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Wyoming Recording Statutes and the Bankruptcy Act

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caliber, it would be preferable to make this board a part of the judicial system of the state. If, for example, the appointments were left up to the District Judges, it is likely that a highly qualified group of technicians would be assured. From the standpoint of both the system and the individual member of the probation staff, their tenure should be dependent upon their ability, rather than on political affiliations.

FRANK A. ROLICH

WYOMING RECORDING STATUTES AND THE BANKRUPTCY ACT

The Bankruptcy Act makes provision for transfer of the bankrupt's nonexempt property to the trustee in bankruptcy, title vesting "as of the date of the filing of the petition in bankruptcy."¹ After bankruptcy and prior to adjudication or before a receiver takes possession of the bankrupt's property, a transfer of the property by the bankrupt to a purchaser acting in good faith and paying fair value will be protected under Section 70 (d) of the Bankruptcy Act. Real property, excepted from this section, is governed by Section 21 (g) introduced in the Chandler Amendments to the Bankruptcy Act.

Section 21 (g) allows the trustee in bankruptcy to record in every county wherein the bankrupt owns or has an interest in real property either a certified copy of the petition with schedules omitted, the decree of adjudication, or the order approving the trustee's bond. Further, unless the trustee records in accordance with this section *in any state whose laws authorize such recording*, the commencement of proceedings under the Act will not be constructive notice to, or affect the title of, any subsequent purchaser without actual notice of the proceedings in bankruptcy who renders fair equivalent value.

Somewhat similar provisions² prior to the revision in 1938, though more limited, provided for recording by the trustee of a certified copy of the order approving his bond.³ Compliance constituted notice equivalent to the bankrupt's giving the trustee a deed to the property⁴ and it being recorded in the county in which the property was situated. Under those provisions, a purchaser in good faith from the bankrupt and giving value acquired title valid as against the trustee, where no certified copy of the order approving the trustee's bond was filed.⁵ Such recordation was held to be directory only, not mandatory, and trustee's failure to observe those provisions did not prevent passage of title of bankrupt's property to him.⁶ An adjudication in bankruptcy was not of itself notice to incumbrancers

1. 11 U. S. C., sec. 110 (1938).

2. 11 U. S. C., sec. 44 (c) (1898).

3. 11 U. S. C., sec. 21 (e) (1898).

4. *Ibid.*

5. *Vromback v. Willvra*, 331 Ill. 508, 163 N.E. 340, 17 Am. B. R. (N.S.) 122 (1928).

6. *Hull v. Burr*, 55 So. 832, 61 Fla. 625, 26 Am. B. R. 897 (1911).

or purchasers of the property of the bankrupt.⁷ Since notice also depends on recording, under the Bankruptcy Act as it now stands, it would seem on principle that a failure to record by the trustee should allow an innocent purchaser for value, who acquired his interest during the period of non-filing, to hold a valid title.⁸ But doubt is cast on this by the proviso limiting the effect of recording to those states whose laws permit such recording.

Do Wyoming statutes⁹ authorize the trustee in bankruptcy to record those instruments enumerated by the Bankruptcy Act, thus affording protection to those who may purchase from a person then in bankruptcy? Chapter 66 of the Wyoming Compiled Statutes (1945) lists documents entitled to be recorded so as to afford notice. Only those documents named in the recording act are admitted to record,¹⁰ to provide notice for subsequent purchasers. The character of the instrument rather than its name or title determines the necessity for recording.¹¹ While a liberal construction is generally given these statutes by the courts to aid in the prevention of fraud,¹² still, instruments which do not come within the classification set out by the recording act are not entitled to record.¹³ The words "deed" and "conveyance" as used in the recording statutes have well-defined meanings today.¹⁴ It has been said that a voluntary act of the transferor is necessary to constitute a conveyance.¹⁵ Because the alienation under the Bankruptcy Act is involuntary on the part of the bankrupt,¹⁶ it therefore may be said that the trustee cannot record under these words. Also, the principle of *ejusdem generis*,¹⁷ if applied to the recording statutes would admit to record only those writings in the nature of a deed or conveyance. However, if recordation is possible at all, it perhaps might come under the general term "instrument in writing."¹⁸

An "instrument in writing" is generally defined as a document or writing which gives formal expression to a legal act or agreement for the purpose of creating, securing, modifying or terminating a right.¹⁹ The phrase includes writings of legal import such as simple contracts, deeds wills, bonds, and mortgages.²⁰ In reference to a statute similar to the Wyoming statute under discussion, it was held²¹ that a judgment is not an instrument in writing. While it could be advocated that the phrase "instru-

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7. Beach v. Faust, 2 Cal. 2d 290, 40 P. 2d 822 (1935).
 8. 4 Remington on Bankruptcy, sec. 1953.50 (4th ed. 1939).
 9. Wyo. Comp. Stat., 1945, Chapter 66.
 10. Rehm v. Reilly, 161 Wash. 418, 297 Pac. 147 (1931).
 11. Ford Motor Co. v. National Bond & Investment Co., 294 Ill. App. 585, 14 N.E. 2d 306 (1938).
 12. Hawkins v. Stoffer, 40 Wyo. 226, 276 Pac. 452 (1924).
 13. Leatherman v. Schwab, 98 Fla. 885, 124 So. 459 (1929).
 14. Reed v. Hazelton, 37 Kan., 321, 15 Pac. 177 (1887).
 15. Merriam v. Wimpfheimer, 25 F. Supp. 405 (S. D. N. Y. 1938).
 16. See note 2, supra.
 17. Cutshaw v. Denver, 19 Colo. App. 341, 75 Pac. 22 (1904).
 18. Wyo Comp. Stat., 1945, secs. 66-114 to 66-120.
 19. Moore v. Diamond Dry Goods Co., 47 Ariz. 128, 54 Pac. 2d 553 (1936).
 20. Gardenas v. Miller, 108 Cal. 250, 39 Pac. 783, 49 Am. St. Rep. 84 (1895).
 21. Davis v. Perry, 120 Cal. App. 670, 8 Pac. 2d 514 (1932).

ment in writing" may encompass those documents the trustee seeks to record, it is felt that in the face of decision and definition, such argument is not tenable. Were the documents to be admitted under such a provision, it would seem that the able drawers of the revised Bankruptcy Act would have omitted the expression "in any state whose laws authorize" the recording. As the Recording Act now exists in Wyoming, presumably the trustee is unable to record those documents as to evidence the vesting of title in himself. It is interesting to note that some thirteen states including Colorado,²² New York,²³ and Florida²⁴ have taken advantage of Section 21 (g) of the Bankruptcy Act and enacted legislation expressly enabling the trustee in bankruptcy to record.

Construing Wyoming Recording laws as not permitting the trustee in bankruptcy to record his title to the bankrupt's property, what possible consequences may be anticipated? P purchases property located in Wyoming from the bankrupt B without knowing of the proceedings in bankruptcy in a sister state against B. P pays fair equivalent value for the property. The trustee, after appointment, proceeds against P to obtain and dispose of the property for the benefit of Bs creditors. At common law the recording of documents such as deeds, conveyances, or other instruments affecting interests in real property was not provided for.²⁵ Priority of right being priority in time, the interest conveyed by the grantor to his grantee could not be affected by a subsequent conveyance by the same grantor to another. Since the recording statutes do not provide for the trustee's recording, it would seem that the common law is applicable, and therefore, as the trustee's title relates back to the date of the filing of the petition in bankruptcy, his title would be superior to that of the subsequent purchaser P.

On the other hand, it is entirely possible that the state court might hold the trustee's unrecorded title void as to subsequent purchasers, though there is no provision for recording by state law. The state is the ultimate proprietor of all lands within its boundaries and possesses the power to regulate the transfer and acquisition of real property.²⁶ The first taker of legal title is required by state law to record in order to have title valid as against a subsequent purchaser.²⁷ But where the trustee seeks to record and cannot because there is no authorization for this recording, it is possible that a constitutional question might arise. Article 6, paragraph 2 of the Constitution of the United States provides that acts of Congress passed pursuant to the Constitution are the supreme law of the land. Article I, Section 8, empowers Congress to enact uniform laws on Bankruptcy. Where a superior power is lodged in the Federal Government, the state may not

22. Colorado, 39 Session Laws, c. 77 (1939).

23. New York, 41 Session Laws, c. 90 (1941).

24. Florida, 1946 Laws, c. 997, amended 1947 c. 86.

25. *Epps v. McCollum Realty Co.*, 139 S. C. 481, 138 S. E. 297 (1927).

26. *People ex rel. Kuntzman v. Shinshu Nagano*, 389 Ill. 31, 59 N.E. 2d 96 (1945).

27. See note 10, *supra*.

exercise concurrent or independent power.²⁸ Thus, if state law comes into conflict with an act of Congress, the state law is superseded to the extent that the two are in conflict.²⁹ Section 21 (g) of the Act as previously noted gives sanction to the trustee to record his documents of title in those states authorizing this recording. The trustee, because of the Bankruptcy Act, would be the first taker of legal title. If the trustee cannot record because of lack of authorization or failure of the statute on recording to allow the recording, this would seem to impede the operation of the Bankruptcy Act. Therefore, it might be argued that as a matter of Federal law the trustee could take better title than that of a subsequent purchaser from the bankrupt who had recorded according to state law.

CONCLUSION

Section 21 (g) of the Bankruptcy Act was classified in the House Reports³⁰ under the general heading of "Amendments to Improve the Procedural Sections of the Act" and subheading "Safeguarding of Real Estate Title." The section was added to prevent the possibilities of fraud and its consequences on innocent purchasers from the bankrupt. In a state not allowing the recording by the trustee in bankruptcy, perhaps the legislative intent of the Bankruptcy Act is not met. Needless litigation may arise, creating unnecessary expense and wasting the court's very valuable time. Further, the attorney who must examine the title to real property is unessentially burdened. He must search the Federal District where the property is located and those Districts in which the grantors in the chain of title were domiciled, resided or had their principal place of business in order to ascertain if any of those grantors had been adjudicated a bankrupt.³¹

These obnoxious problems can be eliminated by state legislation specifically enabling the trustee in bankruptcy to record his title as provided for by the Bankruptcy Act. While it is conceivable that the courts themselves may construe the recording laws either as being qualified by the Bankruptcy Act or broad enough to admit such recording, in the light of the many decisions concerning construction of the recording statutes, this would be a major digression.

DONALD R. COLLINS

WILL SUBSEQUENT APPRECIATION SAVE PROMOTER HIS SECRET PROFIT

The Massachusetts Rule denies a corporation the power to consent to promoters' secret profits while the corporation is under the exclusive control of the promoters and the plan contemplates procuring subsequent

28. *Houston v. More*, 5 Wheat. (U.S.) 1, 5 L. Ed. 19 (1820).

29. *People v. Erie Railroad Co.*, 198 N. Y. 369, 91 N. E. 849 (1910).

30. H. R. 1409 on H. R. 8046, 75th Congress, 1st Session (1937).

31. *Patton on Titles*, sec. 355.