DEVELOPMENTS IN VERMONT LAW

HANER v. BRUCE: FAILURE TO ACCORD TO THE PRESENT REALITIES OF THE REAL ESTATE RECORDING SYSTEM

INTRODUCTION

The Vermont Supreme Court recently held, in a three-to-two decision, that a misindexed real estate attachment was valid against a subsequent purchaser who had no actual knowledge of the attachment.[1] In *Haner v. Bruce*, the court found "that the proper recording of an instrument . . . served as constructive notice[2] to the public, notwithstanding clerical errors in indexing."[3] Thus, the *Haner* court implicitly held that the notation of a property interest in the general index,[4] which a town clerk is required by statute to maintain, is not essential to perfecting an interest in real estate. The practical effect of this decision is that a title searcher is not justified in relying solely upon the index. Instead, a title searcher must undertake the onerous task of searching all records affecting real estate in order to attain actual knowledge of that which the law will otherwise impute.[5]

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1. Haner v. Bruce, 146 Vt. 262, 262, 499 A.2d 792, 792 (1985). Although a prior attachment was the subject of dispute in *Haner*, based upon the court's reasoning, the decision would have been the same whether the prior interest was a deed, a mortgage, an encumbrance, or any other recordable interest in real estate. This note will use "prior interest" to denote any recordable interest in real estate that could adversely affect a subsequent purchaser's interest.

2. Constructive notice is defined as "[s]uch notice as is implied or imputed by law, as in the case of notice of documents which have been recorded in the appropriate registry of deeds or probate." BLACK'S LAW DICTIONARY 284 (5th ed. 1979). The law imputes knowledge of properly recorded interests to all persons, whether or not they actually find the instrument. *See* 6A R. POWELL, POWELL ON REAL PROPERTY ¶ 904[3] (1986); Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231, 238 (1962). The concept of constructive notice lies at the heart of the problem that is the subject of this note.

3. *Haner*, 146 Vt. at 264, 499 A.2d at 793.

4. *See* VT. STAT. ANN. tit. 24, § 1161 (1975 & Supp. 1986).

5. This assertion is the practical result of *Haner*, if that decision is carried to its logical conclusion. However, it is common practice for a lawyer in Vermont to rely solely on the index when conducting a title search. Telephone interview with Norman Cohen, Esquire (Mar. 19, 1987). Any loss caused by a prior interest that is recorded but not indexed is absorbed by title insurance companies, provided that title insurance is purchased. *Id.* There is a distinct possibility that the question whether indexing is essential to making a record will arise in the context of a legal malpractice suit, brought by a subsequent purchaser who suffers a loss as a result of being uninsured against misindexed interests.

The purpose of this note is to point out the shortcomings of imposing constructive notice of property interests that are not indexed upon subsequent purchasers. Section I briefly reviews the development of and purposes behind indexing statutes. Section II looks at Vermont case law regarding indexing and critiques *Haner v. Bruce* in terms of both its practical effect and for its reliance on outdated case law. This note concludes that the general index should be regarded as an essential part of the record to better serve the purposes and policies that underlie recording laws.

I. Overview of Indexing Statutes

The earliest recording acts were established to serve two purposes: to establish a public record and to protect innocent purchasers from fraudulent conveyances.[6] The major beneficiary of these acts were subsequent purchasers,[7] who could safely determine the status of title to real estate by searching the record. However, subsequent purchasers could not protect themselves from competing interests by simply remaining ignorant of the contents of the record. "When an instrument is recorded, the record gives constructive notice of its existence" to all subsequent purchasers.[8]

When state legislatures enacted the first recording statutes, land transactions occurred at a "leisurely pace."[9] Because all land records could be searched without much trouble, it was fair to impose constructive notice of all properly recorded interests on subsequent purchasers. However, as the types of recordable interests and the number of land transactions increased, the recording system proved unsatisfactory.[10]

In response, many state legislatures attempted to simplify title searches by providing for the indexing of recorded property interests.[11] The enactment of indexing statutes gives rise to the question of whether the index is an essential part of the record and, if

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6. *See* IV A. Casner, American Law of Property § 17.5, at 535 (1952); 6A R. Powell, *supra* note 2, ¶ 904[3].

7. *See* IV A. Casner, *supra* note 6, § 17.5, at 535; Johnson, *supra* note 2, at 233.

8. Johnson, *supra* note 2, at 238. For a definition of constructive notice, see *supra* note 2.

9. *See* 8 G. Thompson, Thompson on Real Property § 4306, at 320 (1963) ("The concept of recordation as it originated . . . contemplated a minimum of transactions, and of types of instruments to be recorded together with a more leisurely pace of life.").

10. *Id.*

11. *Id.*

so, whether failure to index an interest in real estate negates constructive notice of that interest to the subsequent purchaser.

These questions are by no means novel. State courts that have addressed these questions can be divided into two categories: those that hold that the index is an essential part of the record, and those that do not.[12] States that fall into the former category hold that indexing must be regarded as the final step in recording, and failure to index will not charge subsequent purchasers with constructive notice.[13] One state that adheres to this view is Iowa.[14] Iowa courts look to the "whole statutory scheme, [and] not just the filing statute," to determine the proper role of indexing.[15] The Iowa courts also believe that the filer (prior purchaser) should bear the burden of an improper indexing because "he is usually the only one who can make certain it is done right."[16]

Vermont, like the majority of states, falls into the latter category.[17] Vermont's indexing statute is set out in section 1161 of title 24 which provides in part:

> A town clerk shall keep a general index of transactions affecting the title to real estate wherein he shall enter in one column, in alphabetical order, the name of the grantor to the grantee and, in a parallel column, the name of the grantee from the grantor, of every deed, conveyance, mortgage, lease or other instrument affecting the title to real estate, and each writ of attachment, notice of lien or other instrument evidencing or giving notice of an encumbrance on real estate which is filed or recorded in his office, with the name of the book or volume, and the page of record. . . .[18]

The statute further provides the proper form of the index, and also provides guidance on who is to be considered the grantor and grantee in certain situations.[19]

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12. *See generally* Annotation, *Failure Properly to Index Conveyance or Mortgage of Realty as Affecting Constructive Notice*, 63 A.L.R. 1057 (1929).

13. *Id.* at 1061-62. In the following states, the index is regarded as an essential part of the record: *Iowa*: Compiano v. Jones, 269 N.W.2d 459 (Iowa 1978); *North Carolina*: Johnson Cotton Co. v. Hobgood, 243 N.C. 227, 90 S.E.2d 541 (1955); *Pennsylvania*: Prouty v. Marshall, 225 Pa. 570, 74 A. 550 (1909); *Washington*: Richie v. Griffiths, 1 Wash. 429, 25 P. 341 (1890); *Wisconsin*: Hiles v. Atlee, 80 Wis. 219, 49 N.W. 816 (1891).

14. *See, e.g.*, Compiano v. Jones, 269 N.W.2d 459 (Iowa 1978).

15. *Compiano*, 269 N.W.2d at 462.

16. *Id.*

17. Annotation, *supra* note 12, at 1058.

18. VT. STAT. ANN. tit. 24, § 1161 (1975 & Supp. 1986).

19. *Id.*

Vermont's indexing statute is set out under the duties of the town clerk, rather than under the recording statutes.[20] This is similar to the statutory schemes of other states where courts hold that the index is not an essential part of the record.[21] Vermont courts hold that the indexing statute's purpose is solely to point out the duty of the town clerk to furnish facilities for tracing titles.[22] Vermont courts believe it is fairer to place the burden of an improper indexing on the title searcher because he can protect "himself by simply asking the clerk about search procedures and whether there are particular volumes or indexing records he should check."[23]

II. Vermont Case Law Regarding Indexing

Recently, in *Haner v. Bruce*,[24] the court was asked to decide which of two innocent parties should bear the burden caused by the failure of the town clerk to properly index an interest in real estate. In *Haner*, the plaintiff filed a writ of attachment, obtained in a pending suit, with the city clerk.[25] At that time, defendant Bruce held a contract to purchase certain property.[26] Although the clerk recorded and indexed the attachment in an "attachment book,"[27] she did not index it in the general index as required by statute.[28] Defendant Bruce subsequently purchased the property pursuant to his contract, and one day later conveyed the property to defendants David and Gloria Fosgate.[29] It was uncontroverted that the Fosgates' title search did not disclose the misindexed writ.[30]

The trial court dismissed the plaintiff's claim, recognizing the defendants as *bona fide* purchasers without notice, and observing that prospective real estate purchasers should not be required to

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20. Vermont's statutes regarding conveyancing of real estate are set out in chapter 5 of title 27. Vt. Stat. Ann. tit. 27, §§ 301-609 (1975 & Supp. 1986).

21. *See* Annotation, *supra* note 12, at 1058.

22. *See, e.g.*, Curtis v. Lyman, 24 Vt. 338 (1852); Barrett v. Prentiss, 57 Vt. 297 (1884); Haner v. Bruce, 146 Vt. 262, 499 A.2d 792 (1985).

23. *Haner*, 146 Vt. at 265, 499 A.2d at 794.

24. 146 Vt. 262, 499 A.2d 792 (1985).

25. *Id.*

26. *Id.*

27. Although the record was unclear on this point, it is safe to presume that the attachment was filed in the volume in which attachments of personalty are recorded. *See* Vt. Stat. Ann. tit. 24, § 1163 (1975).

28. *Haner*, 146 Vt. at 262-63, 499 A.2d at 792.

29. *Id.* at 263, 499 A.2d at 792.

30. *Id.*

search personal property records.[31] The trial court based its decision on the authority of *Burchard, Wilson & Co. v. Town of Fair Haven*.[32] In *Burchard*, the court was asked to decide whether a subsequent purchaser without notice took property subject to an attachment that had been lost before the clerk had a chance to record or index it.[33] The *Burchard* court held that a purchaser of an interest in real estate without notice of a prior conveyance, "who has his deed duly recorded, will hold the same against a prior grantee who has failed to have his conveyance recorded, whether through his fault or that of the town clerk."[34] The *Burchard* court based its decision on the right of the subsequent purchaser to rely upon the land records which are required by law to be kept.[35]

By finding *Burchard* applicable to the situation presented in *Haner*, the trial court implicitly determined that the general index was an essential part of the record, and that subsequent purchasers had the right to rely on the index.[36] Although the trial court reached what is arguably the proper result, the supreme court did not agree with its disposition of the issue.

Reversing the trial court, the Vermont Supreme Court cited prior case law for the proposition that, "for over a century, it has been the law of Vermont that the proper recording of an instrument has served as constructive notice to the public, notwithstanding clerical errors in indexing."[37] Aside from relying on these cases of questionable precedence,[38] the *Haner* court found support for its decision in other areas of the law. For instance, the court relied on the Uniform Simplification of Land Transfers Act, which provides that the filer need not verify the correctness of indexation after the recording officer has accepted a completed submission.[39]

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31. *Id.*

32. 48 Vt. 327 (1875).

33. *Id.* at 331.

34. *Id.* at 332.

35. *Id.*

36. The *Burchard* court followed the general rule that the filer bears the burden of errors in recording caused by the negligence of the town clerk. *See* 9 G. THOMPSON, THOMPSON ON REAL PROPERTY § 4351 (1963). Under this theory, the clerk is regarded as the agent of the filer, and the filer is charged with the duty of seeing that the instrument is properly recorded. *Id.*

37. *Haner*, 146 Vt. at 264, 499 A.2d at 793.

38. *See infra* text accompanying notes 44-62 (discussing the *Haner* court's misplaced reliance on outdated case law).

39. *Haner*, 146 Vt. at 265, 499 A.2d at 793-94 (citing Uniform Simplification of Land Transfers Act §§ 2-302 to 2-304, 3-202(b), 14 U.L.A. 234-37, 244-45 (1980)).

This statute provides little support for the ultimate decision in *Haner* for two reasons. First, it has not been enacted in Vermont. Second, the act contemplates a uniform method of recording throughout the enacting jurisdiction—a concept that is contrary to Vermont's current recording system.[40]

Finally, the *Haner* court attempted to resolve the dilemma of which of the two parties was more blameworthy. The court reasoned that although the filer could return to the clerk's office to make certain that the instrument was properly recorded and indexed, he or she should not be required to do so and should be entitled to rely on the clerk to do his or her job in a proper manner.[41] The court noted that both the filer and the clerk would be inconvenienced and annoyed if a filer was required to make one or more trips to the clerk's office to determine whether the instrument was properly recorded.[42] On the other hand, the court observed that the title searcher was in a better position to protect himself by simply asking the clerk about search procedures and whether there were particular books that should be checked.[43] The court reasoned that the title searcher could have more easily avoided the conflict, and as a result the subsequent grantee had to bear the clerk's mistake.

The *Haner* decision suffers from two major weaknesses. First, the decision placed principal reliance upon case law that never sufficiently examined the effect that the general indexing statute had on the recording act. By summarily stating that it is settled in Vermont that the index is not an essential part of the record, the court shirked its duty to determine what effect the legislature intended the statute to have. Second, by finding that the subsequent purchaser is the more blameworthy of the two parties, the *Haner* court failed to take into consideration the present realities of the recording system.

A. Misplaced Reliance in Haner

The first Vermont case to address whether the index is an es-

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40. It is safe to say that substantial differences exist in the ways that town clerks keep records. Telephone interview with Norman Cohen, Esquire (Mar. 19, 1987).

41. *Haner*, 146 Vt. at 265, 499 A.2d at 794.

42. *Id.*

43. *Id.*

sential part of the record was *Curtis v. Lyman*.[44] In *Curtis*, plaintiff-mortgagees sought to foreclose on a mortgage given to them by defendant Edgerton.[45] Edgerton was indebted to the mortgagees in the amount of $2,000, so he mortgaged to the plaintiffs certain lands to secure the debt.[46] Edgerton, who interestingly was the town clerk at all times relevant to this case, entered the mortgage on the land records but never made any reference to the mortgage in the index.[47] Subsequently, defendant Lyman, who had no actual knowledge of the mortgage, purchased the encumbered property from Edgerton.[48]

The subsequent purchaser in *Curtis* argued that an act, which imposed a duty on the town clerk to keep an index of all interests affecting title to real property, should be construed to impose an additional requirement before a mortgage could be regarded as properly recorded.[49] In accordance with the defendant's argument, an interest in property was not properly recorded until reference to it was made in the index. The *Curtis* court, however, relied on the plain language of the recording act to find that the index was not an essential part of the record. The court held that an instrument was properly recorded once it was entered on the land records.[50]

In dictum, the *Curtis* court noted that many practical difficulties would arise if the index was held to be an essential part of the record. The court feared that such a decision would open up the courts to a "serious and embarrassing course of litigation" which would be required to determine when an index was sufficient to impart notice to a subsequent purchaser.[51] The court anticipated future litigation involving questions of when the record becomes effective and proper index form. [52] In conclusion, the *Curtis* court found that the practical difficulties that would arise as a result of holding the index to be part of the record were "insurmountable."[53]

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44. 24 Vt. 338 (1852).
45. *Id.* at 339.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 340. The act referred to by defendant Lyman was a general act regulating town meetings and the choice and duties of town officers. *Id.*
50. *Id.*
51. *Id.* at 341.
52. *Id.*
53. *Id.* at 342. It should be noted that a town clerk is subject to monetary penalties for

In 1858, possibly as a result of the *Curtis* decision, the Vermont Legislature enacted a law which required the town clerk to keep a general index.[54] This statute, which is the predecessor of the current indexing statute,[55] provided:

> The town clerk shall furnish and keep in his office a general index . . . wherein he shall enter in one column, in alphabetical order, the name of the grantor to the grantee, and in a parallel column the name of the grantee from the grantor, of every deed or other conveyance of land hereafter recorded, with the number of the book or volume, and the page of record, in the following form . . . .[56]

The statute further delineates the proper form of the index.[57]

Thus, this statute apparently clarifies most of the perceived ambiguities expressed by the *Curtis* court that would arise if the index was held to be an essential part of the record. Not only did the statute set out the proper form of the index, but it also described the proper method for entering and keeping the names of grantors and grantees. In addition, a subsequent judicial decision held that an index was sufficient if it would enable a "man of ordinary intelligence" and "fair business capacity" to find the record he was in search of.[58] The only concern expressed by the *Curtis* court that was not allayed by the statute and subsequent case law was when the record would become effective. However, this problem could have been easily solved by finding that the record would be complete at the time the filer deposits the instrument with the town clerk, provided that the instrument was subsequently recorded and indexed.[59]

In 1884, the Vermont Supreme Court in *Barrett v. Prentiss*[60] was given the opportunity to reconsider its holding in *Curtis* in light of the intervening statute. However, rather than examining the reasoning relied upon in *Curtis* and looking at the legislature's intent in enacting the statute, the *Barrett* court simply cited *Cur-*

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failing to index property interests. *See* VT. STAT. ANN. tit. 24, § 1162 (1975).

54. 1858 Vt. Laws 21.

55. VT. STAT. ANN. tit. 24, § 1161 (1975 & Supp. 1986).

56. 1858 Vt. Laws 21.

57. *Id.*

58. Smith v. Royalton, 53 Vt. 604 (1881).

59. *See* Jarvis v. Aikens, 25 Vt. 635 (1853)(holding that the effective date of the recording would relate back to the date on which the filer submitted the instrument, provided that the instrument was properly recorded).

60. 57 Vt. 297 (1884).

tis and held that the index was not an essential part of the record, reasoning that the rule laid down in *Curtis* was not affected by the statute requiring a general index to be kept.[61]

The supreme court once again addressed whether the index was a part of the record in 1985. However, rather than examining the reasoning behind the *Curtis* decision, and the effect of the subsequent statute on that reasoning, the *Haner* court cited *Curtis* and *Barrett* for the proposition that the index was not an essential part of the record.[62] Therefore, the effect of the indexing statute on the *Curtis* court's reasoning has, to this day, never been thoroughly examined.

B. Present Realities of the Recording System

As noted earlier,[63] the *Haner* court recognized that both the prior attacher and the subsequent purchaser were equally blameless for the failure of the town clerk to index the attachment. In such situations, courts usually attempt to determine which of the two innocent parties could have more easily avoided the controversy, and then place the burden on that party.[64] The *Haner* court found, in its final analysis, that the subsequent purchaser could have more easily avoided the controversy by simply asking the clerk about search procedures and whether there were particular volumes that should be checked.[65] The problem with this analysis is that it fails to take into consideration present realities and the practical difficulties that the decision creates.

At the time *Curtis* was decided, placing the burden on the subsequent purchaser was probably the proper result. At that time, difficulties in transportation and communication dictated against requiring a filer to make repeated trips or calls to the clerk's office to ensure that the instrument was properly recorded. On the other hand, it was not unreasonable to require a subsequent purchaser to search through the records that were kept at that time. In addition, the clerk's familiarity with the instruments filed in his or her office served as a reference source to all subsequent purchasers.

Present realities, however, suggest that the filer is the party

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61. *Id.* at 300.
62. *See Haner*, 146 Vt. at 264, 499 A.2d at 793.
63. *See supra* text accompanying notes 41-43.
64. *Id.*
65. *Haner*, 146 Vt. at 265, 793 A.2d at 794.

that can more easily avoid the controversy. Today, there are some communities in Vermont that have hundreds of volumes of recorded materials relating to land transactions.[66] To suggest that the subsequent purchaser could more easily avoid the controversy is to suggest that a page-by-page search of all records affecting title to land is less burdensome than requiring the filer to ensure that the clerk properly indexes an instrument. Logic dictates that placing the burden on subsequent purchasers is improper, especially in light of the fact that the filer is usually the only person that can make certain that an interest is indexed.[67]

Taking *Haner* to its logical conclusion, a subsequent purchaser is not allowed to rely on the general index, but rather is required to make a search of all records to determine the state of title to a piece of realty. It has been stated that a basic policy concern behind all recording acts is the question of "whether emphasis should be upon penalizing those who fail to record or upon protecting those who deserve protection."[68] By holding that the index is not a part of the record, Vermont's recording act fails to serve either policy. Vermont's current law neither penalizes the filer for failing to have an interest properly indexed, nor protects a subsequent purchaser from interests that can not be ascertained without an unreasonable search of the records.

The present reality of the Vermont recording system suggests that adjustment is necessary to relieve some of the burden that is placed on a subsequent purchaser. Because of the mass of records that have been accumulated by town clerks over the years, it is almost impossible for a person to ascertain the state of title of real estate without the aid of the general index. Based on this reality, subsequent purchasers should be allowed to rely upon what the law requires to be kept.[69] Placing the burden of the clerk's error upon the filer will not only relieve some of the burden on a title searcher, but will also "foster . . . inspection of the record to assure the absence of mistakes, and thereby promote the effective operation of the system."[70]

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66. *Id.* at 266, 499 A.2d at 795 (Allen, C.J., dissenting).

67. *See* Compiano v. Jones, 269 N.W.2d 459, 462 (Iowa 1978).

68. Johnson, *supra* note 2, at 231.

69. *See* Burchard, Wilson & Co. v. Town of Fair Haven, 48 Vt. 327, 332 (1875).

70. Cross, *Weaknesses of the Present Recording System*, 47 IOWA L. REV. 245, 248 (1962).

CONCLUSION

Recording statutes were enacted at a time when it was possible for subsequent purchasers to search all land records to determine the state of title to real estate. However, as land transactions increased, the system proved inefficient. To relieve some of the burden the system placed on subsequent purchasers, states enacted indexing statutes. The amount of relief the index provides subsequent purchasers depends upon whether it is regarded as an essential part of the record. By holding that the index is not a part of the record, the Vermont Supreme Court has declared that a subsequent purchaser is not justified in relying solely upon the index, but rather must search all records to protect against competing interests.

Because the court failed to seize the opportunity to correct this perceived problem with the recording system, the onus is now upon the legislature to act. Although the legislative intent behind Vermont's current indexing statute could very well be that the index is a part of the record, the court did not find this intent apparent. Thus, the legislature must act to clarify its intent. If the legislature determines that a subsequent purchaser should be allowed to rely upon the general index, as it undoubtedly should, this result could be achieved by simply amending the current indexing statute with language to the effect that an instrument will not be deemed recorded, so as to impart constructive notice, until it is properly indexed. The law should not constructively impose knowledge of a fact upon a person unless it is possible, or at least practicable, for that person to obtain actual knowledge of that fact. Therefore, the index should be a prerequisite to the validity of recording, thereby bringing recording laws into accord with the present realities of Vermont's recording system.

William F. Ellis