Washington Law Review

Volume 20 | Number 2

4-1-1945

Acknowledgment—Duty of Auditor to Record—Curative Statute—Statutory Construction; Gifts—Time of Taking Effect—Gift of United States Bonds

M. B. K.

W. A. Z.

contract they intended to have, if it does not violate public policy.[31] By striking the inconsistent remedy the court gives effect to the lawful intent of the parties, whereas construing the purported conditional sales contract as a chattel mortgage is to overlook the declared intent and to invite a new contract.

LUCILE LOMEN.

[31] For a collection of cases see 92 A. L. R. 305.

RECENT CASES

ACKNOWLEDGMENT—DUTY OF AUDITOR TO RECORD—CURATIVE STATUTE—STATUTORY CONSTRUCTION. In 1916, *A*, *B*, and *C* purchased a parcel of real estate. Title was taken by *C* for convenience. *C* executed a "declaration of trust" reciting that he held the property for the benefit of *A*, *B* and himself. The instrument was signed but not acknowledged. *C* died in 1942. Thereafter *A* and *B* presented the instrument to the county auditor, tendered the required fee, and requested that it be recorded. The auditor refused to accept it on the ground that it was not acknowledged as required by statute. *A* and *B* applied for a writ of mandamus to compel recordation. Auditor's demurrer was sustained and *A* and *B* appealed. *Held:* The county auditor may not be compelled to record an instrument which fails to attain the statutory requirement as to acknowledgment. *Eggert v. Ford*, 21 Wn.(2d) 152, 150 P.(2d) 719 (1944).

The statutes applicable to the question raised are as follows:

REM. REV. STAT. § 10596: "A conveyance of real property, when *acknowledged* by the person executing the same (the acknowledgment being certified as required by law), *may* be recorded in the office of the recording officer of the county where the property is situated. . . ." (Italics supplied.)

REM. REV. STAT. § 10596-10: "A recording officer, upon payment or tender to him of the lawful fees therefor, shall record in his office any instrument authorized or permitted by this act to be so recorded."

REM. REV. STAT. § 10599: "Every instrument in writing purporting to convey or encumber real estate situated in this state, or any interest therein, which has been recorded in the auditor's office of the county in which such real estate is situated, although such instrument may not have been executed and acknowledged, in accordance with the law in force at the time of its execution, shall impart the same notice to third persons, from the date of recording, as if the instrument had been executed, acknowledged, and recorded, in accordance with the laws regulating the execution, acknowledgment and recording of such instrument then in force."

REM. REV. STAT. § 10601: "He must, upon payment of his fees for the same, record separately in large and well-bound books:

"(1) Deeds, grants and transfers of real property, mortgages and releases of mortgages of real estate, powers of attorney to convey real estate, and leases which have been acknowledged or proved: . . .;

> (7) All such other papers or writings as are required by law to be recorded and such as are required by law to be filed if requested so to do by the party filing the same."

The appellants contended that the county auditor must record any instrument presented to him, that this duty is mandatory under REM. REV. STAT. § 10601, and that while REM. REV. STAT. § 10596-2 sets out what *may* be recorded *when acknowledged,* there is no statutory inhibition against recording an unacknowledged instrument, and finally, when once recorded but unacknowledged, REM. REV. STAT. § 10599 would operate to make the unacknowledged instrument constructive notice to third parties, thus curing the lack of acknowledgement.

This particular question, whether a keeper of records may deny recordation to such an extrinsically imperfect instrument has seldom been raised. The case of *People v. Fromme,* 35 App. Div. 459, 54 N. Y. S. 833 (1898), wherein a recording officer was mandamused to record an instrument affecting title to real propetry, is distinguishable from the instant case as the only defect in the instrument, apparently, was a lack of sufficient stamps as required by the U. S. Revenue Act of 1898, 30 STAT. 448. There being nothing in the New York statutes requiring revenue stamps makes it clear the recorder was attempting to exercise a power not his as a recorder.

The only case uncovered by the Washington Supreme Court, and this writer as well, which is in point is *People v. Donegan,* 226 N. Y. 84, 123 N.E. 71 (1919). There a deed was executed by four grantors, one of them failing to meet the statutory requirements as to acknowledgment. The court allowed the instrument to be recorded but held the record would not as to subsequent purchasers be notice in favor of him whose acknowledgment was defective, and had he been the sole grantor the instrument could not have been lawfully recorded.

Statutes require acknowledgment chiefly to afford proof of the due execution of the instrument sufficient to authorize the officer to record it. 7 Thompson on *Real Property* (2d ed. 1940) § 3991. To dispense with acknowledgments would simplify casting a cloud on anyone's title by having recorded an instrument purporting to be a *bona fide* conveyance from the grantor whose name merely appeared thereon but whose acknowledgment was lacking.

REM. REV. STAT. § 10596-2 provides when a conveyance of real property is acknowledged and said acknowledgment is certified as required by law it "may" be recorded. While the word "may" is generally permissive, when a fair interpretation of the statute requires it, when certain prerequisite conditions must exist or be performed before "other powers can be exercised," or when the prerequisites are designed to protect the citizen and his property rights, the statute is to be regarded as mandatory. Black on *Interpretation of Laws* (2d ed. 1911) p. 530.

Although REM. REV. STAT. § 10601 is by its terms mandatory, it seems reasonable to construe it as such only to the extent that there is compliance with REM. REV. STAT. § 10596-2 which provides for acknowledgment, or REM. REV. STAT. § 10551 which requires as an element of a "deed" that the instrument be acknowledged. To regard REM. REV. STAT. § 10599, then, as enlarging REM. REV. STAT. § 10596-2 would in effect make legal nullities of the parts of the latter, REM. REV. STAT. § 10601, and REM. REV. STAT. § 10551 which specifically require acknowledgment.

A vigorous dissent by three of the judges in the principal case raised the objection that to allow the auditor to exercise any discretionary power would make for wide disparities in recording practice from one county to another and allow recording to be at the caprice and whim of an individual. It is submitted that this is not too persuasive an objection because the county auditor is charged with knowledge of the statutes pertaining to his official duties, and in rejecting an unacknowledged instrument is merely functioning in a ministerial capacity in conformity with the statutes. While a view in support of the minority opinion was taken in *Rehm v. Riley*, 161 Wash. 418, 424, 297 Pac. 147, 149, 74 A. L. R. 350, 355 (1931), by way of dictum, the instant case resolves the point. On the basis of this dictum one textwriter lists Washington as adopting the minority view which does not make acknowledgment a prerequisite to recordation. 8 Thompson on *Real Property* (2d ed. 1940) § 4343 n. 71, § 4355 n. 30.

An interesting collateral question assumed by both appellant and respondent in their briefs and not passed upon squarely by the court is the proper construction of REM. REV. STAT. § 10599. This statute as it presently appears is a reenactment of § 2323 of the Code of 1881, 1 H. C. § 1440. The latter repealed by implication an act entitled "Curing Defective Instruments" of WASH. TERR. LAWS 1873, p. 481. The joint committee on Revision of Laws introduced the 1929 legislation (Sen. Bill No. 11), Wash. Laws 1929, c. 33, § 8, and commensurate with its avowed purpose of merely rewording existing statutes to embrace prior judicial interpretation, made no appreciable change in the content or meaning of § 2323 of the CODE OF 1881. Peculiarly enough, there is no known case wherein a deed or other form of conveyance or encumbrance has been recorded subsequent to 1881 whereby the court has had to pass squarely on the proper construction to be given this statute.

It is further submitted that the legislative history of the statute gives rise to two alternative implications: (1) § 2323 of the CODE OF 1881 and the Act of 1929 were both operative restrospectively only, and another curative act must be passed to effectuate the recording of defective instruments from 1929 to date; or (2) § 2323 of the CODE OF 1881, which superseded the curative Act of 1873, was intended to be prospective in scope, and hence all defective instruments recorded subsequent to 1881 are as valid now as if executed properly in the first instance.

The latter view seems more logical when it is remembered that forty-eight years have, in effect, passed since there has been a curative act, as the 1929 enactment was merely a restatement of § 2323 of the CODE OF 1881. It seems only reasonable, then, when one considers the purpose of the Joint Committee on Revision of Laws that, desite the fact REM. REV. STAT. § 10599, *supra*, was enacted two years later in point of time than the general recording act, REM. REV. STAT § 10596-2, *supra*, the former should not be regarded as an enlargement upon the latter.

The dicta in *Davidson v. National Can Co.*, 150 Wash. 370, 376, 273 Pac. 185, 187 (1928), and in the instant case also, seem to indicate that when REM. REV. STAT. § 10599 is squarely before the court for construction it will be regarded as having been presently operative since 1881. M. B. K.

GIFTS—TIME OF TAKING EFFECT—GIFT OF UNITED STATES BONDS. In 1940-41, *A* purchased two groups of United States Bonds—series D and E. The series D bonds were payable to *B* after ten years. The series E bonds were identical but the proceeds would revert to *A* on the death of *B*. No

physical delivery of the bonds was made before *A* died in 1942. The bonds were excluded from the estate of A. In this action the State Inheritance Tax Division contends: (1) that the gift of the bonds was not complete and should be part of *A's* estate and subject to inheritance tax; (2) that the decedent had a taxable interest in the series E bonds even if the gift were complete, under REM. REV. STAT. (supp. 1937) § 11201, PPC(1943) 7051. *Held:* (1) that the gift of the bonds was complete; (2) that decedent's interest in the series E bonds was not taxable. *Inheritance Tax Division v. Chamberlin Estate,* 121 Wash. Dec. 756, 153 P.(2d) 305 (1944).

After finding that *A* actually intended to make a gift of the money represented by the bonds, the Supreme Court goes on to construe their wording to constitute an actual relinquishment by *A* of all rights and title to the proceeds. Therefore *A's* physical possession of the bonds was meaningless in so far as it tended to deny a completed gift to *B.* The gift was complete at the time the money was paid to the United States and the bonds were issued. In considering the importance of the estate's reversionary interest in the series E bonds, the Court again takes judicial notice of the probability that a child will outlive an adult. For previous judicial acknowledgment on that point see *In re Eaton's Estate,* 170 Wash. 280, 16 P.(2d) 433 (1932). As a result they find that that interest does not fall within our statute, REM. REV. STAT. (supp. 1939) § 11206, PPC(1943) § 7507, which in effect states that all reversionary interests included in an estate are taxed on the basis of probabilities rather than possibilities.

The principal case is the latest step toward re-establishing the status of Baby Bonds—or War Savings Bonds, as they are now known. That status was rendered uncertain by the principle laid down in *Decker v. Fowler,* 199 Wash. 549, 92 P.(2d) 254, 131 A. L. R. 961 (1939), that the gift to the beneficiary of series E bonds purchased by the decedent was not complete and therefore the proceeds became part of the decedent's estate. That case is criticized in Comment (1939) 14 Wash. Law Rev. 312, which suggests that an opposite result—and one more harmonious with existing law and the intent of the purchaser of the bonds—could have been reached if a contract donee-beneficiary theory were used. The statute, REM. REV. STAT. (supp. 1943) §§ 11548-60, 61, passed by the Washington Legislature to ameliorate the effect of *Decker v. Fowler, supra,* is discussed in Comment (1943) 18 WASH. L. REV. 162. Although the principal case offered another opportunity to clarify our law on donee-beneficiaries, the Court has again see fit to remain silent on the subject. W. A. Z.