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Constructive Notice and Its Effect on the Law of Conveying Real Estate

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Thesis.

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and

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I n t r o d u c t i o n .

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It frequently happens during the many and rapid transactions of business, that two or more persons in good faith, acquire equal rights in the same subject matter, and courts are called upon to decide which shall have the priority, and which shall bear the loss.

These two old and well settled maxims are called to their aid ; "Where the equities are equal the law prevails", and, "Where the equities are equal the first in order of time prevails."

In the determination of these controversies the law of notice plays a very important part. It is regarded throughout the whole range of jurisprudence, as a decisive element in these controversies, whether the party

asking relief acted with or without notice of the claims of others in or over the same subject matter.

It is a well settled principle that a purchaser with notice that the subject matter of the transaction is effected by some claim in favor of a prior third party, takes subject to that claim. While on the other hand it is equally well settled, that, if he took without notice, of any such preceeding claim he will be protected against such claim. Notice may be either actual or constructive.

It is the purpose of this article to deal only with the latter and its effect on the law of conveying real estate. The terms used to define constructive notice are many and varied as implied, imputed, presumptive, and even actual notice. Chief Baron Eyre defines it

thus, "constructive notice I take to be in its nature no more than evidence of notice, the presumption being so violent that the court will not allow it to be contradicted." Judge Selden defines it as being, "A legal inference from established facts, and like other legal presumptions does not admit of dispute." These and many other similar expressions are the ones usually adopted by judges and text-writers. Yet they seem to be a little short of what seems to me the true theory. Is not constructive notice, in its technical sense rather, "The legal cognizance of a fact or facts, which the law imputes to a party"? Therefore it has nothing to do with actual knowledge, nor is it founded on any doctrine of evidence. It does not rest on any presumption of knowledge. The theory is not that the party is pre-

sumed to know,but by intendment of law he does know, that is, he stands as though he had actual knowledge. These numerous definitions, together with an attempt by many text-writers and judges to distinguish between constructive and implied notice, tend to involve the dostrine of notice in much confusion.

Story on his work on Equity at section 410 a makes such a distinction, by placing notice by registry and lis pendens as constructive, but notice by possession, to agents, and other other similar classes he calls implied notice.

Wade,in his work on notice, carries the same idea to a limited extent. They give as the reason for the distinction, that in the latter cases, the presumption is one of fact and can be disputed. While on the other

hand, Pomroy , in his work on Equity, classes them all as constructive notice. This seems to be the best and truest classification.

Story and Wade, in their reasoning, seem to leave out of consideration the fact that in what they term implied notice, it is only the facts on which the notice rests, that are open to dispute, and when once they are proven to exist, the notice that the law raises is as conclusive as in cases of record. In the latter cases the fact of the existence of the records, and whether or not the instrument was properly recorded, are open to dispute. Therefore I claim they should both be placed in in the same class. When the facts are once established and the relation of the parties is such as to bring them within the operation of the law of constructive notice,

the notice itself presents a pure question of law for the court to pass upon. Williamson vs. Brown, 15 N. Y. 519 ; Warden vs. Williams, 24 Ill. 67 ; Jones vs. Bramford, 21 N. J. Eq. 217 ; Roland vs. Hart, 6 Ch. App.678.

Constructive notice seems to arrange itself into the following classes or branches :

1st. Notice arising out of records. To this class belongs the Registry law and Lis Pendens.

2nd. Notice arising from the parties' personal relation to the transaction, such as possession by an adverse claimant, and from title papers.

3rd. Notice arising out of the parties' constructive relation to the transaction, as by agents or attorneys.

These will be treated in the order named.

Registry Laws.

In the case of Jackson vs. Burgot, 10 Johns. 461, Ch. Kent said in effect, that the policy which applies the doctrine of constructive notice to the registry of of deed and other instruments, is to protect against fraud. The policy arrived at being to accomplish through constructive notice, the same results which would be obtained through actual notice. Hence these records were to furnish a means whereby a purchaser or incumbrancer could obtain reliable information, as to the condition of his grantor's or mortgagor's title ; and to give a grantee a chance to protect his title, by placing it on record, against the subsequent acts of his grantee or third persons. This is a matter never known to the common law, and is regulated entirely by statute.

In England there is no general registration act, but for certain local reasons there were passed as early as the beginning of the last century, statutes regulating registration in certain counties. 2 & 3 Anne Ch. 120, 8 Geo.II, Ch. 6 ; 6 Anne, Ch. 35.

These statutes were , in most cases, simply directitory, and provided in substance that a memorial of all conveyances may be recorded in a prescribed manner.

In some cases it was provided that such conveyances, not recorded, should be void against a subsequent recorded conveyance. Nothing is said in any case of the record acting as notice to any one. And the courts , in constructing them, have given them no such application. Wayatt vs. Bradwell , 6 Ves. 435 ; Jollant vs. Stam Stambridge, 3 Vest. 477.

The reason why England did not pass registry law can be accounted for, by their peculiar mode of conveyancing by livery of seizin, which was a public notorious acts of which every body was supposed to take notice. This can also be assigned as a reason for the absence of recording acts in the civil law of Rome. Their formal conveyance by copper and scales was a public act ; and later when done by simply delivery a man in possession would be looked upon as the owner.

In the United States the legislatures and courts have always favored the registration of instruments of conveyance. Long before the Revolution, the colonies of Massachusetts and New York had passed registration acts. In 1710 the colony of New York passed an act providing for the recording of deeds, and in 1754 an act providing

for the registry of mortgages was passed. These were among the first general registration acts passed. They were perpetuated by the Constitution of 1777, and with their various revisions, repeals, re-enactments, and amendments have remianed in force to the present day. Since these acts every state has passed similar acts.

In construing these various acts, the courts of the various states differ with respect to the details. They are, however, agreed that, if an instrument of conveyance or incumbrance be properly recorded, the record imparts constructive notice to subsequent purchasers or incumbrances, of the instrument and its contents, from the time the original is left for record. Wade on Notice, Ch. II, Part II ; Pomroy on Eq. Jur. sec. 646.

They also practically agree that the instrument

must be, first, an instrument effecting either the legal or equitable title to real estate. If the instrument is void, the record is void. Second, such an instrument as is a proper subject for record. Nothing can be gained by recording an instrument which is not the proper subject of record. Third, it must be properly recorded, In the sense that it must show that the statutes regulating execution, acknowledgment and so on have been complied with. Parker vs. Hill, 8 Metc.447 ; Washburn vs. Burnham 63 N. Y. 132 ; Zeigler vs. Shower, 78 Pa. St.357; Pringle vs. Dunn, 37 Wis. 449 ; Galphin vs. Abbott, 6 Mich. 17.

As to the extent that clerical errors or willful misconduct of the recorder may effect the constructive notice the authorities are in conflict. Some courts

hold that if the instrument be left with the proper officer, and it has in itself all the requisites to entitle it to a valid registry that grantee or mortgagee has done all in his power and shall not be held by reason of the omissions or mistakes of the recorder. Franklin vs. Cannon 1 Root (Conn.) 580 ; Merrich vs. Wallace 19, III. 486 ; Nichols vs. Rengolds, 1 R.I. 30.

Other courts hold that the subsequent purchaser or incumbrancer is only to be conclusively notified of what the record actually recites. In other words he need not go back to see if the instruments were properly spread on the record books. Barnard vs. Chapman, 29 Mich. 162 ; Pringle vs. Dunn. Supra.; Jennings vs. Wood 2 Ohio, 261 ; Frost vs. Beekman, 18 Johns. 544; Dey vs. Dunham,2 Johns. Ch.413. These two last cases are leading cases on this subject.

In the Dey case a deed absolute on its face, but intended for a mortgage, was recorded as a mortgage held to impart no notice as a mortgage.

In the Frost case a mortgage for $3,000. was recorded as one for $300. held that it was notice only to the extent of $300. This seems like a hard rule that a grantee is to be held for the acts or misconduct of an officer over whom he has no control. True he has a remedy against the officer, but in many cases this is vastly inadequate.

But the courts say these statutes are in derrogation of common law rights, and must be strictly construed. Our registry officers are simply ministerial and may record any instrument left for record, but nothing can be gained by recording an improper instrument. Where the conveyance is involuntary, as by a sheriff's deed,

the whole proceedings is in derrogation of the common law rights and is provided for by statute. Therefore the whole of the statute must be complied with, and equity will not aid the execution of such powers. Demming vs. Smith, 3 John. Ch. 344; Atkins vs. Kennell, 20 Wend. 241.

Another important consideration is that the record of conveyance is only notice to subsequent parties claiming under or through the same grantor, by whom the recorded conveyance was executed.

A recorded conveyance from one stranger to the title to another stranger will not effect a party who claims under a different grantor. Huthington vs. Clark, 30 Pa. St. 393 : Page vs. Waring, 76 N. Y. 463 ; Losey vs. Simpson, 11 N. J. Eq. 249.

In the latter case the Chancellor saying, "When one link in the chain of title is wanting, there is nothing to guide the purchaser to the next succeeding link by which the title is continued. When he traces down to an individual, out of whom the title is not carried by the record the registry acts makes that title the purchaser's protection."

The often quoted expression that the record is notice to the world is as erroneous as it is misleading. The true rule is that it is notice only to subsequent parties claiming under the same grantor. Some statutes add the words, in good faith and for a valuable consideration, and where these do not appear in the statute they have been added by the courts.

L i s P e n d e n s .

The doctrine of lis pendens is one of very early origin. Lord Bacon, in one of his early ordinances, laid down the rule, "No decree bindeth any that cometh in bona fida, by conveyance from the defendant, before the bill is exhibited, and is made no party by bill or order; but when he cometh in pendente lite, and while the suit is in full prosecution, and without any color or privity of court, then regularly the decree bindeth. But, if there were any intermissions of suit, or the court is made acquainted with the conveyance, the court is to give order according to justice." Bacon's Works, Vol. II, 479.

Chancellor Kent, in the case of Murray vs. Bellow, 1 John. Ch.; thinks this one of the earliest promulga-

tions of the rule, and adds that it has been fully supported down to the present time. The foundation of the rule seems to be the prevention of litigation. There is a difference of opinion among text-writer and judges as to whether it operates by reason of the doctrine of constructive notice or by reason of the publicity of courts and their proceeding , together with the fact that the law will not allow the parties pending the litigation to give other parties rights to the property in dispute, so as to prejudice the other. This latter doctrine is advocated by Dwight C. in the case of Hobrook vs. N. J. Zinck Co. 57 N. Y., and by Lord Cranworth in case of Bellemy vs. Sabine, 1 De G. & J. 566.

While on the other hand, Story, Wade, Kent and other writers apply the doctrine strictly on the ground

of notice. The courts and many of the statutes on the subject apply it with the same effects as constructive notice. At common law the doctrine seemed to be that, if after the filing of the bill and issuing of the subpoena, a person purchased the property from one of the litigants it would be bound by the decree of the court. After the establishment of registry laws and under the reform proce dure acts, the whole doctrine has been changed and made statutory.

In New York the Court of Civil Procedure sec. 1670-1675 provides for the filing of a notice of lis pendens in the County Clerk's office. The suit must be one concerning real estate. The plaintiff may, on filing his complaint, file with it a notice as prescribed by law. This notice shall be recorded and will act as constructive notice to purchaser or incumbrancer of the property,

during the litigation. In most if not all of the states the doctrine of lis pendens has become a pure matter of statute, which if followed, give the same result as at common law. The doctrine in its technical common law sense was a harsh one and one not favored by the courts. In the case of Leitch vs. Wells, 48 N.Y. 585 Earl C. in commenting on the doctrine said, "It has always been considered a hard rule and will be applied only when the case is actually brought within it, and if a slip is made in the proceeding, the court will not aid in rectifying the mistake. Hard and unjust as the rule may at times seem, if constructive notice were not applied there would be no certainty that litigation would ever cease. It is from the consideration of public policy, as well as the protection of the rights of the parties themselves that the law charges a party with notice by a record to the

same extent and with the same consequences as though he had actual knowledge.

Notice by Possession.

The general rule is well settled both in this country and England that open, notorious, and exclusive possession of real estate is constructive notice to those dealing subsequently with the estate, of the interest of the one in possession, whether such interest be legal or equitable.

The leading English case on this subject is that of Taylor vs. Stebbert, 2 Ves. 437, decided in 1794 by Lord Rosslyn, and followed by the case of Holmes vs. Powell, 8 De G. M. & G. 572, where the rule was clearly and accurately stated by J. C. Knight-Bruce in the following language : "I apprehend that by the law of England, when a man is of right and de facto in possession of a

corporeal heriditiment, he is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistant with the title or alleged title under which he is in possession or has a right to couple with his possession".

The case of Brown vs. Volkening 64 N. Y. 76 states the rule as applied in this country substantially as it is applied in England. The English courts say that the possession must be open, visible, notorious, and under a claim of right or ownership.

In the cases of this country, the adjectives used are about the same, or at least of the same import. A fair sample are those used in the case of Brown vs. Volkening, supra. which are, "that the possession must be actual open, visible and inconsistant with the record

of the apparent owner by the records ; not equivocal, occasional, nor for a special or temporary purpose. Constructive possession is not enough."

As to the possession of a tenant of the grantor, there is a diversity of opinion in the country. In England it seems well settled that it is simply notice of the tenancy ; that is, it is notice only of the interest or title of the actual accupant. Barnhart vs. Greenshield, 28 Eng. L. & Eq. 77; 2 Sug. on Vendors, sec. 762 -3 ; Wade on notice p. 121.

In New York the clear weight of authority is that the possession must be actual. Brown vs. Volkening. In that case a key to unfinished dwelling houses was delivered to the purchaser, and it was held not to be such a delivery of possession as would give a bona fida in-

cumbrancer notice of the interest of the purchaser.

In California possession by a tenant is held to be notice even of the land-lord's title.

In Hodgin's Executors vs. Ammerman, 40 N. J. Eq. 99, it was held that actual residence on the land was not necessary, but as in the case where the land was used for a meadow, and defendant had kept the fenses in repair, he would be protected against the lien of a judgment rendered against his grantor after the giving, but before the recording of the deed.

In Fassett vs. Smith, 23 N. Y. 256, it was held that the possession of the wife's land by the husband was sufficient to put the purchaser on enquire as to the wife's title. These are fair samples of what the courts hold to be sufficient possession to put subse-

quent parties on enquire as to what the interest of the party in possession is.

In Massachusetts the statute declares that nothing but actual notice will suffice to invalidate a subsequent recorded conveyance, and that it cannot be presumed from open and notorious possession, even when the subsequent party had actual knowledge of the possession. He can abide by the result of an examination of the records. Sibley vs. Leffingwell, 8 Allen 584 ; Pomeroy vs. Stevens, 11 Metc. 244.

It appears to be well settled in England that possession of a tenant is not only notice of the rights and interests arising out of the tenancy, but is also notice of subsequent rights acquired during the tenancy. Danials vs. Davinson, 16 Ves. 249. In this case the

subsequent right was an agreement to purchase. This has been extended to all persons in possession. Pom. Eq. Jur. sec. 616. This is also the rule in New York. Reed vs. Garron, 50 N. Y. 345 ; Parker vs. Connor, 93 N. Y. 118.

Yet there are courts which hold that possession began under one right is not notice of any other subsequent acquired right.

Taking the theory of this doctrine as established by the best authority and the latter rule can not hold; because possession is enough to put one on enquire and he is bound by what he discovers or might have discovered by a diligent enquire.

Notice from Title Papers.

At the present time purchasers or incumbrancers generally rely on the public records for information in regard to titles. If from such records these appear a connected chain of titles by a succession of deed from the general government down to his grantor, he can safely rest, unless he discovers that there is an outstanding equity in favor of some third person.

In England, when titles are conveyed by a long line of title deeds, the absence of one is sufficient to put him on enquire as to why it is missing. It is an indication of an outstanding interest secured by the absent deed. This method of conveyancing and creating lines is practically never used in this country ; yet Pomeroy says the principle still exists and will be applied in

analagous cases. The most common way of giving notice by title papers is by recitals contained in them. Whenever a purchaser or incumbrancer hold under a conveyance, and is obliged to make out his title by a series of conveyances, the rule is well established that he has constructive notice of all matters which appear, either by recital, reference, or otherwise, on the face of any instrument necessary to make out his chain of title.

Such purchaser charged with notice in this manner, of any trust, subject to which the legal title of his grantor was held, takes subject to such trust and holds as trustee for the beneficiary whose interest is disclosed by the title papers, or facts to which their recitals would lead an enquirer of ordinary diligence.

Therefore, if a deed recites or refers to another

transaction in relation to the same subject matter, the purchaser shall be deemed to have constructive notice of such transaction. Oliver vs. Pratt, 3 How. 333 ; Acer vs. Wescott, 46 N. Y. 384 ; Cambridge vs. Delano, 48 N. Y. 384.

This doctrine applies also where the facts recited are in regard to equitable and not legal interest. Acer vs. Wescott, 1 Lans. 193. It has been applied to statutory conveyances, as a sale on execution. The conveyance is declared to consist of the judgment, levy, sale, and sheriff's deed, each of which is an essential requisite to a valid conveyance. Upon the validity of these constituents the purchaser must depend for his title.

In the case of Nelson vs. Allen, 1 Yarg (Ten) 360,

when the record of the decree was examined, it was found that the judgment was invalid for want of jurisdiction of the court. The purchasers were held chargeable with constructive notice of the above fact, as the decree was part of his chain of title.

The lien of a vendor for purchase price has always been favored by the courts of equity. They will enforce it if the purchaser, by reference to the title instruments of his grantor, might have learned that a former conveyance was on credit. It is his duty to enquire whether such has been paid. Executors vs. Blackwell, 6 B. Mon. 67. This doctrine is often applied when the title is claimed through a will. In Harris vs. Fly, 7 Paige 421, a testator devised his land to a son and gave his daughter a legacy payable by the son.

The real estate was held to be incumbered by the legacy, and a subsequent purchaser from the son was charged with notice that the legacy had not been paid. The same rule was applied in the case of McTeeter vs. McMullen, 2 Pa. St. 32 ; Bellas vs. Lloyd, 2 Watts 401.

It has been said that the recitals must be certain and explicit, but the better rule seems to be that they need only be reasonably clear. The courts say that is certain which can be made certain.(Cases supra.) A second mortgagee always has notice of a prior mortgage mentioned in his mortgagor's deed. Baker vs. Matthews, 25 Mich. 31.

As to the remoteness of a conveyance that will bind a purchaser by its recitals, the rule seems to be that he has constructive notice of all instruments in his

chain of title to which an examination would lead. But in Bush vs. Ware, 15 Pet. 93, it was decided that he need not go back of a grant from the general government. These classes of constructive notice like others never operate between the immediate parties, but only between a purchaser and some prior party claiming an interest . II Pomeroy Eq. Jur. sec. 63 ; Wade on Notice, p. 143. They seem to operate as by estopple and negligence.

If a third party is in possession or a title instrument recites a fact, it is gross negligence for the purchaser or incumbrancer not to follow up the clue, which he has discovered. Therefore he will not be heard to deny the interest of the third party.

Notice to Agents.

Constructive notice in that class of cases where an agent has actual knowledge is a question that has been much mooted and discussed by text-writers and judges both in this country and England. There is a great diversity of opinion as to the principles of law on which it rests. Many writers insist that it is not constructive notice at all, but imputed notice. The distinctions that they draw are refined and scholarly, yet to an ordinary lawyer they only tend to confuse the law and involve him in hopeless confusion.

There were attempts in England as early as the seventeenth century to lay down a rule, but owing to the poor reporting, it is almost impossible to find out what they did decide.

The cases of Lowther vs. Carlton, 2 Atk. 242; Warrick vs. Warrick, 3 Atk. 294 ; and Le Neve vs. Le Neve, 3 Atk. 648, decided by Lord Hardwick, laid down the rule, that only such knowledge of the agent effects the principle as is acquired in the same transaction. This rule was law in England until the decision of Desser vs. Norwood, 17. C. B. (N.S.) 466, and Rowland vs. Hart, L. R. 6 Ch. App. 678, about twenty-five years ago when Hardwick was overruled. So now the rule is that if the agent, at the time of the transaction, has knowledge of any prior lien, trust or fraud, affecting the subject matter, no matter how obtained, his principle is effected thereby. If he acquired it before the purchase, the fact that he retains it will depend on the circumstances of the case.

The doctrine seems to rest on the rule of law, that what knowledge the agent has of the subject matter of the transaction, he is bound to disclose it to his principal except where it would be a breach of professional confidence reposed in him by another. This rule is the one followed in the United States Supreme Court.

The Distilled Spirits case, 17. Wall. 356. In our state courts there is a conflict as to what the rule is. The courts of Pennsylvania follow the Hardwick rule. Bracken vs. Miller, 4 W. & S. 110. In New York the rule is laid down in Holden vs. N. Y. & E. Bk., 72 N. Y. 286, a case in which a bank was held bound by knowledge obtained by its president when he was not acting in such capacity.

In the late case of Slatterly vs. Schnanneck, 44 Hun. 75, it was held that by the rule in Holden case, ~~that~~ a holder of a mortgage would be bound by knowledge imparted to his agent if the knowledge was present in the mind of the agent at time of transaction. Therefore the rule in New York seems to be the same as the late rule in England and United States.

The other states are more or less divided as to which is the true rule.

C o n c l u s i o n .

Though at time the application of the rules which govern constructive notice, works seeming hardship and injustice, yet we have but to remember that it has for its foundation a broad principle of public policy and protection to innocent third parties, and much of its seeming hardship and injustice will vanish.

True the party that suffers is not always the one really in fault, but in a majority of the cases where this doctrine is applied to the detriment of an apparent innocent party, if the surrounding circumstances be examined, it will be found that the sufferer was not quite as diligent and careful as he should have been. There will continually appear some seeming insignificant fact, which if followed up will show some want of cau-

tion or diligence, some neglect of duty, or some desire to gain a little advantage over an unsuspecting neighbor. If the doctrine was not applied to these cases, the hardship and injustice would be much more patent.

Therefore, my conclusion is, that the rules which govern constructive notice are as fair and equitable as any rules can be, which have for their object equal justice and the government of a selfish people.