
January 1949

Rights of Creditors in Property of Debtors Subject to Prior Unrecorded Conveyances

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Recommended Citation

E. W. Parkhill, Note, *Rights of Creditors in Property of Debtors Subject to Prior Unrecorded Conveyances*, 3 Sw L.J. 91 (1949)

<https://scholar.smu.edu/smulr/vol3/iss1/5>

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The *Chevalier* case does not set forth a policy that full performance will never withdraw a personal service contract from the Statute, it merely qualifies the rule adopted by the American Law Institute³⁰ in order to assure that the statute of frauds will be applied to accomplish its purpose, unless the performance is evidence of the existence of the alleged contract. This will go far to prevent fraudulent claims under a nonexistent contract, and at the same time will rarely result in any great hardship on employees because in most cases the performance will refer to the alleged contract. For these reasons it seems unlikely that the Court will fulfill Justice Simpson's desire that *Paschall v. Anderson* be overruled. At least no such intent was shown by the Court when it stated that: "A view contrary to *Paschall v. Anderson* has, it is true, been taken by some authorities such as the American Law Institute. . . , but we nevertheless regard the case as sound on principal within its self-imposed limits."³¹

Joe L.Randle.

RIGHTS OF CREDITORS IN PROPERTY OF DEBTORS SUBJECT TO PRIOR UNRECORDED CONVEYANCES

THE Texas recording statute states that "all . . . conveyances . . . of any land . . . and all deeds of trust and mortgages shall be void *as to all creditors* . . . unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law";¹ and the Texas statute of conveyances provides that conveyances of land "shall not be good and effectual . . . *against any creditor*, unless such conveyance" shall have been recorded as required by law.² (Italics supplied.) Questions have frequently

³⁰ RESTATEMENT, CONTRACTS § 198 Illustration 9 (1932).

³¹ ___ Tex. ___, 213 S. W. (2d) 530, 533 (1948).

¹ TEX. REV. CIV. STAT. ANN. (Vernon, 1925) Art. 6627.

² *Id.* Art. 1289.

arisen in the courts as to the meaning of the word "creditors" in these statutes with respect to property of debtors subject to prior unrecorded conveyances.

If the language of the statutes were applied literally, unrecorded prior conveyances of a debtor would be void as to his creditors irrespective of whether they had reduced their claims to judgment, had recorded their abstracts of judgment, or had levied upon the land. It was early established in Texas, however, that the word "creditors" as used in these statutes, refers only to "lien creditors." In *Grace v. Wade*³ the Supreme Court stated:

"It is scarcely necessary to say that our courts, like those of other states where statutes on this subject extend to creditors, have held that they only apply to and protect creditors who have acquired some character of lien upon or interest in the land."⁴

This construction of the statutes has been consistently followed and applied by the courts.

Texas statutes relating to the recording of abstracts of judgment provide that judgments which have been recorded and indexed shall, from the date of such record and index, "operate as a lien upon all of the real estate of the defendant situated in the county where such record and index are made, and upon all real estate which the defendant may thereafter acquire, situated in said county."⁵ The question has arisen whether the recording of an abstract of judgment would have the effect of giving the creditor such lien on the property of the debtor as would defeat the rights of a prior grantee of the debtor who had failed to record. In *Hooker v. Eaken*,⁶ decided by the Court of Civil Appeals, the conveyance was made by the debtor prior to judgment obtained by the creditor, and the deed was recorded after rendition and recording of the judgment but prior to levy upon the property. The Court

³ *Grace v. Wade*, 45 Tex. 522 (1876).

⁴ *Linn v. Le Compte*, 47 Tex. 440 (1877); See 36 TEX. JUR. § 97 (1935).

⁵ TEX. REV. CIV. STAT. ANN. (Vernon, 1925), Art. 5449.

⁶ *Hooker v. Eaken*, 176 S. W. 80 (Tex. Civ. App. 1915) *writ of error refused*.

held that, notwithstanding the abstract of judgment statute, the grantees's rights in the property were superior to those of the judgment creditor. The Court pointed out that the statute gave the judgment creditor a lien only upon real estate then owned or afterwards acquired by the judgment debtor, that at the time the abstract of judgment was recorded the debtor, by reason of his prior conveyance, even though unrecorded, did not actually own the land, and that the judgment creditor could not, therefore, obtain a lien upon such land merely by recording his abstract of judgment. The Supreme Court adopted the rule of this case in *Lewis v. San Antonio Belt and Terminal Ry.*,⁷ and declared that the rights of the grantee, whose deed is unrecorded, are superior to a subsequent judgment creditor who has recorded his abstract of judgment because the rights of such grantee are beyond the "contemplation of the statutes of registration respecting creditors."⁸ In both of these cases the courts stated by way of dictum that if the judgment creditor had actually levied execution on the property without actual or constructive notice of the prior conveyance, he would have prevailed over the grantee, because upon the levy a lien in favor of the creditor would have arisen, which lien would be given the protection of the recording statutes. Under the rule of these cases, therefore, judgment creditors may protect themselves against the possibility of prior unrecorded conveyances of their debtors only by levying execution upon specific property of the judgment debtor and not by mere recordation of the abstract of judgment. If the conveyance was made *after* the recording of the abstract of judgment, the judgment creditor would, of course, prevail under the general provisions of the statutes pertaining to the recording of judgments since, in such event, the property would *actually* have been owned by the debtor at the time the judgment was recorded.⁹

⁷ *Lewis v. San Antonio Belt and Terminal Ry.*, 208 S. W. 552 (Tex. Civ. App. 1919) *writ of error refused*.

⁸ *Id.* at 553.

⁹ *Baker v. West*, 36 S. W. (2d) 695, 120 Tex. 113 (1914); See 36 TEX. JUR. § 96 (1935).

A collateral point is whether the recording of the prior conveyance after levy but prior to sale will defeat the title of the purchaser at the sheriff's sale. A 1948 decision of the Court of Civil Appeals answered this question in the negative.¹⁰ When a judgment creditor levies execution upon the property, the purchaser at the foreclosure sale obtains a title which is superior to that of a third person who held under an unrecorded deed at the time of the levy, and it makes no difference whether the purchaser at the sale had actual notice of the unrecorded deed or had constructive notice (deed recorded after lien attached), because the purchaser obtains the rights of the lien creditor. Unrecorded conveyances are void as to all lien creditors and therefore the lien creditor has the right to have the property sold in satisfaction of his judgment irrespective of the knowledge acquired after levy of prior unrecorded conveyances of the property made by the judgment debtor.

Judicial construction of the Texas conveyance, recording, and abstract of judgment statutes leads to the following conclusions:

(a) The only creditors protected against prior unrecorded conveyances of their debtors are lien creditors.

(b) The recording of an abstract of judgment does not protect a judgment creditor against prior unrecorded conveyances of debtor.

(c) The levy of execution by a judgment creditor upon property of his debtor will enable the judgment creditor to prevail against prior unrecorded conveyances of the property by his debtor.

(d) A prior conveyance of a debtor, recorded after levy of execution by a judgment creditor, but before the sheriff's sale, will not defeat the superior lien of the judgment creditor acquired by levy upon the property.

Since a judgment creditor may not rely upon the recording of his abstract of judgment to protect himself against the possibility of prior unrecorded conveyances made by his debtor, he should