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Doctrine of Lis Pendens in Legal Actions Affecting Land, The

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THE DOCTRINE OF LIS PENDENS IN LEGAL ACTIONS AFFECTING LAND

From conversations which the writer has had with various members of the Bar, including title attorneys, there seems to be a general belief that purchasers of land from a party to a pending suit affecting it, are not charged with constructive knowledge of such suit unless a notice of its pendency is filed in the office of the Recorder of Deeds, as provided by Section 3155, R. S. Mo. 1929. This, however, is not the case except as to the limited character of actions mentioned in this section. As will be pointed out, there are many types of real actions not of that character, in which pendente lite purchasers are bound by the decree rendered in the case, although no notice of its pendency was filed in the Recorder's office. A brief examination of this section and of its construction will demonstrate this.

By the provisions of Section 3155, the plaintiff, in a civil action affecting real estate "based on any equitable right, claim or lien" may file a notice of the pendency of the suit in the office of the Recorder of Deeds of the county where the land is situated. When so filed, subsequent purchasers and encumbrancers are charged with constructive knowledge of the pendency of the suit.

This section first appeared in the Missouri Statutes in the Revision of 1865 (R. S. 1865 Ch. 197, p. 77). As indicated, it applies only to suits of an equitable nature. There is no statute which authorizes a similar notice to be filed where the action affecting real estate is based on a legal right, claim or lien.

However, the doctrine of lis pendens is not confined to proceedings in equity, and it does not date from the enactment of this statute. It is of ancient origin. The doctrine was formulated and promulgated by Sir Francis Bacon in 1618, as the twelfth of his Ordinances in Chancery. (*1) Even before that date, the principle was recognized by the courts. (*2)

(1) 4 Bacon's Works, p. 515. The Ordinance is as follows: "No decree bindeth anyone that cometh in bona fide by conveyance from the defendant before the bill exhibited; and is made no party either by bill or by order. But where he comes in pendente lite, and while the suit is in full prosecution and without any color of allowance or privity of the Court, there regularly the decree bindeth, but if there were any intermission of suit or the Court were made acquainted with the conveyance, the Court is to give order upon the special matter according to justice."

(2) O'Reilly v. Nicholson, 45 Mo. 160, McIlwrath v. Hollander, 73 Mo. 105, Bristow v. Thackston, 187 Mo. 332, Burnham v. Smith, 82 Mo. App. 35. For a full discussion of the origin of the doctrine and of the early English cases recognizing it, see the case of Murray v. Ballou, 1 Johns. Ch. (N.Y.) 577. The purpose of the rule is "to preserve the situation as it existed when the litigation was begun, in order that effect may be given to the rights ultimately established therein." Bristow v. Thackston, supra.

The rule had its origin in the civil law and was expressed in the legal maxim "pendente lite, nihil innoveture." (*3) The word "conveyance" in the Twelfth Ordinance would seem to indicate that the principle may have been derived from the practice in real actions at common law. (*4) At least it was followed in common law actions before it was recognized in chancery. (*5)

Since the formulation of this Ordinance, the doctrine has been generally followed by the English (*6) and American courts (*7) in both legal and equitable actions affecting land. In referring to it, Chancellor Kent said that "it would be impossible, as I apprehend it, to mention any rule of law which has been established upon higher authority or with more uniform sanction." (*8)

In harmony with these decisions, the Missouri courts have uniformly held that a pendente lite purchaser of land, some interest or right in which is sought to be affected by an action at law, acquires title subject to the final decree rendered in the case. (*9) He who "steps into the shoes of the litigant vendor is just as fully bound and concluded by the judgment so far as the property is concerned, as the vendor himself." (*10) The fact the vendee had no actual notice of the suit is immaterial. The pendency of the

(3) Jones v. Williams, 155 N. C. 179, 71 S. E. 222, 36 L. R. A. (N. S.) 426.

(4) Holbrook v. New Jersey Zinc Co., 57 N. Y. 616, 629.

(5) O'Reilly v. Nicholson, supra, McIlwrath v. Hollander, supra, Murray v. Ballou, supra.

(6) Culpepper v. Austin, 2 Ch. cases, 115 Baens v. Canning, 1 Ch. cases, 301, Preston v. Tubbin, 1 Vern. 286, Garth v. Ward, 2 Atk. 174, Sorrell v. Carpenter, 2 P. Wms. 582, Bishop of Winchester v. Paine, 11 Ves. 194. The Master of Rolls, Sir William Grant, in the Paine case, thus states the reason for the rule: "He who purchases during the pendency of the suit is bound by the decree, the same as the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, suits would be interminable, or what would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it."

(7) Secomb, et al v. Steele, 61 U. S. 94, 15 L. Ed. 833, Norton v. Burge, 35 Conn. 250, Jackson v. Warren, 32 Ill. 331, Inloes Lessee v. Harvey, 11 Md. 519, Bennets Lessee v. Williams, 5 Ohio 461, Story's Equity Jurisprudence (14th Ed.) Vol. 1, Sec. 536.

(8) Murray v. Ballou, supra.

(9) O'Reilly v. Nicholson, supra. (This was a partition suit.) Real Estate Savings Inst. v. Colonious, 63 Mo. 290, McIlwrath v. Hollander, supra, (These were suits to set aside wills. The McIlwrath case was filed in 1867, and the deed to the pendent lite purchaser was executed in 1874). Becker v. Stroeher, 167 Mo. 306, 66 S. W. 1083. (This was a partition suit.) Tice v. Hamilton, 188 Mo. 298, 87 S. W. 497, (This was a suit to recover the value of improvement on land). Tice v. Edmonston, 210 Mo. 411, 109 S. W. 33, Mo. State Life Insurance Co. v. Russ (Mo. Sup.), 214 S. W. 860, (These were actions to determine title), Alexander v. Haffner, 323 Mo. 1197, 20 S. W. (2d) 896, (This was a suit to enforce the lien of a special tax bill).

(10) Mo. State Life Insurance Co. v. Russ, supra.

case charges him with constructive knowledge. (*11) It is unnecessary that notice of the suit be filed in the Recorder's office; if filed, it adds no efficaiy to the constructive notice imparted by the pendency of the suit. (*12) To illustrate, suppose the defendant, in a statutory quiet title suit, after a judgment in his favor has been rendered by the trial court, conveys the land to John Jones who has no actual knowledge of the suit. No lis pendens has been filed in the Recorder's office. Later, the Supreme Court, on plaintiff's appeal, reverses the decree and orders judgment rendered in plaintiff's favor. As against the plaintiff, John Jones has no title. (*13).

Not only is the immediate vendee of the litigant thus bound by the final judgment, but subsequent grantees of such vendee likewise are concluded. (*14) This doctrine obtains, even though the change of venue has been granted and the judgment is rendered in a county other than that in which the suit was filed. (*15) The vendee is bound by all parts of the judgment, not just by that part which expressly determines some right in the land. (*16).

(11) Mo. State Life Insurance Co. v. Russ, supra, Turner v. Edmonston, supra, O'Reilly v. Nicholson, supra.

(12) McIlwrath v. Hollander, supra. The Court points out that the statute (now Sec. 3155, R. S. Mo. 1929) applies only to claims of an equitable nature. The Court indicates that so far as suits based on an equitable claim are concerned, the statute abrogated the doctrine of lis pendens, and the vendee is not charged with notice of such suit until notice is filed with the Reecorder of Deeds. In Mo. State Life Insurance Co. v. Russ, supra, the Court, in discussing this statute, says, "This statute does not create the law of lis pendens in this state, but merely imposes a limitation upon the common law rule and is to be construed with reference to that rule and the reason behind it * * *. The Statute, therefore, merely withdraws from the operation of the common law rule of lis pendens proceedings and kinds of actions therein mentioned.

(13) This was the situation presented by the case of Mo. State Life Insurance Co. v. Russ, supra.

(*14) Mo. State Life Insurance Co. v. Russ, supra.

(*15) McIlwrath v. Hollander, supra, Mo. State Life Insurance Co. v. Russ, supra.

(*16) Tice v. Hamilton, supra. In this case, the plaintiff sued to recover the value of improvements he had made on certain land. During the pendency of the case, defendant executed a deed of trust conveying the land to Vance, trustee. Thereafter, plaintiff recovered judgment for the value of the improvements and that he be permitted to retain possession until the judgment was paid. The judgment also provided that he recover his costs from defendant and that execution issue therefor. The land was sold on execution under the judgment for costs and Hamilton acquired title through the purchaser at the execution sale. The deed of trust was later foreclosed and the property was purchased by Tice at the foreclosure sale. The Court held that Hamilton had a superior title to that of Tice, as the judgment for costs was a part of the judgment for the value of the improvements, and "'being a part of the judgment the purchaser pendente lite is bound by it and takes subject to it just as much as any other part of the judgment or decree."

From this brief statement of the theory and some of the applications of the doctrine, it is apparent that actions at law involving land may affect the title thereto, as much as a deed, and that the pendency of such actions, regardless of whether notice thereof is filed in the Recorder's office, charges subsequent purchasers and encumbrancers with constructive knowledge to the same extent as does the record of a deed. Because of this, a purchaser or mortgagee, before accepting his conveyance or lien, should be as careful to ascertain whether there are any actions at law pending against his predecessors in title affecting the land, as he is to determine what deeds have been recorded conveying the land.

The only practical way a person can ascertain this fact and so protect himself is by having the abstracter search the records in the Circuit Clerk's office and certify as to suits pending. It is common practice for the abstracter to certify as to judgments or mechanics' liens, but most forms of abstracters' certificates do not recite any search as to suits pending against parties in the chain of title.

The writer believes that an attorney, before approving the title for a purchaser or mortgagee should require the abstracter to expressly certify as to such matters. Theoretically, the certificate should cover pending suits against all persons in the chain of title, but such a search, especially in large cities, would add materially to the cost of the abstract. It is believed that as a practical matter, a search for pending suits against persons who have acquired a record interest in the land, within the last twenty years, would be adequate protection. Very few suits remain undetermined for a longer time. That period, however, is an arbitrary one, and in exceptional cases, may be too short.

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