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RECORDING THE LAND CONTRACT

The man who records a contract to sell land in Wyoming is like the farmer who puts a scarecrow in his cornfield. It may not be a real man, but it keeps the crows away. Recording of contracts for purposes of cutting off subsequent grantees isn't provided for in the statutes, but by decision it will shoo the crows away. Originally ours was an especially confusing situation both to the crows and to the farmer because of our recording scheme. One paragraph of the statute says that every instrument touching any interest in land which is recorded will be notice,¹ and another provides an unrecorded conveyance is void as against a subsequent bona fide purchaser who first records.² Section 66-124 defines a *conveyance* so that an executory contract is expressly excluded,³ and yet another permits the recording of an executory contract but does not say the record will be notice.⁴

Thus we have a "notice" type of statute protecting the bona fide purchaser whether or not he records first as well as a "race-notice" statute placing a premium on the race to the recorder's office protecting the BFP only if he gets there first and records.⁵

The problem is further controlled by the decision in *Hawkins v. Stoffers*⁶ in which it was held that a subsequent purchaser under an execu-

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1. Wyo. Comp. Stat. 1945 sec. 66-116. Each and every such deed, mortgage, instrument or conveyance touching any interest in lands, made and recorded, according to the provisions of this chapter, shall be notice to and take precedence of any subsequent purchaser or purchasers from the time of the delivery of any such instrument as the office of the register of deed, for record. Patents issued by the United States for lands and certificates of purchase or payment for public lands issued by the receiver of the land office, shall be entitled to record under this chapter, and the record of all such instruments shall have the same effect to all intents and purposes as though the same were acknowledged and otherwise executed as required by the provisions of this chapter relating to conveyances.
 2. Wyo. Comp. Stat. 1945 sec. 66-119. Every conveyance of real estate within this state, hereafter made, which shall not be recorded as required by law, shall be void, as against any subsequent purchaser or purchasers in good faith and for a valuable consideration of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.
 3. 3 Wyo. Comp. Stat. 1945 sec. 66-124. The term "conveyance," as used in this Act, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, alienated, mortgaged or assigned, or by which the title to any real estate may be affected in law or in equity, except wills, leases for a term not exceeding three (3) years, executory contracts for the sale or purchase of lands, and certificates which show that the purchaser has paid the consideration and is entitled to a deed for the lands, and contain a promise or agreement to furnish said deed at some future time.
 4. Wyo. Comp. Stat. 1945 sec. 66-127. Every letter of attorney, or other instrument, containing a power to convey lands as agent or attorney for the owner of such lands, and every executory contract for the sale or purchase of lands only when acknowledged by such owner, may be recorded by the register of deeds of any county in which the lands to which such letter, instrument or contract relates, or any part of such lands, may be situated, and when so acknowledged, and the record thereof when recorded, or a transcript of such record duly certified, may be read in evidence in the same manner and with like effect as a conveyance recorded in such county.
 5. Casner and Leach, *Cases and Text on Property* 783 (1st Stand. Ed. 1950.)
 6. 40 Wyo. 226, 276 Pac. 452 (1929) ; On re-hearing, 40 Wyo. 245, 278 Pac. 76 (1929).

tory contract who went into possession before a prior grantee had recorded was protected as though he had first recorded a deed.

As a general rule, instruments affecting title to land are required to be recorded to protect a grantee against a subsequent conveyance to another bona fide purchaser. By operation of the recording statutes, this record provides constructive notice of the instrument⁷ and its contents.⁸ Proper recording is the basis for an irrebuttable presumption that a buyer knows of a prior conveyance by his grantor.⁹

Statutes in many states provide for the recording of a conveyance, and this has been decided in some to mean that a legal estate must pass.¹⁰ Although it is true that the making of an executory contract to convey land vests equitable title in the vendee,¹¹ it is not always held to be a conveyance.¹² Recording of such an instrument therefore provides no constructive notice¹³ and only affords the possibility that actual knowledge will be imparted to a buyer who sees the contract on the record while making an examination.¹⁴

New York, with substantially the same statutory scheme as Wyoming's,¹⁵ interpreted it to mean that while an executory contract *may* be recorded to preserve authenticated evidence, this was no notice.¹⁶

However, the problem is pretty well confused by the decision of the Wyoming court in *Hawkins v. Stoffers* where a subsequent purchaser under an executory land contract was held to retain his rights under the contract, over his own protests, because he had entered into possession before the prior grantee under a deed had recorded.¹⁷

To summarize, the court reasoned that possession for the purposes of giving notice is ordinarily equivalent to recording. Therefore, Mr. Hawkins' going into possession protected him as if he had actually re-

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7. *Pitcher v. Barrows*, 17 Pick. (Mass) 361 (1835); *Anderson v. Wilson*, 48 Cal.App. 289, 191 Pac. 1016 (1920).
 8. *Mills v. Strawn*, 206 Ill.App. 107 (1917).
 9. *Anderson v. Wilson*, 48 Cal.App. 289, 191 Pac. 1016 (1920).
 10. *Churchill v. Little*, 23 Ohio St. 301 (1872); 66 C.J. 1149, 23 R.C.L. 249. Contra: *Miller v. Akin*, 350 Ill. 186, 182 N.E. 722 (1932). Held to be "conveyances": *Epps v. McCallum Realty Co.*, 139 S.C. 481, 138 S.E. 297 (1927); *Keese v. Beardsley*, 190 Cal. 465, 213 Pac. 500, 26 A.L.R. 1538 (1923).
 11. *Churchill v. Little*, 23 Ohio St. 301 (1872); *Equity, deFuniak* 242.
 12. *Greaves v. Cardieux*, Rap. Jud. Quebec, 50 C.S. 361, 33 D.L.R. 584 (1916).
 13. *Johnson v. Darr*, 114 Tex 516 272 S.W. 1098 (1924).
 14. *Parkside Realty v. MacDonald*, 166 Cal. 426, 137 Pac. 21 (1913).
 15. N.Y. Real Prop. Law par. 291 like Wyo. Comp. Stat. 1945 sec. 66-119; N.Y. Real Prop. Law par. 290(3) like Wyo. Comp. Stat. 1945 sec. 66-124; N.Y. Real Prop. Law par. 294 like Wyo. Comp. Stat. 1945 sec. 66-127.
 16. *Boyd v. Schlesinger*, 59 N.Y. 301 (1874); *Washburn v. Burnham*, 63 N.Y. 132 (1875); *Puglisi v. Belasky*, 118 Misc. 336, 193 N.Y. Supp. 357 (1922).
 17. Though the land was in Utah, the court assumed that the Utah law was the same as that of Wyoming and applied our recording statutes to determine the parties' rights.

corded first. The prior and unrecorded deed was void as to him.

On re-hearing the court said that the recording acts in most states do not require a subsequent BFP to record in order to be protected. Citing the statute which would make recording an instrument "touching any interest in lands" constructive notice,¹⁸ the court said that standing alone this might afford protection to a subsequent bona fide purchaser even if he did *not* record. The court said the statute protecting a grantee who records a "conveyance"¹⁹ did not apply to the executory contract because the statute defining conveyance excluded it. Instead, the other statute requiring the recording of certain instruments making the record notice²⁰ could be held applicable so as to protect such a vendee.

This conclusion was based upon the presumption that the legislature did not wish to leave a purchaser in good faith and for a valuable consideration under an executory contract unprotected.

The court said that Hawkins was protected because he "recorded" and indicated in dictum that he might have been protected even if he'd not recorded or gone into possession. The court went on to say that open, visible, and exclusive possession is ordinarily held to take the place of registration.²¹

In holding possession to be the equivalent of registration the court has in effect said that recording, instead of possession, by the subsequent bona fide purchaser under an executory contract, would serve to make void as to him an unrecorded conveyance to a prior grantee and protect such purchaser under the "race-notice" statute.²²

The remaining question left unanswered is whether or not the same recording will also give notice to a subsequent vendee or grantee. As pointed out, it has been decided in New York in a series of decisions that record of a contract would afford no notice, but language of the Wyoming court indicates otherwise. It was said that if the statute which provides constructive notice to a subsequent grantee as a result of recording a ". . . deed, mortgage, instrument or conveyance touching any interest in lands . . ."²³ stood alone a vendee under a land contract would be protected against a prior unrecorded conveyance, as well as against a subsequent conveyance if the vendee under the contract did record. Chief Justice Blume then said that since the definition of conveyance excluded the

18. Wyo. Comp. Stat. 1945 sec. 66-116. See note 2 *supra*.

19. Wyo. Comp. Stat. 1945 sec. 66-119. See note 2 *supra*.

20. Wyo. Comp. Stat. 1945 sec. 66-116. See note 1 *supra*.

21. Citing 27 R.C.L. 719: "It seems to be generally considered that possession under an unrecorded deed or contract of purchase is equivalent to registration of the deed or contract, and affords the same protection."

22. Wyo. Comp. Stat. 1945 sec. 66-119. See note 2 *supra*.

23. Wyo. Comp. Stat. 1945 sec. 66-116. See note 1 *supra*.

land contract, the broader statute should be the applicable one. Though the reasoning of the decision is open to criticism (since it was said not only that possession serves as well as recording for purposes of notice to a subsequent grantee but also that possession is effective to cut off a prior grantee who had not recorded) the court has reached a desirable result.

The decision in *Hawkins v. Stoffers* would have the effect of making any subsequent purchaser of land previously contracted for, when the contract is recorded, a purchaser with notice.

The case extends the scope of the recording statutes to the buyer under a land contract and reflects an underlying conflict in policy which seems to be a conflict between a liberal or a strict view of the statutes. The argument for granting protection was summed up by the Missouri court when it pointed out that equitable title passes by the contract and said that there is no real difference in principle between a conveyance of legal title and equitable title justifying different treatment. Those jurisdictions which consider a contract a "conveyance" explain this result by saying that though the recording statutes can only apply to those instruments which are permitted to be recorded, the statute is favored and therefore a liberal view should be taken of what was meant to be subject to the provisions of the statute.

Those courts which refuse to classify the contract as a conveyance logically explain that just a chose in action arises, enforceable in an action on that contract, and that there is no transfer of title within the contemplation of the recording statutes. This may very well have been the same reasoning which lay behind the enactment of the statute defining conveyance, now circumvented by the court, and if so it would appear that the legislature did intend to leave such a vendee unprotected by the recording laws.

To resolve any ambiguities or doubts which have arisen it is recommended that the Wyoming statute be changed. This would shoo the crows and doubts away for good. New York has altered its law²⁸ so as to give unqualified protection to the first purchaser under a contract who records, and this same sort of revision is recommended by this as well as by other law review writers.²⁹

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24. *Digman v. McCollum*, 47 Mo. 372 (1871).
 25. *Keese v. Beardsley*, 190 Cal. 465, 213 Pac. 500, 26 A.L.R. 1538 (1923).
 26. *Standard Oil Co. v. Moon*, 34 Ohio App. 123, 170 N.E. 368 (1930).
 27. *Wyo. Comp. Stat.* 1945 sec. 66-124. See note 3 *supra*.
 28. *N.Y. Real Prop. Law*, par. 294 (1941 Pocket Supp.)
 29. See: 29 U. Cin. L. Rev. 140 (1950); 24 Ore. L. Rev. 289 (1945); 15 Brooklyn L. Rev. 312 (1949).