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## COMMENTS

### AFTER-ACQUIRED PROPERTY AND THE TITLE SEARCH

The Appellate Division of the New York Supreme Court in *Fries v. Clearview Gardens Sixth Corp.*<sup>1</sup> has once again affirmed a principle of law which has met with little or no adversity from the bench of this state for over eighty years.<sup>2</sup> The principle tersely stated is that a grantor or mortgagor of an after-acquired property interest is estopped from claiming the invalidity of the conveyance when once he acquires the interest, and such estoppel runs to all his privies of estate, blood or law.<sup>3</sup> For the purposes of this comment the term, after-acquired property, relates to property which has been conveyed or mortgaged by one who has no title to the property but who subsequent to the purported conveyance acquires title.

In *Fries v. Clearview Gardens Sixth Corp.* the Flushing Terrace Corporation was seized and was record owner of real estate in North Flushing, New York on May 9, 1929. On January 16, 1933 the corporation conveyed a parcel of the realty, including the premises which are the subject of the suit, to one Brickner. On February 2, 1934 said corporation, when it was not seized of the property, conveyed the specific property in question by full covenant and warranty deed to the plaintiffs. On June 29, 1934 Brickner re-conveyed to the corporation the entire property conveyed to him in 1933. On the same day that the property was re-conveyed to it the corporation conveyed the property to a third party and by a series of mesne conveyances defendants obtained title. The suit, among other things, was to determine the owner of the fee of the premises specifically contained in the deed from the corporation to plaintiffs in 1934. All of the aforementioned deeds were duly and properly recorded. The Appellate Division found in favor of the plaintiffs relying heavily on the principle previously stated.<sup>4</sup> Since the court found as a matter of fact that the defendants had actual notice of the conveyance to plaintiffs, this analysis of the principle can find no fault with the decision. In relation to this finding of actual notice, it is essential to point out at this time that all of the conveyances were recorded in what is known as a "lot and block system." The importance of this factor will soon be explained.

The court cited as one of its chief authorities the case of *Tefft v. Munson*.<sup>5</sup> This case more vividly enunciates the principle which will be the object of the adverse criticism contained in this article. The facts are brief: On March 7, 1848, Gamiel Perkins was seized and was record owner of property in Washington County, New York. Immediately after acquiring the premises, said Perkins let his son Martin into possession. Martin thereupon forged a deed from his father, and recorded it on May 27, 1850. Subsequently he mortgaged the premises to

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1. 285 App. Div. 568, 139 N.Y.S. 2d 573 (2d Dep't 1955).

2. See 58 A.L.R. 353 (1929) cases cited therein commencing with *Tefft v. Munson*, 57 N.Y. 97 (1874).

3. *Tefft v. Munson*, 57 N.Y. 97 (1874); Annot., 1918B L.R.A. 776 n. 185.

4. *Tefft v. Munson*, 57 N.Y. 97 (1874); *Oliphant v. Burns*, 146 N.Y. 218, 40 N.E. 980, (1895); *House v. McCormick*, 57 N.Y. 310 (1874).

5. 57 N.Y. 97 (1874).

defendants with covenants of seisin and warranty and this mortgage was recorded on October 1, 1850. Martin thereafter purported to convey the property back to his father and recorded the deed on January 23, 1860. On January 14, 1860 a legitimate deed for the premises from Gamiel to Martin was recorded. On January 31, 1867 plaintiff acquired title from Martin and recorded his deed on February 9th of that year. Plaintiff sought to restrain defendants from foreclosing said mortgage, but the court denied relief, holding that although the forged deed could be considered a nullity and constructive notice to no one, plaintiff being privy in estate to Martin Perkins was estopped from claiming the invalidity of the mortgage, and could not avail himself of the protection of the recording act. It seems indicative and noteworthy that this leading case was decided by a divided court (three to two) and that the short but precise dissent seized upon the glaring practical difficulty posed by the majority's decision.<sup>6</sup>

To appreciate the practical problem presented by the decision, it is first necessary to have at least a general concept of the scheme and manner of conducting a title search to real property. In New York today two chief systems are utilized. In most of the larger metropolitan areas a system known as "lot and block" is available, while in the more numerous suburban areas the "grantor-grantee" or "alphabetized" indices must be resorted to.<sup>7</sup>

Thus when searching in a county where the "lot and block" system is utilized, the procedure is relatively simple. In these counties all of the real estate is divided into geographical units, usually city blocks. Each block is numbered—and frequently its subdivision of lots also numbered—and said block allotted a page or pages in an index book for deeds and similarly so in an index book for mortgages. By turning to the proper page in the index book one may find all of the conveyances affecting the property being searched. Thus if one were searching lot 1, block 1 in "X" County, he would first turn to the index book containing deeds or conveyances; turning to the page headed Block 1, the searcher would find listed each deed affecting property contained in Block 1. Upon close scrutiny the searcher would discover each deed that had affected his premises, and would subsequently examine each instrument so affecting for the period of his search.<sup>8</sup> These instruments (photostats or copies of them) are kept in libers numbered chronologically. The indices tell the liber and page where the instrument will be found. An exactly similar procedure would be followed in regard to mortgages. Thus if the search were to cover a sixty year period the

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6. Reynolds, C., dissenting stated: "In the very best aspect of defendant's case, the record of the mortgage was made out of the order required by law, and failed to give notice to anybody dealing with the title to the land. . . . In this view, the deed of the plaintiff was first recorded, and he is entitled to protection in his title." *Id.* at 103.

7. See North & Van Buren, *Real Estate Titles and Conveyancing* 128-30 (1st ed. 1927); Flick, *Abstract and Title Practice* 4-5 (1st ed. 1951).

8. The period of the title search often varies, depending on the facts of the case; the length of time in continued possession and other elements of adverse possession might convince a prospective purchaser that a title search of fifteen years was sufficient. Most title insurance companies and mortgage corporations require at least a thirty year search of the records and many require a sixty year search. Only infrequently is it required to search a title to its source.

specific page or pages of said indices would reveal each instrument recorded between 1895 and 1955. Upon examination of these instruments the searcher can readily ascertain the precise and present recorded status of the premises in question. This is an excellent and rapid means of title search.

The second and more prevalent method is the "grantor-grantee" system. Here is where we find only the highly trained and qualified technician entrusted with the title search.<sup>9</sup> The first step in this procedure is to ascertain the present record owner of the premises for which a search is required. Once knowing this name the searcher goes to a system of indices called "grantee." In these ledgers each deed is recorded according to an alphabetized system and each instrument is placed in chronological order according to its date of recording. So assuming that the present record owner is John C. Smith, the searcher would turn to that ledger wherein is contained those grantees named Smith; thence he would seek a grantee John C. Smith and ascertain each deed wherein John C. Smith was a grantee. Then he would examine each instrument itself until he discovered the premises in question granted to John C. Smith. Upon discovering that deed, Smith's grantor would be revealed and the searcher would then proceed with said grantor from the date of said deed in the same manner as he had proceeded with Smith. This process would continue until the desired chain of title had been obtained.<sup>10</sup> Of course in the interim many problems could arise but the purpose here is only to give the reader a general idea of the system and not the many refinements of its mechanics.<sup>11</sup>

When once the chain of title has been obtained and each deed carefully abstracted, the searcher's chore is only half complete. The next and more difficult task is to complete what is known as the "adverse work." The searcher must take each person in his chain of title, and during his period of seizure<sup>12</sup> run him through a system of indices known as "mortgagor" and "grantor." These indices, as their names indicate, reveal each grantor or mortgagor of property in the county. So assuming that our present record owner, Smith, obtained title by a deed dated November 1, 1948, it would be necessary to run him from that date in each of these indices. This would reveal if said Smith had made any deeds or mortgages. If such should be revealed the searcher would examine each instrument to see if it affected the premises in question.

Perhaps now the problem which confronts the title searcher begins to make itself apparent to the reader. The court by its declaration in the cases previously discussed has bound the purchaser of property with any deed or mortgage made

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9. See North & Van Buren, *op. cit.* supra note 7, at 224-25.

10. See note 8 supra.

11. For a comprehensive treatment of title searching with its many allied subjects, see North & Van Buren, *op. cit.* supra note 7; Flick, *op. cit.* supra note 7; 2 Weed, *Practical Real Estate Law* (1st ed. 1920).

12. See North & Van Buren, *op. cit.* supra note 7, at 143; Maupin, *Marketable Title to Real Estate* (2d ed. 1907); 2 Weed, *op. cit.* supra note 11, at 77. Whether the owners in the chain of title need be searched as to the adverse work only for the period between the date of the deed into him until the recordation of the deed out of him is the precise question presented by this comment. The above authorities state emphatically that the searcher is responsible only for examining instruments recorded during this period.

by a person prior in title, regardless of whether or not said person had title or was to later acquire it. Exactly what does this mean to the title searcher?

To one fortunate enough to have available for his perusal a lot and block system no difficulty is encountered since he has before him every conveyance, deed or mortgage which has affected the property being searched. Although he discovers that the mortgagor or grantor was not in title at the time of the indenture, he is aware of the principle advocated in *Tefft v. Munson* and thus so reports his title.

But what of the title searcher in the more rural areas with his antiquated, if not classical, means of searching. Applying the aforesaid principle to his endeavors, he must in his "adverse work" take each record owner and run him from the date of his birth until he departs from title in the mortgagor and grantor indices in order to ascertain if such individual executed any indentures of mortgage or deed. This presents an impossible, if not ludicrous, situation. For example "X" Corporation acquires Blackacre in 1954 and has now contracted for its sale. "X" Corporation was incorporated in 1900 and has developed some fifty tracts in "Z" County. "X" Corporation has executed and there has been recorded since its incorporation 3,000 deeds. It would then be necessary for the title searcher to examine each of these instruments as well as any mortgages recorded from 1900 in order to satisfy himself that said corporation had not previously conveyed or mortgaged Blackacre which it did not acquire until 1954. The procedure would have to be followed with each owner in the chain of title. The strict application of this principle would make title searching impossible and the cost prohibitive. The fee for a title search in New York today bears mute witness that the principle is being ignored.<sup>13</sup>

Although the purpose of this comment is not specifically to find fault with the legal or equitable reasoning of this court, but rather the impractical situation its application involves, mention might be made of the somewhat paradoxical principles propounded by the court. If "A" conveys property which he does not own by warranty deed to "B" who records and subsequently "A" becomes seized and conveys to "C" who records, "B" prevails in a suit to establish the owner of the property.<sup>14</sup> However if "A" who is seized and record owner conveys to "B" who does not record and then "A" again conveys the premises to "C" who does record, "C" prevails in a similar suit.<sup>15</sup> Admittedly the two cases are not squarely in conflict, but it seems apparent that the first does not fulfill the intent of the recording act.<sup>16</sup> The exact purpose of the act was to permit the purchase of realty with some degree of assurance as to the quality of the title and, as has been shown, the application of the principle makes a proper search prohibitive and casts the prospective purchaser back to the status in which he suffered prior to the recording act. This is an unrealistic situation and one of which the courts or legislature should take cognizance.

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13. See note 12 supra.

14. See note 2 supra.

15. N.Y. Real Property Law § 291 (1944).

16. In *McCusker v. McEvey*, 9 R.I. 528 (1870), the court, although advocating the principle of *Tefft v. Munson*, admits that it may be at variance with the spirit of the recording act.

Outside of New York there is sharp conflict and dispute as to this principle. There is practical unanimity as to estoppel against the grantor or mortgagor himself of after acquired property from later claiming its invalidity. But as to the recording of such instrument serving as constructive notice to an otherwise bona fide purchaser for value without notice there is sharp controversy.<sup>17</sup>

The cases typified by *Tefft v. Munson* either find no conflict with the recording act or else arbitrarily dismiss it as subservient to the principle propounded.<sup>18</sup>

The opposing line of cases take the view that the recording laws prevent the after acquired title from inuring to the benefit of a grantee who took a conveyance from one who had no title to the property, and who recorded such title before the grantor acquired title.<sup>19</sup> A Connecticut court so precisely seized upon the problem that it would seem most informative to quote from its decision in *Wheeler v. Young*<sup>20</sup> at length. The court maintains that to carry the doctrine that an after-acquired title inures to the benefit of a prior grantee to the extent of giving priority to the title of one who from his negligent failure to examine the records has been induced to purchase land of a person having no title over that of one who without negligence, in good faith, and for value and without knowledge of such prior deed, has purchased after his grantor has acquired title from one having both legal and record title is opposed to the principles of equity and to the theory of the registry laws. Further, the court said: "It may be said that such estoppel by deed is not any equitable doctrine, but is a rule of the common law, based upon the recitals or covenants of the deed. We reply that as a rule of law it has been so far modified by the registry laws as to be no longer applicable to cases where its enforcement would work such an injustice as to give priority to the title of one who negligently failed to examine the records before purchasing of a grantor having no title, or who purchased at the risk that his grantor might thereafter acquire title, over that of a subsequent purchaser in good faith, and in reliance upon the title as it appeared of record."<sup>21</sup>

It is regrettable that the New York court has so tenaciously clung to a principle first firmly advocated in 1874. The principle was no more sound at that date than it is now, but the ever increasing real estate negotiations since that date have so multiplied and the recording of deeds, mortgages and other instruments have become so myriad in proportion that this archaic principle has lost all semblance of practicality. A rule of law which with the passing of time has become so unworkable that to a great extent it is being ignored by the people intimately concerned<sup>22</sup> should be closely scrutinized and re-examined by a court that wishes to face and remain abreast of the currents of an ever-changing world.

Today in New York a purchaser of realty in assuming title runs a calculated risk that his title will not be subsequently defeated by a mortgagee or grantee of an owner prior in the chain of title who executed such indenture prior to his acquisition of title. It seems most peculiar that New York's large title insurance

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17. 58 A.L.R. 350 (1929); 41 C.J. 479 (1926); 25 A.L.R. 83-95 (1923).

18. 25 A.L.R. 86-89 (1923).

19. 25 A.L.R. 91-92 (1923).

20. 76 Conn. 44, 55 Atl. 670 (1903).

21. *Id.* at 48, 55 Atl. at 672.

22. See note 12 *supra*.