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Masthead and Recent Cases

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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Recent Cases

REAL PROPERTY—TITLE UNDER UNRECORDED DEED—SOLDIER'S AND SAILOR'S
CIVIL RELIEF ACT
*Godwin v. Gerling*¹

In a recent Missouri case involving the construction of Section 302, subsection 1 of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended in 1942² suit was brought to set aside a trustee's deed to vacant lots in a subdivision executed pursuant to a foreclosure sale under a power of sale in a deed of trust. One

1. 239 S.W. 2d 352 (Mo. 1951).

2. Oct. 17, 1940, c. 888, 54 Stat. 1178, as amended Oct. 6, 1942. 56 Stat. 769; 50 U.S.C.A. App. §§ 501 *et seq.* (1951).

Godwin had purchased the lots, but for his convenience had taken and recorded the title in the name of his secretary. In November 1941, at Godwin's direction and for his benefit, his secretary executed a deed of trust upon the lots securing certain notes. Neither the payee of the notes nor the trustee had knowledge of Godwin's interest. Prior to entering military service in 1942 his secretary conveyed the lots to him by warranty deed subject to the deed of the trust. This deed was never acknowledged nor recorded. The notes and deed of trust through subsequent transactions were negotiated to one Gerling in 1943, and in July 1944, upon default in payment of interest, he requested the trustee to sell the lots under the power of sale. Godwin remained in the military service when the foreclosure sale took place; Gerling purchased the lots apparently without knowledge of Godwin's interest. Before the bringing of suit some of the lots had been purchased by other bona fide purchasers. Godwin contended that he was the owner of the lots in question when he entered service, and therefore a foreclosure without agreement or court order was void under the Soldiers' and Sailors' Civil Relief Act. Under the Act, Section 302, subsections 1 and 3 provide (emphasis added):

"(1) The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property *owned* by a person in military service at the commencement of the period of the military service and still so *owned* by him which obligations originated prior to such person's period of military service."

"(3) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligations, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made after the date of the enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (Oct. 6, 1942) and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in section 107, unless upon an order previously granted by the court and a return thereto made and approved by the court."

The Supreme Court of Missouri held that Godwin was not entitled to have the trustee's deed set aside, for he was neither an equitable nor a legal "owner" at the commencement of his military service, but under the recording act his only interest in the lots was that of an "equitable claim" assertable only against his secretary. Not being an "owner" he was not entitled to the protection of the Soldiers' and Sailors' Civil Relief Act. The court further states that equity will not aid one who comes into court with unclean hands, and though the conduct of the petitioner was not actually fraudulent, nevertheless, by withholding from the record notice of his title he had made it possible for fraud to be perpetrated upon innocent third persons, which Congress clearly did not intend to be one of the purposes of the Act.

Courts which have construed Section 302, subsection 1 of the Soldiers' and Sailors' Civil Relief Act of 1918³ and the Act of 1940 as amended in 1942 (the

3. Mar. 8, 1918, c. 20 §§ 100-604, 40 Stat. 440-449; 50 U.S.C.A. App. § 101, *et seq.* (1951).

section of the earlier and later Act being substantially the same) have consistently held that equitable owners as well as legal owners are encompassed within the term "owner" and thus entitled to the protection of the Acts apparently irrespective of the recording acts of the various states.⁴ In *Hoffman v. Charleston Five Cents Savings Bank*,⁵ the first case to construe Section 302, subsection 1 of the Act of 1918, the petitioner, an officer in military service, brought suit in equity to enjoin the completion of a foreclosure sale, the deed not having been delivered to a purchaser. The petitioner, expecting to be called into military service, had conveyed legal title to his mother subject to the mortgage of the defendant. The deed was duly recorded in the name of his mother, but there was an oral agreement that only if he failed to return would the property be hers. Holding that the petitioner was the equitable owner of the property, the court declared the foreclosure invalid. The Arizona Supreme Court in *Twitchell v. Home Owners' Loan Corporation*,⁶ decided under Section 302, subsection 1 of the 1940 Civil Relief Act as amended in 1942, recognized the applicability of the Act to unrecorded equitable ownership by permitting the petitioner, who was in military service, to intervene in a foreclosure proceeding. He alleged an oral agreement between him and his mother, who was both the record and legal owner of the property, that she was to convey to him upon consideration for her support and for his making payments on the property. The court cited with approval the Massachusetts decisions, stating at page 27 that:

"We think these decisions are consonant with the spirit of the Act. It was meant to protect the interests of those who were called to the defense of their country and who, for that reason, were unable to keep up the payments upon obligations which they had incurred previous to their being called into service."

It should be noted that in both of the above cases the servicemen, who held the unrecorded equitable interests, came forward and asserted them before a deed in foreclosure had been delivered to a bona fide purchaser. If the recognized construction of the Act is that it should be liberally administered and all reasonable doubt should be determined in favor of the serviceman to protect his interest,⁷ there would seem to be little reason for not affording protection to his equitable interest when a bona fide purchaser has not intervened. However, in *Godwin v. Gerling* a deed had actually been delivered to a bona fide purchaser and some of the lots had been conveyed to subsequent bona fide purchasers. Such facts present

4. *Hoffman v. Charlestown Five Cents Savings Bank*, 231 Mass. 234, 121 N.E. 15 (1918); *Twitchell v. Home Owners' Loan Corp.*, 59 Ariz. 22, 122 P. 2d 210 (1942); *John Hancock Mut. Life Ins. Co. v. Lester*, 234 Mass. 559, 125 N.E. 594 (1920); *Morse v. Stober*, 233 Mass. 223, 123 N.E. 780 (1919); *Petition of Institution for Savings in Newburyport and Its Vicinity*, 309 Mass. 12, 33 N.E. 2d 526, 137 A.L.R. 448 (1941).

5. *Supra*, note 4.

6. *Supra*, note 4.

7. *Boone v. Lighter*, 319 U.S. 561 (1943); *Franklin Soc. for Home-Building & Savings v. Flavin*, 265 App. Div. 720, 40 N.Y.S. 2d 582 (1st Dep't 1943), *aff'd* 291 N.Y. 530, 50 N.E. 2d 653 (1943), *cert. den.* 320 U.S. 786 (1943).

a far more difficult problem—that of protecting a serviceman's interest but at the same time maintaining a degree of stability of titles under well recognized property law. Failure to give effect to the recording acts would mean that every purchaser would have to ascertain at his peril the possibility of secret equities of unknown persons in military service. Thus, no purchaser could safely acquire title from a foreclosure sale until all servicemen had been discharged, and all conveyancing would be placed in a state of uncertainty. This would seem to place an unreasonable burden on civilian interests, and, as the Missouri Supreme Court in the *Godwin* case states, it is unlikely that Congress intended such an interpretation of the Act.

Earlier decisions in Missouri had consistently held that an unacknowledged and unrecorded deed was effective to pass legal title, subject of course to divestment by a subsequent conveyance from the record owner to a bona fide purchaser. The court stated in *Pew v. Price*:

"It is not essential to the conveyance of real estate between parties, that the instrument of transfer should be either registered or recorded."⁸

The Missouri Supreme Court also stated in *State v. Page* (emphasis added):

"It is well settled in this state that deeds of private persons, though unacknowledged and therefore not eligible to record, are valid and effective to pass title as between the parties and their privies in blood and as against persons having actual notice thereof."⁹

Similar statements are found in many other Missouri cases.¹⁰ However, in the *Godwin* case it was said that the petitioner was not an "owner" but merely had an equitable claim. It is not too clear what constitutes an equitable claim, or how an "owner" is to be distinguished from a "claimant." Following the general rule, when the petitioner paid the consideration for the property and invested legal title and recorded it in the name of his secretary to hold for his benefit, it would seem that a resulting trust would immediately arise by operation of law and the petitioner would be deemed the equitable owner.¹¹ Missouri decisions have been in accord with this general rule,¹² and though in the principal case the petitioner is said to have had only an equitable claim, it would seem to be equivalent to equitable ownership. Likewise to hold that after the petitioner had received an unacknowledged and unrecorded deed from the legal owner of record he had no more than an equitable claim, seems to cast some doubt as to what is the status of the holder of an unrecorded deed in Missouri.

8. 251 Mo. 614, 620, 158 S.W. 338, 339 (1913).

9. 332 Mo. 89, 95, 58 S.W. 2d 293, 295 (1933).

10. *Elsea v. Smith*, 273 Mo. 396, 202 S.W. 1071 (1918); *Hiler v. Cox*, 210 Mo. 696, 109 S.W. 679 (1908); *Caldwell v. Head*, 17 Mo. 561 (1853); *Southern v. Southern*, 52 S.W. 2d 868 (Mo. 1932); GILL, MISSOURI TITLES § 384 (3rd ed. 1931); MO. REV. STAT. § 442.400 (1949), and annotations thereunder.

11. 2 RESTATEMENT, LAW OF TRUSTS § 440 (1935); 2 BOGERT, TRUSTS AND TRUSTEES § 454 (1935); 54 AM. J. § 206.

12. *Mays v. Jackson*, 324 Mo. 1224, 145 S.W. 2d 392 (1940); *Bowen v. McKean*, 82 Mo. 594 (1884); *Baumgartner v. Gueßfeld*, 38 Mo. 36 (1866).

Two other recent Missouri cases, *Shaw v. Armstrong*¹³ and *King v. Fasching*,¹⁴ where the holders of unrecorded deeds were permitted to establish independent titles by adverse possession as against the claimants under tax deeds, seem also to question the effectiveness of an unrecorded deed to convey title. This problem has been discussed at length by Bruce A. Ring in his comment, *Adverse Possession Under Unrecorded Deed*.¹⁵ In *Shaw v. Armstrong* and *King v. Fasching* the court's observations with regard to the effect of unrecorded deeds on title were unnecessary to the holdings in these cases. In the principal case the court's problem was to get around the unqualified word "owner" as used in the Soldiers' and Sailors' Civil Relief Act. The actual decisions in all three cases seem to be sound. However, it does not necessarily follow that in other types of situations the grantee under an unrecorded deed will be held to have only an equitable claim, but he may and probably will be determined to have legal title in accord with earlier Missouri cases.

The actual result of the *Godwin* case appears to be that only recorded legal and equitable ownership will be included within the word "owner" used in Section 302, subsection 1 of the Soldiers' and Sailors' Civil Relief Act where the rights of bona fide purchasers have intervened. Such a requirement, that of recording a serviceman's status or ownership, would be in accord with the general policy of protecting an innocent purchaser from undisclosed claims which are impossible to discover by the most diligent search of the record and still accomplish the purpose of the Act—that of protecting persons in military service from the enforcement of their obligations when their ability to discharge them has been materially affected by serving their country.¹⁶ By construing this section as not affording protection to unrecorded interests of a serviceman the purposes of both the state recording acts and the Soldiers' and Sailors' Civil Relief Act may be given effect since the serviceman can with little difficulty record such interest as he may have upon entering service.

MARY F. GIBSON

13. 235 S.W. 2d 851 (Mo. 1951).

14. 234 S.W. 2d 549 (Mo. 1950).

15. 16 MO. L. REV. 461 (1951).

16. *Bowman v. Peterson*, 45 F. Supp. 741 (D.C. Neb. 1942).

