purchaser. See the cases cited in 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., §600, n. 7 (1941).

[7] Aigler, "Operation of the Recording Acts," 22 MICH. L. REV. 405 at 415 (1924).