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Lis Pendens: Its Effect on Prior Unrecorded Mortgages

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Approached the correct way the future advance agreement presents a highly useful means of financing. Approaching the correct way means having a thorough understanding of the limitations which are inherent in such devices under present laws, as well as an appreciation of the advantages to be gained by their use. It necessarily follows, then, that approached the incorrect way the decision to use the future advance agreement could be a most unhappy one.

SIDNEY F. DAVIS

LIS PENDENS: ITS EFFECT ON PRIOR UNRECORDED INTERESTS

The necessity of keeping property that is involved in a suit within the court's power and subject to its decree gave rise long ago to the doctrine of *lis pendens*. "Without it . . . a man, upon the service of a subpoena, might alienate his lands and prevent the justice of the court. Its decrees might be wholly evaded."[1] Although modified by statute and often maligned, misunderstood and confused with other concepts, the doctrine is still important today, particularly in certain types of litigation. Considerable changes, precipitated by new situations not contemplated by the early common-law doctrine, have in some instances limited, and in others extended, the doctrine.

This note deals with the problem whether a plaintiff in a property dispute should be permitted to rely upon the record as it exists when he files a notice of *lis pendens*. Any analysis of this problem requires at least a rudimentary knowledge of the common-law doctrine of *lis pendens,* its evolution and its statutory ramifications and changes. A general discussion of these topics is followed by an examination of the problem of prior unrecorded conveyances and possible solutions.

1. Murray v. Ballou, Johns. Ch. R. 566, 576 (N.Y. 1815).

THE COMMON-LAW DOCTRINE OF LIS PENDENS

The doctrine of *lis pendens* originated in the civil law,[2] but as used today, it apparently came from the common-law rule that if a defendant alienated during the pendency of a real action, the judgment overreached the alienation.[3] Lord Bacon later adopted the rule in chancery, and it has since been followed and is now considered by writers to be an established doctrine.[4] An 1815 opinion by Chancellor Kent[5] is considered the foundation of the doctrine in this country.[6]

Lis pendens has been defined by the Florida Supreme Court as "the jurisdiction, power or control which courts acquire over property involved in a suit pending the continuance of the action and until final judgment therein."[7] The object of the doctrine is to keep the subject matter of the controversy within the court's power until the final decree so that the judgment, when rendered, will be effective.[8]

Authorities disagree about the basis of the doctrine of *lis pendens*. Some say that the doctrine rests upon the idea of implied or constructive notice that the property is involved in litigation.[9] However, most authorities believe the basis is public policy and necessity.[10] The latter theory holds that the doctrine operates mainly to prevent circumvention of the court's judgment by disposition of the property in controversy.[11] If circumvention were allowed, a person could hardly enforce his legal rights through court action.[12] Furthermore, supporters of the public policy and necessity theory assert that the

2. DePass v. Chitty, 90 Fla. 77, 80, 105 So. 148, 149 (1925).

3. Oil Fields Corp. v. Dashko, 173 Ark. 533, 546, 294 S.W. 25, 30, *cert. denied*, 275 U.S. 548; DePass v. Chitty, 90 Fla. 77, 80, 105 So. 148, 149 (1925).

4. Oil Fields Corp. v. Dashko, 173 Ark. 533, 547, 294 S.W. 25, 30 *cert. denied*, 275 U.S. 548; DePass v. Chitty, 90 Fla. 77, 80, 105 So. 148, 149 (1925).

5. Murray v. Ballou, 1 Johns. Ch. R. 566 (N.Y. 1815).

6. DePass v. Chitty, 90 Fla. 77, 80, 105 So. 148, 149 (1925).

7. Intermediary Fin. Corp. v. McKay, 93 Fla. 101, 103, 111 So. 531 (1927); DePass v. Chitty, 90 Fla. 77, 80, 105 So. 148, 149 (1925).

8. Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 727, 18 S.E.2d 436, 438 (1942); Stuart v. Coleman, 78 Okla. 81, 82, 188 Pac. 1063, 1064 (1920).

9. *E.g.*, DePass v. Chitty, 90 Fla. 77, 105 So. 148 (1925); Ingraham & LeGrand Lumber Co. v. McAllister, 188 Ga. 626, 4 S.E.2d 558 (1939); Olson v. Leibpke, 110 Iowa 594, 81 N.W. 801 (1900).

10. *E.g.*, Batson v. Etheridge, 239 Ala. 535, 95 So. 873 (1940); Davidson v. Dingeldine, 295 Ill. 367, 129 N.E. 79 (1920); Picerne v. Redd, 47 A.2d 906 (R.I. 1946); see 54 C.J.S. *Lis Pendens* §1 (1948); OSBORNE, MORTGAGES 601 (1951).

11. Jarrett v. Holland, 213 N.C. 428, 196 S.E. 314 (1938).

12. "Suits would be interminable, if the rights of the parties could be disturbed by mesne conveyances . . . ." Bridger v. Exchange Bank, 126 Ga. 821, 827, 56 S.E. 97, 100 (1906); Israelson v. Bradley, 308 N.Y. 511, 127 N.E. 2d 313 (1955).

notice theory breaks down in some instances because even a complete check of all court proceedings may not inform a purchaser pendente lite that the property is the subject of litigation.[13]

For the doctrine of *lis pendens* to apply in a particular situation, certain essential requirements must be present.[14] First, the court must have jurisdiction over both the subject matter involved and the person of the defendant.[15] Second, the property must be clearly described in the pleadings.[16] Third, the subject matter of the action must be specific property,[17] such as a suit for recovery of possession or the enforcement of a lien. A suit to recover a money judgment or any other action not involving specific property in respect to which relief is sought would not operate as a *lis pendens*.[18] Fourth, the property involved must be of the type that may be affected by a *lis pendens*. Generally, the doctrine applies to real property[19] and to many types of personal property.[20] However, *lis pendens* is inapplicable to certain categories of personal property,[21] and in some states, the doctrine is limited solely to real property.[22]

13. "[A]t common law the writ was pending from the first moment of the day on which it was issued and bore teste; and a purchaser, on or after that day, held the property subject to the execution upon the judgment in that suit. . . ." Newman v. Chapman, 23 Va. 93, 102 (1823). For example, suppose *A* purchases the land in question from *C* at 9:00 A.M. At 11:00 A.M. on the same day *B* files suit against *C* in an action involving the same land. Because the writ became effective on the first moment of the day, *A* took subject to the suit, despite the fact that he could not possibly have known about the suit at the time of the purchase.

14. *E.g.*, Walker v. Houston, 176 Ga. 878, 879, 169 S.E. 107, 108 (1933); Connecticut Life Ins. Co. v. Birzer Bldg. Co., 101 N.E.2d 403, 406 (C.P. Ohio 1950); Flanagan v. Clark, 156 Okla. 230, 231, 11 P.2d 176, 177 (1932).

15. *E.g.*, Houston Chronicle Publishing Co. v. Bergman, 128 S.W.2d 114, 116 (Civ. App. Tex. 1938).

16. *E.g.*, Leuders v. Thomas, 35 Fla. 518, 522, 17 So. 633, 635 (1895); Burnett v. Hatch, 200 Ore. 291, 297, 266 P.2d 414, 417 (1954); Picerne v. Redd, 47 A.2d 906, 910 (R.I. 1946).

17. 1 FREEMAN, JUDGMENTS §534 (5th ed. 1925).

18. *Ibid.*

19. *E.g.*, Riesen v. Maryland Cas. Co., 153 Fla. 205, 14 So. 2d 197 (1943); Sarkeys v. Marlow, 205 Okla. 15, 235 P.2d 676 (1951).

20. See 34 AM. JUR., *Lis Pendens* §17 (1941); see also Note and Comment, 12 ORE. L. REV. 68 (1932).

21. *E.g.*, Presidio County v. Noel-Young Bond & Stock Co., 212 U.S. 58 (1909) (bonds); Orleans v. Platt, 99 U.S. 676, 682 (1878) (commercial securities); County of Warren v. Marcy, 97 U.S. 96, 105 (1877) ("[N]egotiable securities purchased before maturity nor to articles of ordinary commerce sold in the usual way."); Knight v. Shutz, 147 Ohio St. 267, 47 N.E.2d 886 (1943) (stock certificate and the stock it represents); see Note, *The Application of Lis Pendens to Personalty*, 47 HARV. L. REV. 1023 (1934).

22. Thomas v. Nevans, 67 Nev. 122, 215 P.2d 244 (1950); Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929).

Generally, a purchaser pendente lite[23] takes subject to the decree or judgment.[24] Such a purchaser is bound by the result of the litigation just as if he had been a party thereto.[25] A *lis pendens* does not establish a lien on the property or have any effect on the parties to the litigation; it simply gives notice to all third persons that any interest they acquire in the property pendente lite is subject to the outcome of the action.[26]

As to the extent of notice, the rule has been stated that:[27]

> "[*L*]*is pendens* is notice of all facts apparent on the face of the pleadings and such other facts as the pleadings would necessarily put the purchaser on inquiry and of the contents of exhibits filed and proved if they are pertinent to the matter in issue of the relief sought."

Statutory Lis Pendens

The common-law doctrine has a harsh impact on an innocent purchaser that purchases property pendente lite because he is bound by the decision in the suit. To mitigate this hardship, statutes have been enacted in nearly all states requiring litigants to file notice of the pendency of their suits before third parties are bound by the *lis pendens* doctrine.[28] However, these statutes are by no means uniform and many affect only certain types of litigation. For instance, some statutes mention only certain kinds of real property actions,[29] whereas others include personal property.[30] Generally, *lis pendens* statutes are considered supplementary in nature and not in substitution of the common-law doctrine.[31]

Because few statutes cover the entire common-law doctrine, the unaffected portions continue to operate, making it impossible to rely

23. One who acquires interest in the matter in litigation pending suit. The words are part of the maxim upon which the doctrine of *lis pendens* is based—*pendente lite nihil innovetur*, meaning pending the suit nothing should be changed. Whiting & Slark v. Beebe, 12 Ark. 421, 564 (1851).

24. Intermediary Fin. Corp. v. McKay, 93 Fla. 101, 103, 111 So. 531, 532 (1927); Leuders v. Thomas, 35 Fla. 518, 522, 17 So. 633, 635 (1895).

25. Greenwald v. Graham, 100 Fla. 818, 130 So. 608 (1930); see 54 C.J.S. *Lis Pendens* §42 (1948).

26. Dice v. Bender, 383 Pa. 94, 97, 117 A.2d 725, 726 (1955); see Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

27. DePass v. Chitty, 90 Fla. 77, 82, 105 So. 148, 150 (1925).

28. *E.g.*, Conn. Gen. Stat. Rev. §52-325 (1958); Fla. Stat. §47.49 (1961); see Note, *Statutory Lis Pendens*, 20 Iowa L. Rev. 476 (1934).

29. *E.g.*, Iowa Code Ann. §617.10 (1950); Tex. Rev. Civ. Stat. Ann. art. 6640 (1960).

30. *E.g.*, Fla. Stat. §47.49 (1961); Va. Code Ann. §8-142 (1956).

31. Brown v. Cohn, 95 Wis. 90, 69 N.W. 71 (1896).

exclusively upon the absence of a *lis pendens* notice.[32] If the statute does not cover the entire common-law doctrine, it may cause more hardship than it relieves. When the common-law doctrine is in effect a purchaser will diligently search all court records knowing he is bound by them. But when a statute exists, he may tend to rely too heavily upon the absence of a *lis pendens* notice, and may later find that a *lis pendens* was in effect because the statute did not cover the particular area.[33]

Although the real basis behind *lis pendens* is probably public policy and necessity,[34] the statutes requiring the recording of a notice of *lis pendens* have the effect of recording acts that require constructive notice before a bona fide purchaser pendente lite can be bound by the judgment in the pending suit.

Section 47.49 of the Florida Statutes 1961, originally enacted in 1892, provides that a suit will not operate as a *lis pendens* unless notice is recorded in the county in which the property in dispute is situated. The notice must contain the names of the parties, the time of the institution of the suit, the name of the court, a description of the property, and a statement of the relief sought.

In 1927, the statute was amended[35] to limit the effectiveness of the *lis pendens* to one year unless the relief sought is based upon an instrument in writing properly of record or upon a materialman's or mechanic's lien, or unless the judge extends the time upon reasonable notice and for good cause shown. Also, the chancery court was empowered to discharge the notice of *lis pendens* unless the suit is founded upon one of the above bases.

The statute makes a *lis pendens* applicable to "any property, real or personal" when properly recorded in the county in which the property is located.[36] Florida is one of the few states that covers the entire common-law doctrine by statute.[37]

It has been held that the Florida statute affects the common-law doctrine only as to notice.[38] In order for the *lis pendens* to be effective against a bona fide purchaser, the *lis pendens* statute must be complied with, that is, notice must be recorded; but the statute "in no way affects the common law method of enforcing the doctrine."[39] The court further stated that since the scope of notice is not defined,

32. OSBORNE, MORTGAGES 602 (1951).
33. Brown v. Cohn, 95 Wis. 90, 69 N.W. 71 (1896).
34. See text at note 10 *supra*.
35. Fla. Laws 1927, ch. 12081 §§1-3, at 806.
36. FLA. STAT. §47.49 (1961).
37. OSBORNE, MORTGAGES 601 (1951); NOTE, *Statutory Lis Pendens* 20 IOWA L. REV. 476, 479 (1935).
38. DePass v. Chitty, 90 Fla. 77, 80, 105 So. 148, 149 (1925).
39. *Id.* at 81, 105 So. at 150.

the courts will look to the "general or common law rules on the subject"[40] to determine the scope and effect of the doctrine.

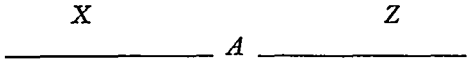
Failure to record the prescribed notice does not preclude a party from invoking the common-law doctrine; a purchaser pendente lite that had actual knowledge of the pending litigation is bound by the judgment in that action.[41] In *Ray v. Hocker*,[42] although a *lis pendens* notice was not recorded, a writ of assistance was allowed against a purchaser who took with actual knowledge of the pending suit.

The Problem of Prior Unrecorded Conveyances

Statutes requiring the recording of a notice of *lis pendens* make it necessary to consider the effect of the recording system on the *lis pendens* area. The interaction of these two statutes points up the conflict between the plaintiff that is trying to establish his interest in the property and the transferee under an unrecorded conveyance. This conflict has caused the courts a great deal of trouble. Before discussing this problem it is important to recognize the similarities, differences, rationale, and purposes behind *lis pendens* statutes, recording acts, and the common-law *lis pendens* doctrine.

In reality, the purpose of the common-law doctrine is to protect the plaintiff by keeping the disputed property within the court's jurisdiction and subject to the outcome of the litigation. The original purpose of the *lis pendens* statutes was to warn subsequent innocent purchasers that litigation was pending involving the property. The purpose of the recording acts is to protect subsequent bona fide purchasers and lien creditors by making priority dependent upon recordation. In view of these often conflicting purposes, no wonder confusion exists when all three interests, or even two, are involved.

The relationship and interaction of the recording acts and *lis pendens* statutes is difficult to visualize. It is important to recognize the dual aspects of the recording acts, that is, reliance and notice.



A hypothetical purchaser, Mr. Byer, has a deed executed to him at point *A*. Imagine two periods of time: *X*, the period from the most recently recorded conveyance to point *A*, and period *Z* which stretches from point *A* into the future (infinity).

When Byer checks the record and purchases, he is protected over period *X*, that is, against all prior unrecorded interests. This could

40. DePass v. Chitty, 90 Fla. 77, 81, 105 So. 148, 150; see Peninsular Naval Stores Co. v. Cox, 57 Fla. 505, 514, 49 So. 191, 194 (1909).

41. Howard Cole & Co. v. Williams, 157 Fla. 851, 27 So. 2d 352 (1946).

42. 65 Fla. 265, 61 So. 500 (1913).

be called the *reliance* aspect of the recording acts. When Byer records at point *A*, he protects himself for period *Z* against all subsequent purchasers and creditors. This could be called the *notice* aspect. Thus, by the two acts, purchasing and recording, Byer assures himself of ownership of the property.

Applying the same hypothetical to a *lis pendens* situation, suppose Mr. Pender, a plaintiff, records his *lis pendens* at point *A*. This protects him for time period *Z*. He has stopped defendant from successfully alienating the property during pendency of the suit, thereby protecting himself against subsequent bona fide purchasers. Now the question arises whether Pender is or should be protected with reference to time period *X*. That is, should there be a reliance aspect in a *lis pendens* situation?

Putting Byer and Pender together in the same situation, in which Byer fails to record and Pender files a *lis pendens* at point *A*, myriad problems arise. Several of these problems are dealt with below.

Holdings in Other Jurisdictions

No general rule obtains as to the effect of a *lis pendens* on a prior unrecorded conveyance. Several divergent views are taken of the matter. Necessarily, these views often merely reflect variations in recording acts and *lis pendens* statutes. In a number of jurisdictions, a person failing to record his conveyance before a notice of *lis pendens* is filed, is treated as a purchaser pendente lite and is therefore bound by the judgment in the suit.[43] Most of these states also have statutes providing that an unrecorded instrument has no effect on persons having no actual notice of the transfer.[44] Thus, the plaintiff is put in a position similar to that of a subsequent bona fide purchaser that can cut off a prior unrecorded transfer. Other jurisdictions take the position that failing to record a conveyance does not make the purchase pendente lite.[45] A Minnesota court has held that if the conveyance is recorded prior to judgment, the purchaser's interest is not subject to the outcome of the suit.[46] In several states, statutes provide that in some situations a notice of *lis pendens* properly filed has priority over an unrecorded conveyance, thereby eliminating the problem.[47] Such statutes protect the plaintiff from the situation that

43. *E.g.*, Wolfenberger v. Hubbard, 184 Ind. 25, 110 N.E. 198 (1915); Simmons v. Fleming, 157 N.C. 389, 72 S.E. 1082 (1911).

44. 2 POMEROY, EQUITY JURISPRUDENCE 760 (5th ed. 1941).

45. *E.g.*, Noyes v. Crawford, 118 Iowa 15, 91 N.W. 799 (1902); Baker v. Bartlett, 18 Mont. 446, 45 Pac. 1084 (1896).

46. *E.g.*, West Missabe Land Co. v. Berg, 92 Minn. 2, 99 N.W. 209 (1904).

47. *E.g.*, CAL. CIVIL CODE ANN. §1214 (1960); N.M. STAT. ANN. §21-3-14 (1953); WIS. STAT. ANN. §281.03 (1958).

arises in a jurisdiction in which an unrecorded conveyance of which he has no notice has priority over a *lis pendens.*

Holdings in Florida

Few reported Florida cases discuss transfers that occur before the filing of a notice of *lis pendens,* but that are not recorded until afterward. The decisions are highly inconsistent.

Bowers v. Pearson,[48] decided in 1931, involved the assignment of a mortgage executed prior to the filing of a notice of *lis pendens,* but not recorded until after the notice was filed. The court explicitly stated that although the assignment was unrecorded, it was not made pendente lite. The court further said:[49]

> "Where a mortgage foreclosure suit is started, and a *lis pendens* filed, the *lis pendens* can only affect transfers and assignments which are made after the suit is started and after the *lis pendens* is filed."

Investigation of the authorities cited in the opinion discloses that the cases relied on hold that the important question is not when the transfer was recorded, but whether it occurred before the *lis pendens* became effective.[50]

In 1936, *O'Bryan v. Dr. P. Phillips & Sons,*[51] involving a prior unrecorded transfer and a *lis pendens,* was decided differently. However, additional important considerations entered into this decision. On March 24, 1927, Phillips' grantor initiated a mortgage foreclosure action and filed a notice of *lis pendens.* A few days earlier, however, the mortgagor had conveyed his interest by quitclaim deed to O'Bryan who recorded approximately three months after the judicial sale of the property. After remaining in possession of the property for seven years, Phillips brought suit to quiet title.

The court ruled in favor of Phillips, mentioning the fact that valuable improvements had been made and that Phillips' title had ripened through adverse possession; thus O'Bryan was now estopped from asserting any claim to the property. O'Bryan had waited more than seven years after the foreclosure sale before asserting his claim, and did not then assert it until Phillips brought a quiet title suit. However, these were not the only grounds relied upon for the decision. The court also stated that O'Bryan purchased pendente lite and was therefore bound by the foreclosure and sale. Herein lies the problem.

48. 101 Fla. 714, 135 So. 562 (1931).

49. *Id.* at 715, 135 So. at 562.

50. Baker v. Bartlett, 18 Mont. 446, 45 Pac. 1084 (1896); Wingfield v. Neall, 60 W. Va. 106, 54 S.E. 47 (1906).

51. 123 Fla. 302, 166 So. 820 (1936).

The *Bowers* case was not even mentioned, much less expressly overruled. Yet using the *Bowers* criteria for determining whether a transfer is made pendente lite, it is obvious that O'Bryan could not be called a purchaser pendente lite.[52] Adverse possession and estoppel were admittedly very important in this case. Just how important was *lis pendens*? Perhaps what the court was really concerned with was constructive notice of the mortgagee's rights since notice of these rights binds the transferee, regardless of litigation or a *lis pendens*. O'Bryan did not take with notice of the pending suit, but he did take with notice of the mortgage[53] and thus any interest he may have acquired in the land was subject to the mortgage. It might be said that there was really no *lis pendens* problem here at all. Even if the deed had been recorded prior to the *lis pendens*, the property would still have been encumbered by the recorded mortgage.

An argument that the *O'Bryan* case overruled *Bowers v. Pearson* could be raised, but several factors weigh against this argument. First, a different factual situation and additional considerations of adverse possession and estoppel are present in the *O'Bryan* case. Second, the cases were only five years apart, the same judges were sitting, and yet there was no mention whatsoever of the *Bowers* case. Third, the doctrine of *Bowers* was not refuted except as to who is considered a purchaser pendente lite. Regardless of what may be said against the *O'Bryan* decision in the *lis pendens* context, some writers have cited the case as authority for the statement that in Florida the interest of a person that fails to record before a *lis pendens* is filed is subject to the outcome of the suit.[54]

The only subsequent case that sheds any light on the problem is *Freligh v. Maurer*,[55] in which the appellee brought suit to establish an equitable lien on certain property. Two hours before the filing of the suit and a notice of *lis pendens*, the intervenor, a bona fide purchaser, had purchased the property from the defendants. The intervenor's deed was recorded while the suit was pending. The equitable lien was based upon certain moneys that had been advanced to the defendants, but no claim of any kind was recorded until the suit. Relying on the recording statute,[56] appellee insisted that the

52. See text at note 49 *supra*.

53. See note 58 *infra* and accompanying text.

54. *E.g.*, 2 POMEROY, EQUITY JURISPRUDENCE 760 (5th ed. 1941); Durham & Gunn, *Foreclosure of Conventional & Government Insured Mortgages in Florida*, 15 U. FLA. L. REV. 188 (1962).

55. 111 So. 2d 712 (2d D.C.A. Fla. 1959).

56. FLA. STAT. §695.01 (1961). The statute provides in part: "No conveyance, transfer or mortgage of real property, or of any interest therein, nor any lease for a term of one year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same shall be recorded . . . ."

intervenor's failure to record before the filing of the notice of *lis pendens* rendered her title subordinate to the lien. The court dismissed this contention, holding that in order to qualify as a creditor under the recording act, the claim must be reduced to a lien or judgment. Otherwise, the purpose of the act would be defeated because it would be practically impossible for a purchaser to check all creditors. As the court put it:[57]

> "[A]n unrecorded and unliquidated claim . . . cannot by the filing of a *lis pendens* be raised to the dignity of a record interest in land so as to establish a priority by force of the statute alone."

Obviously, this statement further limits the effectiveness of a *lis pendens*, if this be the law. From the language in the opinion, in order for a *lis pendens* to cut off an unrecorded transfer, there must either be a judgment, which, when recorded, would cut off the unrecorded transfer anyway, or the equivalent of a decree establishing a lien. The reason given is that it would be impossible for an abstractor to check all creditors. Had the purchaser recorded, this would be no problem because once his interest was recorded, assuming the deed was valid, his interest would be beyond the reach of creditors of his vendor and subsequent purchasers.

The court distinguished the *O'Bryan* case relying on the fact that here nothing on record warned the purchaser of any outstanding claims, whereas in *O'Bryan*, the mortgage was on record at the time of the purchase and thus any interest gained by the purchaser was subordinate to the mortgage. Although no mention was made in the *O'Bryan* opinion of the recordation of the mortgage, it would be of no consequence, and the mortgage would have had priority because the purchaser of a quitclaim deed was not considered a bona fide purchaser under the recording act as it existed at that time.[58]

Though the *Freligh* and *Bowers* decisions are in accord, their reasoning differs greatly. In *Freligh*, the court was more concerned with the absence of a lien or judgment on record that would give the purchaser notice of the plaintiff's claim, than the fact that the transfer occurred before the filing of a *lis pendens* notice. The prior transfer was greatly emphasized in the *Bowers* case.

A Proposal

At best, Florida law in this area is uncertain. A plaintiff that invests considerable amounts of time and money should be protected

57. Freligh v. Maurer, 111 So. 2d 712, 714 (2d D.C.A. Fla. 1959).

58. Pierson v. Bill, 133 Fla. 81, 182 So. 631 (1938); Rabinowitz v. Keefer, 100

from "secret" titles of which he has no knowledge. Also, since a conveyance that was not recorded until after a notice of *lis pendens* was filed could constitute a serious cloud on a title and render it unmarketable, some definite rule is needed upon which title examiners and potential purchasers can rely.

As mentioned above,[59] a number of states have passed statutes dealing with the problem of prior unrecorded conveyances. The main purpose of these statutes is to protect a plaintiff from "secret" titles and to eliminate the necessity of his having to initiate another lawsuit against the holder of an unrecorded interest that was not prejudiced by the original suit. The general effect of these statutes is to bind the holder of the unrecorded interest if a judgment is rendered against the record owner. In some instances, separate *lis pendens* statutes were passed,[60] while in others, the recording statutes were simply amended.[61]

Undoubtedly, Florida needs some definite rule as to the effect of a notice of *lis pendens* upon prior unrecorded conveyances. Passage of a statute to protect a plaintiff against unrecorded interests in certain situations would seem to be a needed step in dealing with this problem. Some question might be raised as to just which type would be more beneficial. There is an important distinction between the statutes, which may be crucial.

The Wisconsin statute[62] binds the holder of the unrecorded interest to the same extent as if he were a party to the suit. Under statutes of this type, a person holding an interest superior to that of the plaintiff would not be bound, because the holder of the unrecorded interest would have prevailed, had he been joined in the action. Therefore, the plaintiff acquires merely a procedural right eliminating the necessity of another suit against the holder of the unrecorded interest. This eliminates multiple suits without the harshness of cutting off all unrecorded interests. But it does not solve fully the problem of "secret" titles, and a plaintiff would not be able to rely on the record as it existed when he initiated his lawsuit.

Ostensibly, the California statute[63] allows a judgment to cut off interests not recorded before the filing of a notice of *lis pendens*. This type of statute could be construed to determine substantive rights and thus in some cases cut off otherwise superior unrecorded titles.[64]

Fla. 1723, 132 So. 297 (1931); Braddy & Hale Fishery Co. v. Thomas, 93 Fla. 326, 112 So. 55 (1927).

59. See text at note 47 *supra*.

60. *E.g.*, CONN. GEN. STAT. REV. §52-325 (1958); WIS. STAT. ANN. §281.03 (1958).

61. CAL. CIVIL CODE ANN. §1214 (1960).

62. WIS. STAT. ANN. §281.03 (1958).

63. CAL. CIVIL CODE ANN. §1214 (1960).

64. California has not yet gone this far, in fact in Torrez v. Gough, 137 Cal.

This puts the plaintiff in a position similar to that of a subsequent purchaser under the recording acts, and it also gives a broader effect to judgments. One of the major purposes of a statute of this type is to encourage the recording of instruments, thereby giving greater protection to those that rely on the public records.[65]

Other types of statutes deal with the problem,[66] and cases in some of these jurisdictions have cut off an otherwise superior interest because it was not recorded before the filing of a *lis pendens* notice.[67]

It can be argued that an otherwise superior unrecorded interest should never be cut off because this has nothing to do with the purpose of a *lis pendens* and because a purchaser is not required to record. Recordation may not be mandatory, but today when nearly all land transactions are handled through attorneys and the records are relied upon as the chief evidence of title, all but the least prudent of purchasers normally record; and it is the interest of everyone concerned with land titles that the record show the true owner of the property. A statute of this type would be in accordance with the spirit of the recording acts since their ultimate purpose is to provide record title that can be relied upon.

Although the California type statute goes beyond the original purposes of the *lis pendens* doctrine and statutes, it keeps one of the situations that gave rise to the doctrine from occurring, in that it prevents fraudulent conveyances by the defendant. In the absence of a statute or rule allowing a *lis pendens* to cut off an unrecorded interest, a defendant, upon learning of the suit, could convey to an accomplice and then both parties to the transaction could claim that the conveyance was executed prior to the filing of a notice of *lis pendens*.

Such a statute might in some instances cut off otherwise superior interests; however, a purchaser can fully protect himself by recording while a plaintiff would be at the mercy of "secret" titles in the absence of a statute. Also, a mere general creditor could not cut off the unrecorded interest because a judgment must "affect title" to come within the statute.

App. 2d 62, 289 P.2d 840 (1955), the court severely limited the coverage of the statute, allowing a bona fide purchaser who took from the plaintiff's grantee to prevail although his interest was unrecorded at the time plaintiff filed a notice of *lis pendens*. Plaintiff's suit was against his grantee who had fraudulently obtained a portion of the property from the plaintiff. However, the court stressed the fact that the plaintiff had actual knowledge of the unrecorded interest.

65. Evarts v. Jones, 127 Cal. App. 2d 623, 625, 274 P.2d 185, 187 (1954).

66. *E.g.*, COLO. REV. STAT. §118-6-10 (1953); KAN. GEN. STAT. ANN. §67-223 (1949).

67. *E.g.*, Schuck v. Quackenbush, 75 Colo. 592, 227 Pac. 1041 (1924); Wilson v. Robinson, 21 N.M. 422, 155 Pac. 732 (1916); Lind v. Goble, 117 Okla. 195, 246 Pac. 472 (1926).

Perhaps a plaintiff should be protected as a purchaser because he has some claim to the property, and because he is in effect "purchasing" when he expends money on a lawsuit. Also, the plaintiff may very likely have relied upon the record at the time of the transaction upon which his claim is based.[68] Why should a purchaser that fails to record, thereby misleading a plaintiff that sues or invests money in reliance on the record, be protected at the plaintiff's expense?[69]

The wording of the statute could limit its operation to certain types of actions and elaborate on just what a "judgment affecting title" is, thus further mitigating the hardship upon holders of unrecorded interests. Careful wording could also eliminate problems that have arisen under other statutes such as the effect of actual notice of the unrecorded interest[70] and related problems.[71]

CONCLUSION

Along with the need for some definite rule in this area, it is further desirable that it be made certain that judgments will be effective, that plaintiffs and others be able to rely upon the record title to land, and that a multiplicity of suits be prevented.

The present-day importance of these interests and the others previously mentioned, would seem to justify a statute allowing a judgment affecting title to cut off interests not recorded before the filing of a notice of *lis pendens.*

Although such a statute would not be an all-encompassing panacea, solving all of the priority problems created by the doctrine of *lis pendens,* it could go far in clearing up a troublesome area.

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68. See First Nat'l Bank v. Savarese, 101 Fla. 480, 134 So. 501 (1931).

69. The Florida Supreme Court apparently recognized this problem in Arundel Debenture Corp. v. LeBond, 139 Fla. 668, 675, 190 So. 765, 768 (1939) where the court stated: "[T]he judgment creditor . . . must show that he in some way relied upon the record in extending credit *or in the reduction of the debt to judgment.*" (Emphasis added.)

70. One difficult problem which has arisen is whether a plaintiff that learns of the unrecorded conveyance during his suit must take affirmative steps to join the holder of the unrecorded interest, or whether the holder will simply be given an opportunity to intervene.

71. See Comment, *Real Property: Recording Statute: Lis Pendens: Right of a Grantee Under an Unrecorded Deed Against One Who Has Previously Recorded a Lis Pendens in an Action Affecting Title,* 25 CALIF. L. REV. 480 (1937) which deals with some of the problems that arise under such statutes.