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Chattel Mortgages--Recordation--Effect of Failure to Index

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denying recognition is not definite. Whether the court considered the Nevada decree as void by the law of that state and thus subject to collateral attack here, or whether the court has abandoned its position taken in the *Goudy* and *Caswell* cases and will permit a collateral attack in this state regardless of the rule in Nevada, remains a matter of conjecture. While the position taken by the West Virginia court in this instance may seem extreme and wholly undesirable other jurisdictions taking a similar position are: California, Connecticut, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Vermont, and the Distruct of Columbia.[7] As to the desirability of such a policy much might be said on either side. If such decrees are freely recognized the result would be that one state would determine the status of the citizens of another. On the other hand the refusal to give effect to divorces granted in another state results in adulterous or bigamous subsequent marriages and the bastardization of the children of such unions.[8] The fault, however, would seem to lie with those states having too lax divorce requirements, and the solution in uniform divorc legislation.

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CHATTEL MORTGAGES — RECORDATION — EFFECT OF FAILURE TO INDEX. — A deed was executed between A and B, which gave the latter a lien on after-acquired property taken on the granted premises. This instrument, although recorded, was spread upon the deed book and not placed in either the trust deed or chattel mortgage books.[1] Plaintiff thereafter claimed a laborer's lien on such after-acquired property. *Held,* such recordation was sufficient to give the mortgage priority over the later acquired laborer's lien. ". . . . the paper is recorded as soon as it is properly lodged

[7] Warren v. Warren, 127 Cal. App. 231, 15 Pac. (2d) 556 (1932); State v. Cooke, 110 Conn. 348, 148 Atl. 385 (1930); Cochran v. Cochran, 173 Ga. 856, 162 S. E. 99 (1931); Walker v. Walker, 125 Md. 649, 94 Atl. 346 (1910); MASS. GEN. LAWS (1921) c. 208, § 39, construed in Andrews v. Andrews, 188 U. S. 104, 23 S. Ct. 265 (1903); Perleman v. Perleman, 113 N. J. Eq. 3, 165 Atl. 646 (1933); Fischer v. Fischer, 245 N. Y. 463, 173 N. E. 680 (1930); Pridgen v. Pridgen, 203 N. C. 533, 166 S. E. 591 (1932); Duncan v. Duncan, 265 Pa. 464, 109 Atl. 220 (1920); State v. Duncan, 110 S. C. 253, 96 S. E. 294 (1918); Blondin v. Brooks, 83 Vt. 472, 76 Atl. 184 (1910); Frazier v. Frazier, 60 F. (2d) 920 (App. D. C. 1932).

[8] Freet v. Holdorf, 205 Iowa 1081, 216 N. W. 619 (1927).

[1] The record does not show whether the instrument was indexed.

in the clerk's office, without regard to the books in which it may actually be spread."[2] *Benson v. Wood Motor Parts Corporation.*[3]

The court relied upon *Wethered v. Conrad*[4] and *Calwell's Ex'r v. Brindle's Adm'r.*[5] In the latter reliance had, in turn, been placed on an earlier Virginia case,[6] which was expressly repudiated by statute[7] the year it was decided. This statute made proper indexing a condition precedent to the validity of the recordation.[8] The *Wethered* Case[9] was based on a different statute[10] than the one in the principal case[11] and, therefore, may be treated as merely persuasive authority.

In view of the fact that the purpose of the recording acts, as a whole, is to protect the grantee or mortgagee, who have all the necessary knowledge, and that such persons receive the greatest benefits of such recordation, it is submitted that they should, in turn, have the burden of seeing that the instrument is properly indexed and recorded.[12]

It has been suggested that to require the person having the

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[2] Note that this point in regard to the recording is not a part of the syllabus by the court, and might conceivably be dictum.

[3] 174 S. E. 895 (W. Va. 1934).

[4] 73 W. Va. 551, 80 S. E. 953 (1914).

[5] 19 W. Va. 604, 608 (1882).

[6] Old Dominion Granite Co. v. Clarke, 28 Gratt 617 (Va. 1887). *A* obtained judgment against *B* and *C* as partners trading under the name of *"B & Co."* *A* delivered an abstract of his judgment to the clerk of the county wherein there was a tract of land belonging to *C*, and it was entered by the clerk in the body of the judgment-docket, and indexed merely in the name of *"B* & Co." Subsequently, *C* conveyed the land to *D* who had no knowledge of the judgments. *A* filed a bill to subject the land held by *D* to his judgments. The court found the judgments good as against a purchaser for value without notice.

If the partnership were doing business in one county and the judgments of this character were filed in a distant county where the unnamed partner had land, the record would hardly be likely to afford notice.

[7] W. VA. CODE (1887) § 3562; see also VA. CODE (1930) § 6464.

[8] The corresponding section in W. VA. REV. CODE (1931) c. 38, art. 3, § 5, requires indexing but does not make it a condition precedent to the validity of the recordation.

[9] *Supra* n. 4.

[10] W. VA. CODE (1906) c. 73 A, deals with the restorations of burnt and lost records. In the Wethered case the deed in dispute was stamped by the clerk prior to the destruction of the court house.

[11] W. VA. REV. CODE (1931) c. 40, art. 1, § 8, see also note (1931) 70 A. L. R. 595, 604: "In many states, however, the consequences of a failure on the part of the recording officer properly to record an instrument must be suffered by the person seeking to protect himself, under the recording acts, against the intervening rights of third parties. There is little or no difference in the wording of the statutes under which this and the opposite view are adopted, the divergence of opinion being a matter of construction."

[12] See note (1929) 63 A. L. R. 1057, 1064 for illustrations of the effect of requiring indexing or proper recordation. See also 5 THOMPSON ON REAL PROPERTY (1924) §§ 4116, 4117.

instrument recorded to see that it is properly indexed or recorded, would be too much of a burden from a practical point of view. In some states, however, a recordation is notice to third parties as soon as indexed[13] whether actually spread upon the books or not,[14] and the practice may be facilitated by a provision requiring the clerk to keep a temporary daily index[15] which would serve as notice until the paper is actually spread upon the books and the permanent index made. Iowa, North Carolina, Pennsylvania, Wisconsin, Washington and Wyoming[16] have strict rules as to recording and indexing, which seem to make the recording system more nearly serve its purpose.

The West Virginia statute[17] provides for records and indexing but does not make indexing a condition precedent to the validity of the recording. It is, therefore, desirable that our statute be amended both in regard to judgments and mortgages, so that one in searching the records will not be bound to go through an endless number of record books to ascertain the existence of a lien which has been improperly indexed, or spread upon a wrong book.[18] Redress against the circuit clerk might be inadequate at best because of the modest and varying amount[19] of his bond.[20] In a situation like that of the principal case the only way to afford adequate protection to third parties, as to after-acquired chattels which do not become fixtures, is to record and index the deed in the chattel mortgage book.

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13 Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772 (1875).

14 Hibbard v. Zenor, 75 Iowa 471 (1888); see also note (1931) 70 A. L. R. 595, 602 *et seq.*, for a list of cases interpreting the various statutes.

15 McCormick, *Possible Improvements in the Recording Acts* (1925) 31 W. VA. L. Q. 79, 88. Sections 3560 and 3561 of Michie's North Carolina Code of 1931 would serve as a "working model." They provide a specific and detailed method of recording and indexing.

16 IOWA CODE (1927) c. 8, § 288; N. C. CODE ANN. (Michie, 1931) §§ 3560, 61; Merchants and Farmers Bank v. Harrington, 193 N. C. 625, 137 S. E. 712 (1927); Woodley v. Gregory, 205 N. C. 280, 171 S. E. 65 (1933). The last case probably goes too far. See the dissenting opinion. PA. STAT. (West, 1920) §§ 18892-18910; Prouty v. Marshall, 225 Pa. 570, 74 Atl. 550 (1909); WIS. STAT. (1929) § 59. 52 *et seq.*; WYO. COMP. STAT. ANN. (1920) §§ 1496-1520; WASH. COMP. STAT. (Remington, 1922) §§ 10596-10617.

17 W. VA. REV. CODE (1931) c. 40, art. 1, § 8; c. 39, art. 2, § 1 *et seq.*

18 See opinion in the principal case, at 174 S. E. 896.

19 This bond varies between three and twenty-five thousand dollars. W. VA. REV. CODE (1931) c. 6, art. 2, § 10.

20 W. VA. BAR ASS'N REP. (50th Ann. Meeting, 1934) 174.