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THE SCOPE OF THE TEXAS RECORDING ACT

*Dwight A. Olds**

IN *Moran v. Wheeler*¹ it is said:

When a purchaser who seeks to buy land has examined the records of titles, and finds nothing to indicate that there is an adverse claim, and he is not in possession of any facts that would put him upon inquiry as to any matter not of record, he has the right to presume that any person claiming an adverse right would have placed the same upon record, and that there is none.

In *Johnson v. Darr*² it is said:

When a right is solely and exclusively of legislative creation and does not derive existence from the common law or principles of equity and creates a new right by statute, the courts will not extend the application of the statute, but will limit its application to the exact words of the Act.

These quotations indicate a divergence in the conception of the scope of the recording act in Texas-Article 6627 of the *Texas Revised Civil Statutes (1925)*. It reads as follows:

All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law, but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding.

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¹ 87 Tex. 179, 184, 27 S. W. 54, 55, 56 (1894).

² 114 Tex. 516, 520, 272 S. W. 1098, 1099 (1925). And see *Brown & Co. v. Chancellor*, 61 Tex. 437, 444 (1884); *Adams v. Hayden*, 60 Tex. 223, 226, 227 (1883).

See *Bryan v. Texas Life Ins. Co.*, 248 S. W. 163 (Tex. Civ. App. 1922) *er. dism.*, holding there is no implied exception as to minority.

Article 6626³ (the so-called "may" statute) contains no penalty for failure to record⁴ and is not treated herein as a recording statute, though its effect is referred to later.

It is the purpose of this discussion to see which view more closely represents the case law in Texas. The discussion will concern itself with the following questions:

1. Is an interest not in writing within the recording law?
2. Are equitable interests within the recording law?
3. Are any interests other than those described in Article 6627 within the recording law?
4. Does the recording law resolve the conflict between conflicting claims, one of which is not subject to the recording law?
5. What is the difference between a purchaser under the equitable doctrine of bona fide purchase and a purchaser under the recording law?
6. How does the recording law operate with respect to conflicting claims within its provisions?
 - I. *Is an interest not in writing within the recording law?*

Article 6627 presupposes some paper setting forth the interest in question; this is further emphasized by the requirement of acknowledgment as a prerequisite to recordation. While not explicit that a writing is necessary, it is surely implicit. For example, it is held that title by adverse possession is outside the recording law because there is nothing which can be recorded.⁵ The

³ "The following instruments of writing which shall have been acknowledged or proved according to law, are authorized to be recorded, viz.: all deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances or other instruments of writing concerning any lands or tenements, or goods and chattels, or movable property of any description. . . ."

⁴ *Shear Co. v. Currie*, 295 Fed. 841 (5th Cir. 1923).

⁵ *Houston Oil Co. v. Olive Sternenberg & Co.*, 222 S. W. 534 (Tex. Comm. App. 1920); *MacGregor v. Thompson*, 26 S. W. 649 (Tex. Civ. App. 1894).

interest in community property of the spouse not named in the deed is another.⁶ The list can be expanded to include resulting and constructive trusts,⁷ easements by prescription,⁸ title by descent,⁹ the grantor's lien¹⁰ and other equitable liens, right of reformation or rescission,¹¹ and easements by necessity.¹² These interests usually arise by operation of law,¹³ not by agreement of the parties.

It may be objected that there is a paper in some situations which is made the basis of a claim. But unless the paper itself discloses the interest, the interest is unrecordable. And this on reflection must be so, as the theory of the recording law is that an inspection of the record shall itself disclose the interest.¹⁴

It will be further noted that some of the non-written interests are legal and some are equitable. Prescription, adverse possession,¹⁵ easement by necessity, and descent¹⁶ will normally involve legal interests. The others above named will usually be equitable. The difference this makes will be alluded to hereafter.

⁶ See the dissent of Justice Moore in *Yancy v. Batte*, 48 Tex. 46 (1877). This dissent is the basis for the rule in Texas.

Barrett v. Weimar, 130 S. W. 181 (Tex. Civ. App. 1910) *er. ref.*, rebuts the idea that legal title is fluid in conveyance by a stranger to the wife. Divorce terminated the husband's statutory agency conferred by Article 4619 even though the divorce decree was not recorded under Article 6638, a purchaser from the husband being awarded only a half interest.

⁷ *Parker v. Coop*, 60 Tex. 111 (1883); *Blankenship v. Douglas*, 26 Tex. 225 (1862).

⁸ *Heard v. Bowen*, 184 S. W. 234 (Tex. Civ. App. 1916) *er. ref.*

⁹ *Texas Lumber Manufacturing Co. v. Branch*, 60 Fed. 201 (5th Cir. 1894); *New York & Texas Land Co. v. Hyland*, 28 S. W. 206 (Tex. Civ. App. 1894) *er. ref.*

¹⁰ *Senter & Co. v. Lambeth*, 59 Tex. 259 (1883); *Briscoe v. Bronaugh*, 1 Tex. 326 (1846).

¹¹ *Deaton v. Rush*, 113 Tex. 176, 252 S. W. 1025 (1923).

¹² *Pokorny v. Yudin*, 188 S. W. 2d 185 (Tex. Civ. App. 1945), states that Article 6627 applies to easements created by implication. It would seem that estoppel would be the proper basis.

¹³ *Eylar v. Eylar*, 60 Tex. 315 (1883).

¹⁴ See *Bowles v. Belt*, 159 S. W. 885 (Tex. Civ. App. 1913) *er. ref.* And see quotation at note 1 *supra*.

¹⁵ See cases cited note 5 *supra*.

¹⁶ See cases cited note 9 *supra*.

So it may safely be assumed that the recording act does not deal with interests not in writing.

II. *Are equitable interests within the recording law?*

It has been stated that they are not,¹⁷ and, of course, to whatever extent they are not in writing this is true. But a deed executed by one who had only an equitable interest would surely be within. In addition, it can be demonstrated that a contract for the sale of real estate, if it effects an equitable conversion (that is, lays the predicate for specific performance), is within Article 6627.¹⁸

The cases which hold that, though one has received a deed embodying his equitable interest, he may still rely on the precedent unrecordable equitable interest,¹⁹ emphasize the distinction between interests within and those outside the recording act.

It is emphasized throughout this discussion that only those transfers described in Article 6627 are within its provisions. Article 6626 is broader in scope than Article 6627. Article 6626 states that any instrument embodying a transfer of any interest in real property may be recorded. And Article 6646²⁰ states that any such instrument properly recorded affords record notice. But unless such an instrument is described in Article 6627, there is no penalty within the recordation system for failure to record. But Article 6626 would not apply to interests not in writing.²¹

¹⁷ See cases cited note 2 *supra*.

¹⁸ In *Linn v. LeCompte*, 47 Tex. 440 (1877), an earlier contract for the sale of land, unrecorded, was cut out by a judgment creditor of the vendor levying execution without notice. This result could be based only on the assumption the contract was within Article 6627. See *McKamey v. Thorp*, 61 Tex. 648 (1884).

¹⁹ *Johnson v. Darr*, cited note 2 *supra*; *Roeser and Pendleton v. Stanolind Oil & Gas Co.*, 138 S. W. 2d 250 (Tex. Civ. App. 1940) *er. ref.*; *J. S. Brown Hardware Co. v. Marwitz*, 32 S. W. 78 (Tex. Civ. App. 1895). *But see Michael v. Busby*, 139 Tex. 278, 162 S. W. 2d 662 (1942).

²⁰ "The record of any grant, deed or instrument of writing authorized or required to be recorded, which shall have been duly proven or acknowledged for record and duly recorded in the proper county, shall be taken and held as notice to all persons of the existence of such grant, deed or instrument."

See *Clements v. Taylor*, 184 S. W. 2d 485 (Tex. Civ. App. 1944).

²¹ See statute quoted in note 3 *supra*.

So if equitable interests reflected directly in an instrument are recorded, record notice is afforded. If they are not recorded, they cannot be cut off by operation of Article 6627 unless they are described by Article 6627.

III. *Are any interests other than those described in Article 6627 within the recording law?*

What has been said under the preceding question is applicable here. The answer is in the negative if the question of recording of foreign wills is ignored.

It will become apparent that a more modest view of the operation of the recording law will be a more wholesome approach. This is emphasized in an article by Professor Edgar N. Durfee and Austin Fleming.²² If we apply Article 6627 as it is written and do not assume it is a panacea for all the ills of secret claims, we shall come nearer the mark. For eventually a court must recede from a wider application than the statute warrants.²³ It is suggested that the statute be applied to the situations indicated by its provisions, leaving other undesirable interests to the operation of the equitable doctrine of bona fide purchase, to estoppel,²⁴ to lis pendens,²⁵ or to adverse possession.²⁶

IV. *Does the recording law resolve the conflict between conflicting claims, one of which is not subject to the recording law?*

²² *Res Judicata and Recording Acts: Does a Judgment Conclude Non-Parties of Whose Interests the Plaintiff Has No Notice?* 28 Mich. L. Rev. 811, 813 (1930).

²³ *Blum v. Schwartz*, 20 S. W. 54 (Tex. 1892), distinguishing cases where prior interest is unrecordable.

²⁴ Estoppel is the best basis on which *Moran v. Wheeler*, cited note 1 *supra*, may be sustained.

²⁵ The lis pendens statute does not operate with respect to interests created prior to filing of lis pendens, *Herbert v. Smith*, 183 S. W. 2d 191 (Tex. Civ. App. 1944) *er. ref. w.m.* It does, however, apply after the filing as to transfer by any party to the suit, whether the transfer is within Article 6627 or not.

²⁶ These doctrines may be termed lines of defense. The best and most obvious defense is that the transaction was effective to transfer what it purports to transfer. If this fails, then try the recording act, then bona fide purchase, then estoppel, and, last, adverse possession. These are increasingly more difficult; in adverse possession usually no connection with the former owner is present.

It should first be noted that only conflicting claims give trouble, for if there is no conflict between the two claims, no resolution thereof is necessary. And, secondly, it is only to the extent of the conflict that there is any need for resolution.²⁷ A decision in favor of a later deed over an earlier mortgage will wipe out the mortgage to the extent the land described is the same. But a decision in favor of a later mortgage over an earlier deed does not wipe out the deed entirely. It may be easier to see the effect of a decision awarding priority to the later interest if the conflicting claims are then treated as inverted in time.

Proceeding now to the question posed, suppose that one of the conflicting claims is not within (not subject to) the recording law. It may be either the earlier or the later claim.

We can start with the premise that if an interest cannot take advantage of the protection of Article 6627 by recording, it should not be subject to its penalty for failure to record. This principle of mutuality is damaged somewhat in Texas by the effect of Article 6646 on Article 6626—that is, allowing an interest outside Article 6627 but within Article 6626 to gain the protection of recording. But protection is of two kinds—prospective and retrospective. The first is protection against instruments executed after the recording of the claim in question. The other is protection against instruments previously executed but not recorded at the time of the creation of the claim in question. Article 6646 deals only with the first and not with the other—with the prospective and not the retrospective type of protection. So, realizing the effect of the difference, we can say the principle of mutuality applies in the more limited sense of the retrospective type.

Assume first that the unrecorded unrecordable interest with

²⁷ At common law there was no thought of dividing the property. A powerful argument for division is contained in Costigan, *The Theory of Chancery in Protecting Against the Cestui Que Trust One Who Purchases from a Trustee for Value and Without Notice*, 12 Calif. L. Rev. 356 (1924).

respect to Article 6627 is the earlier claim and the later claim is within Article 6627—that is, the latter interest is described in Article 6627. There are many cases, where a creditor is the later claimant, holding that the earlier claim is not affected.²⁸ But it may be argued that this rule as to creditors does not apply as to purchasers and therefore does not clearly establish the principle contended for. But in all the cases where the purchaser has prevailed, it will be found that the earlier interest is equitable and the later interest is legal.²⁹ These are the requirements for bona fide purchase as contrasted with the recording act (discussed in the succeeding question). For example, while a later purchaser within the recording act (if he gets legal title) may cut off an earlier equitable interest of the heirs of the spouse not named in a conveyance of property to a married man,³⁰ he cannot cut off an earlier claim acquired by adverse possession.³¹ The stated reason is that an adverse possessor gets legal title.

So it would seem to be established that the recording act affords no relief if the earlier claim is outside Article 6627.

What if the situation is reversed—the earlier claim is within Article 6627 but the later claim is not? No case has been discovered dealing with this situation. But if the recordable interest would not be entitled to protection within Article 6627 if it was the later interest (as above pointed out), it should not be subjected to the penalty of Article 6627.

A situation that could arise is one where a deed is executed to

²⁸ *McKamey v. Thorp*, 61 Tex. 648 (1884), for example.

²⁹ *Hill v. Moore*, 62 Tex. 610 (1884). And see *Gillette v. Davis*, 15 S. W. 2d 1085, 1088 (Tex. Civ. App. 1929).

It would seem that *Stahl v. Westerman*, 250 S. W. 2d 325 (Tex. Civ. App. 1952), and *Stinnette v. Mauldin*, 251 S. W. 2d 186 (Tex. Civ. App. 1952) *er. ref. n. r. e.*, are *contra*, but the point was not discussed in either. In *Luëkel v. Phillips Petroleum Co.*, 243 S. W. 1068 (Tex. Comm. App. 1922), the later equitable claim was preferred on the ground of estoppel.

³⁰ *Hill v. Moore*, 62 Tex. 610 (1884).

³¹ See cases cited note 5 *supra*.

A of the surface excepting all the minerals, and *A* does not record. *B* later starts adverse possession of the land but does not drill for oil and gas. *B* stays on the property for ten years. What has *B* acquired, the surface only or the surface and minerals? It is believed he has acquired title to the surface only.³² In the *MacGregor* case³³ the adverse possessor, as an earlier claimant, prevailed without regard to the recording act; he should now not be able to claim its protection as a later claimant.

Stated in another way, Article 6627 affords no resolution of the conflict unless both conflicting claims are within Article 6627.

Of course, if neither claim is within Article 6627, the recording act would be powerless to afford a resolution of the conflict.

V. *What is the difference between a purchaser under the equitable doctrine of bona fide purchase and a purchaser under the recording law?*

At common law the rule of first in time, first in right prevailed.³⁴ A reference to the four possible contests shows this. (1) If the contest was between an earlier legal claim and a later legal claim, the contest would be in a court of law, and priority would be awarded the earlier legal claim. A court of equity would refuse jurisdiction as the remedy at law would be adequate. (2) If the contest was between an earlier legal claim and a later equitable claim, a court of law would prefer the earlier legal claim on the above ground and also on the ground of non-recognition of

³² This result may be inferred from *Wessels v. Rio Bravo Oil Co.*, 250 S. W. 2d 668 (Tex. Civ. App. 1952) *er. ref.* And what if *B* now executes an oil and gas lease to *C*, an innocent purchaser. It is believed that *C* could not rely on the record. See note 33.

³³ Cited note 5 *supra*. The title of an adverse possessor may also be treated as an independent title. The recording act operates only with respect to claims under a common source. The adverse possessor, at least for some purposes, is not treated as acquiring title from the owner, but independently. But a conveyance by the adverse possessor, after his title has ripened, would be subject to the recording law, and the adverse possessor could then be a common source.

³⁴ An excellent discussion of the situation aside from the recording act and then under it is presented in *OSBORNE, MORTGAGES* (1951) 456-604.

equitable claims. A court of equity, if it assumed jurisdiction, would favor the earlier legal claim on the ground that equity follows the law. (3) If the contest was between two equitable claims, equity would favor the earlier equitable claim. A court of law would refuse to recognize either. (4) Only in a contest between an earlier equitable claim and a later legal claim would there be any variance. A court of law would recognize only the legal claim. So the equitable claimant would take the contest into a court of equity. In a court of equity the earlier equitable claim would prevail unless the later claim was legal. (This may explain the frequent omission, that the later claim be legal, from the definition of bona fide purchase. The claim must be legal before the other elements of bona fide purchase are material.³⁵) If the later claim was legal, this claimant would prevail if he also showed that he paid value, in good faith, and without notice—he must prove all, in the conjunctive. A failure at any point was fatal.

Thus arose the equitable doctrine of bona fide purchase—a later claimant could defeat an earlier equitable claimant if the later claimant could qualify as having acquired the legal title, for value, in good faith, and without notice—four requirements. And this defense impinged on the prior in time, prior in right rule in only one-fourth of the possible contests.

And then recording acts as to lands were enacted.³⁶ It is usually stated that they were designed to benefit subsequent purchasers,³⁷ but it is equally clear that they benefited the first purchaser inasmuch as he could not tell whether he was first. And if it benefited any purchaser, it would likewise benefit the seller, as the seller

³⁵ *Houston Oil Co. of Texas v. Wilhelm*, 182 Fed. 474 (5th Cir. 1910); *Texas Lumber Mfg. Co. v. Branch*, 60 Fed. 201 (5th Cir. 1894); *Hennessey v. Blair*, 107 Tex. 39, 173 S. W. 871 (1915); *Slaughter v. Coke County*, 79 S. W. 863 (Tex. Civ. App. 1904) *er. ref.*

³⁶ The first act in Texas was passed in 1836. SAYLES, *REAL ESTATE LAWS OF TEXAS* (1892) Art. 1055. The present law, Article 6627, is based on the Act of February 5, 1840. SAYLES, *EARLY LAWS OF TEXAS* (1888) Art. 748, § 4.

³⁷ Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. Pa. L. Rev. 125, 127 (1944).

could be assured of getting the market value without allowance for risk of loss of title.

It is usually assumed that all the recording act did was to make notice of the earlier interest more readily available. This fits into the pattern of the equitable doctrine of bona fide purchase, as absence of notice was one of the requirements of bona fide purchase. And notice is usually the focal point of discussions of the recording act.

But there is another method of approach—the recording acts made an additional requirement to the common law requirements for acquiring title; the purchaser must record to get the common law protection of a first purchaser. This approach has great merit, but it is unfamiliar, and that may be sufficient to condemn it.

The recording acts state that there is protection for takers of specified interests if they are recorded, with a penalty for failure to record in favor of takers of specified interests which come later into conflict. In Texas the latter group is broader than the former in that creditors are added.³⁸ Purchasers were stated previously to refer to purchasers of the same type of interest as that required to be recorded. So the interests involved are those described by the act whether the purchaser is earlier or later.

But a creditor can defeat an unrecorded claim required to be recorded by Article 6627, though Article 6627 does not require creditors to record. Article 6627 is construed to require a creditor to have obtained a lien,³⁹ and Article 5449 grants a judgment lien if properly abstracted. The Texas Rules of Civil Procedure allow attachment⁴⁰ and execution liens.⁴¹ A debtor may give a voluntary

³⁸ The purpose in setting creditors off from purchasers is to emphasize that purchase refers to the same type of interest whether it is an earlier or later purchase. Creditors can catch an interest only if the interest is within Article 6627, but the interest must also be one subject to a writ of execution. This may have a limiting effect. See cases cited note 99 *infra*.

³⁹ See text at note 93 *infra*.

⁴⁰ Rules 592-609.

⁴¹ Rules 621-656.

lien to a creditor to secure an antecedent debt.⁴² Must the voluntary creditor record to secure prospective protection? No case has discussed this question, which would test whether he is treated as a purchaser or a creditor within Article 6627.⁴³ This would be tested by a case where the voluntary mortgage was earlier and unrecorded; another creditor without notice levies an attachment or execution. Would the later creditor prevail? Probably he would.

The theory of the operation of the recording act is that until the holder of the specified interest records, a power is left in the grantor, his heirs and assigns, to displace the prior interest.⁴⁴ This power continues until there is recorded a conveyance out of the grantor. This theory serves as a good explanation and harmonizes with the theory that an additional requirement is made of the grantee. Until the additional requirement is fulfilled, the grantor has not been wholly divested so far as the recording act is concerned.

If the effect of the recording act stopped here, it would seem that the recording act has affected the doctrine of bona fide purchase only in making the giving of notice of the earlier interest easier. But the subsequent purchaser still has the other elements of bona fide purchase to prove.

It will later appear that value and good faith are the same in both situations. But is there a requirement that a subsequent purchaser under the recording act secure the legal title?⁴⁵ If so, the

⁴² See text and cases cited *infra* at note 94.

⁴³ Other than the question of burden of proof. See case cited note 95 *infra*.

⁴⁴ *Lee v. Wysong*, 128 Fed. 833 (5th Cir. 1904); *Morris v. Meek*, 57 Tex. 385 (1882); *Keenon v. Burkhardt*, 162 S. W. 483 (Tex. Civ. App. 1913) *er. ref.* (devisees). See Aigler, *The Operation of the Recording Acts*, 22 Mich. L. Rev. 405, 415 (1924). And see note 30 in article by Durfee and Fleming referred to *supra* at note 22.

⁴⁵ *Houston Oil Co. of Texas v. Wilhelm*, 182 Fed. 474 (5th Cir. 1910), states there is no authority in Texas.

National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979 (1902), seems to bottom its decision in a bona fide purchase case (not within the recording act, as the opposing claim was based on fraud, an unrecordable interest) on the ground that an oil and gas lessee did not get legal title. The cases following this are of the same type. No case has been found applying the rule where the earlier interest was within Article

act will be seriously hampered. Of course, if the purchaser does secure the legal title, he may cut off prior equitable interests. If he does not secure the legal title, the equitable doctrine of bona fide purchase is not available. It is usually held that all the subsequent purchaser need acquire is an interest which is specified in the act as one which must be recorded⁴⁶ (though it need not actually be recorded in the so-called "notice" jurisdictions such as Texas⁴⁷).

If the later interest is one specified by the recording act, can it cut off to the extent of conflict an earlier interest which is equitable? It can only if the equitable interest is required to be recorded but is not recorded. This, of course, goes beyond the bona fide purchase rule if the later interest is not legal.

Can a later equitable interest, required to be recorded, cut off an earlier unrecorded legal interest? It can if the earlier legal interest is required to be recorded.

So the requirement of the equitable doctrine of bona fide purchase is modified (aside from notice) to obviate the acquisition of legal title, by a requirement that one acquire some recordable interest within Article 6627. If he does so, he will cut off earlier interests whether legal or equitable, provided they are required to be recorded by Article 6627.

Stated another way, Article 6627 is not concerned with whether

6627, testing the question whether legal title is necessary to the subsequent purchaser under Article 6627.

A change in view as to the nature of an oil and gas lease has probably knocked out the *Teel* case. See *Deaton v. Rush*, 113 Tex. 176, 252 S. W. 1025 (1923).

Batts and Dean v. Scott, 37 Tex. 59 (1872) (Reconstruction court), held that a later contract for sale of real estate was within the recording act though it conferred only an equitable title and could displace an earlier legal mortgage. A discussion of this particular situation is contained in *OSBORNE, MORTGAGES* (1951) 548, in which the author states the later purchaser should have to acquire only a recordable interest but not necessarily legal. A backhanded recognition of this is contained in the case cited in note 76 *infra*.

⁴⁶ *Johnson v. Newman*, 43 Tex. 628 (1875); *Texas Consolidated Compress & Mfg. Assoc. v. Dublin Compress & Mfg. Co.*, 38 S. W. 404 (Tex. Civ. App. 1896).

⁴⁷ *Ranney v. Hogan*, 1 Posey 253 (Tex. Comm. App. 1880); see *White v. McGregor*, 92 Tex. 556, 50 S. W. 564 (1899); *Matthews v. Houston Oil Co. of Texas*, 299 S. W. 450 (Tex. Civ. App. 1927).

titles are legal or equitable; it is concerned only with the interests specified in the statute whether legal or equitable.⁴⁸

So the area of the recording act covers some of the area of bona fide purchase but extends beyond it. It overlaps the doctrine of bona fide purchase to the extent that the earlier interest is equitable and the subsequent interest is legal, if both interests are specified in the recording act. Not the whole area of bona fide purchase is covered, however, the uncovered part being where the earlier interest is equitable and the subsequent is legal but one or both are not specified in the recording act. The coverage of the recording act outside the area of bona fide purchase is that of conflicting claims both specified by the recording act whether earlier equitable against later equitable, earlier legal against later legal, or earlier legal against later equitable—the other three of the four contests discussed in pin-pointing bona fide purchase.

But the outside contests are not fully comprised within the recording act—only to the extent the interests are in writing and are specified in the recording act. So the recording act partially covers the four possible contests but not in whole. The uncovered part leaves the preceding common law rules in force.

There is, therefore, no occasion to say that the equitable doctrine of bona fide purchase is wiped out. It stands ready to aid any person who acquires the legal title as against earlier equitable interests where one or both of the interests are not within the recording act.

And do not suppose that area is small in Texas. The community property system is an important factor in Texas law, and its rule is that only the named grantee in the deed has legal title, the unnamed spouse having only an equitable interest.⁴⁹ And the interest of the unnamed spouse is unrecordable because it is not set

⁴⁸ See statement in *Johnson v. Newman*, 43 Tex. 628, 641 (1875).

⁴⁹ *Strong v. Strong*, 128 Tex. 470, 98 S. W. 2d 346 (1936); *Bordages v. Stanolind Oil & Gas Co.*, 129 S. W. 2d 786 (Tex. Civ. App. 1938) *er. dism. judgt. cor.*

forth in a writing. Also, Texas has the other types of equitable interests common in other states—resulting and constructive trusts, and equities of rescission and reformation.

Texas actually is unique in the widespread field for the creation of equitable interests. The community property rule above referred to is avoided in some of the other states by a requirement that the spouses both join in the conveyance out. Texas does not require this. So in Texas there is not the necessity for inquiry about a wife.

At this point it may be inquired whether the distinction between legal and equitable interests should be maintained in a state where law and equity are supposed to be fused. Justice Gaines raised this question in *Edwards v. Brown*.⁵⁰ However interesting this question may be, the jurisprudence of the state is so thoroughly imbued with the distinction that it would take a major operation to remove it. Adverse possession as to land does not start to run against a grantor who has an equity of rescission until the deed has been judicially rescinded.⁵¹ An instrument failing as a conveyance of legal title will, if justice demands, be treated as a contract to convey.⁵² The law of trusts is bottomed on the distinction. Whether a levy of execution is valid may turn on the distinction.⁵³ And other situations may occur to the reader.

VI. *How does the recording act operate with respect to conflicting claims within its provisions?*

It has been shown that the recording act operates only with respect to interests specified therein. And this is a considerable restriction with respect to the entire field of possible transfers. In addition, it does not cover recorded forgeries,⁵⁴ recorded deeds

⁵⁰ 68 Tex. 329, 338, 4 S. W. 380, 5 S. W. 87, 90 (1887).

⁵¹ *Deaton v. Rush*, 113 Tex. 176, 252 S. W. 1025 (1923).

⁵² TEX. REV. CIV. STAT. (Vernon, 1948) art. 1301.

⁵³ See Clayton, *Creditors' Bills in Texas*, 5 Tex. L. Rev. 263, 265-267 (1927).

⁵⁴ *Trinity County Lumber Co. v. Pinckard*, 23 S. W. 720, 1015 (Tex. Civ. App. 1893) *er. ref.*

Nor is there protection against mistaken identity: *Blocker v. Davis*, 241 S. W. 2d 698 (Tex. Civ. App. 1951) *er. ref. n.r.e.*; *Kerr v. Clark*, 148 S. W. 2d 880 (Tex. Civ. App. 1941).

executed by agents with no authority,⁵⁵ nor undelivered or void but recorded deeds.⁵⁶ Nor may the record reflect a power to disaffirm by minors and incompetents.⁵⁷ But within the field of its operation, restricted though it is,⁵⁸ how does it operate? The discussion will take up purchasers first and then creditors, the two classes named in Article 6627.

A. *Purchasers.*

This part will deal with who are purchasers and how does the act operate as to them.

1. *Subsequent purchasers* are persons who acquire a recordable interest within Article 6627 from or through a common source and are in good faith, without notice, and pay value. (It is unfortunate that another name was not coined to distinguish the purchaser under the recording acts from the purchaser under the equitable doctrine of bona fide purchase.)

a. *The type of interest* to be acquired has been previously discussed, and we take up next

b. *Good faith.* If this means anything other than absence of

⁵⁵ Wall v. Lubbock, 118 S. W. 886 (Tex. Civ. App. 1909) *er. ref.*

⁵⁶ Humble Oil & Refining Co. v. Downey, 143 Tex. 171, 183 S. W. 2d 426 (1944); Steffian v. Milmo National Bank, 69 Tex. 513, 6 S. W. 823 (1888); Garner v. Risinger, 81 S. W. 343 (Tex. Civ. App. 1904) *er. ref.*

⁵⁷ Minors: Folts v. Ferguson, 24 S. W. 657 (Tex. Civ. App. 1894) *er. ref.* Incompetents: Jones v. Lind, 211 S. W. 2d 587 (Tex. Civ. App. 1948); White v. Holland, 229 S. W. 611 (Tex. Civ. App. 1920); Mitchell v. Inman, 156 S. W. 290 (Tex. Civ. App. 1913) *er. ref.*

A list of these defects is set out in Pure Oil Co. v. Swindall, 58 S. W. 2d 7, 10 (Tex. Comm. App. 1933). See also Rood, *Registration of Land Titles*, 12 Mich L. Rev. 379, 389-392 (1914), for a list of 19 defects.

⁵⁸ The restrictions may be presented from another standpoint. The wrongdoer who causes the conflict may be either the purchaser, an outsider, or the owner. The equitable doctrine of bona fide purchase may apply to the first two but not the recording law. The recording law normally applies only to the third.

notice, it must be absence of actual knowledge. If one has actual knowledge of an outstanding claim, he takes subject thereto.⁵⁹

c. *Absence of notice.* Record notice is the type of notice added by the recording act, an easier means of giving notice of one's interest.⁶⁰ Whether an interest is properly of record is a question not dealt with herein further than to say that it is the record as transcribed which governs.⁶¹

The other type of notice (inquiry notice) existed under the equitable doctrine of bona fide purchase and is the same in both with the possible exception of the effect of seeing on record or in an abstract an instrument not entitled to record as it appears in the record or abstract.⁶²

As inquiry notice hinders the operation of the recording act, it might be questioned whether it should have a place therein. To those who seem to feel that absence of notice is an indispensable element, it should be observed that legal rules are man-made, that a few states do not require absence of notice,⁶³ and that Texas does not require a creditor who obtains his lien by judicial pro-

⁵⁹ *Houston Oil Co. v. Hayden*, 104 Tex. 175, 135 S. W. 1149 (1911).

⁶⁰ A recent case raised this interesting question: where there are two earlier unrecorded interests only one of which is in conflict with a later interest and the later purchaser is an innocent purchaser as regards both earlier interests, only one of which need be displaced to give effect to the later, which one of the earlier yields? It seems to be held that the later of the two earlier is displaced. But what if the innocent purchaser has notice of the later of the two earlier transfers? The case seems to hold the earliest loses. So notice to an innocent purchaser determines which of two purchasers loses. *Hunley v. Bulowski*, 256 S. W. 2d 932 (Tex. Civ. App. 1953) *er. ref. n.r.e.*

Record of a deed conveying an easement is record notice though the main purpose of the deed is to convey a lot other than the one through which the easement runs. *Latimer v. Hess*, 183 S. W. 2d 996 (Tex. Civ. App. 1944) *er. ref.*

⁶¹ *In re Rose*, 22 F. Supp. 988 (W. D. Tex. 1938).

⁶² No notary seal on acknowledgment — recorded — on question of improver in good faith, stated even if seen on record there would be no inquiry notice, *Daugherty v. Yates*, 35 S. W. 937 (Tex. Civ. App. 1896). Seeing *lis pendens* and order of dismissal in abstract put on inquiry notice as to claim, *Hexter v. Pratt*, 10 S. W. 2d 692 (Tex. Comm. App. 1928).

⁶³ See PATTON, TITLES (1938) § 8.

ceedings to be free of notice at the time he obtains his lien on chattels.⁶⁴

As to inquiry notice, aside from possession, little need be said. It is a question whether sufficient facts from a reliable source are given the purchaser to excite his inquiry.⁶⁵ Notice from possession of land calls for some discussion. It is stated that possession of land gives notice of every valid claim the possessor has, including that of his landlord.⁶⁶ Two exceptions need be noted, the first being the grantor-in-possession rule. It is to the effect that if the one in possession is the grantor in a prior conveyance, whether recorded or not, it will be presumed that he claims no interest as against his deed.⁶⁷ After some vacillation it was held that the rule is not applicable if the grantor holds by tenant.⁶⁸

The second exception is that if the one in possession has a

⁶⁴ Lindig v. Johnson City State Bank, 41 S. W. 2d 222 (Tex. Comm. App. 1931).

The doctrine of notice was deplored in Guilbeau v. Mays, 15 Tex. 410 (1855). And see Strong v. Strong, 128 Tex. 470, 98 S. W. 2d 346 (1936).

⁶⁵ See Ramirez v. Bell, 298 S. W. 924 (Tex. Civ. App. 1927) *er. ref.*, to effect that recital of \$5000 consideration in deed to land worth \$10,000 is basis for inquiry when of recent date. Also see Luck v. Welch, 243 S. W. 2d 589 (Tex. Civ. App. 1951) *er. ref. n.r.e.*; Downing v. Jeffrey, 195 S. W. 2d 696 (Tex. Civ. App. 1946) *er. ref. n.r.e.*

Several cases have protected the purchaser though he knew or should have known the seller was married, holding he need not inquire whether the wife had died, where the property was community. Lyster v. Leighton, 81 S. W. 1033 (Tex. Civ. App. 1904) *er. ref.*; Smith v. Olson, 56 S. W. 568 (Tex. Civ. App. 1900) *er. ref.*

⁶⁶ Burford v. Pounders, 145 Tex. 460, 199 S. W. 2d 141 (1947); Jackson v. DeGuerin, 124 Tex. 424, 77 S. W. 2d 1041 (1935); Howard v. Leonard, 185 S. W. 2d 490 (Tex. Civ. App. 1945) *er. ref. w.m.*

⁶⁷ Eylar v. Eylar, 60 Tex. 315 (1883). Is there any limitation as to length of time grantor remains in possession? Davis v. Cox, 176 S. W. 931 (Tex. Civ. App. 1915) (4 years—notice); Segal v. Saunders, 220 S. W. 2d 339 (Tex. Civ. App. 1949) *er. ref. n.r.e.* (17 years—no notice). Exception is inapplicable where grantor has equity of reformation, Bumpas v. Zachary, 34 S. W. 672 (Tex. Civ. App. 1896), and to non-delivery of deed, Cardwell v. Shifflet, 294 S. W. 519 (Tex. Comm. App. 1927). Estoppel is basis—not necessary purchaser check the record if deed is exhibited to him, Anglin v. Cisco Mortgage Loan Co., 135 Tex. 188, 141 S. W. 2d 935 (1940); Barron v. Theophilakos, 13 S. W. 2d 739 (Tex. Civ. App. 1929); Bryant v. Grand Lodge Sons of Herman, 152 S. W. 713 (Tex. Civ. App. 1912) *er. ref.* But knowledge of deed held sufficient in Guaranty Bond State Bank v. Kelley, 13 S. W. 2d 69 (Tex. Comm. App. 1929).

⁶⁸ Pondrum v. Gray, 298 S. W. 409 (Tex. Comm. App. 1927), *rehearing denied*, 1 S. W. 2d 278 (1928). But see Dallas Trust & Sav. Bank v. Pickett, 59 S. W. 2d 1090 (Tex. Civ. App. 1933) *er. dism.*

recorded interest entitling him to possession, his possession will be held to be referable to that record and limited thereby.⁶⁹ But Texas has refused to apply this where the one in possession is a tenant in common by the record but has received an unrecorded conveyance from a cotenant.⁷⁰

d. *Value.* Value is consideration which has been performed. A mere promise could be consideration but is not value unless put in the form of a negotiable instrument.⁷¹ But if the promise has been performed, it is value. Performance of promises of almost any character can be value except that release of or security for an antecedent debt is not value in land transactions.⁷² But change of position by extension of time of payment,⁷³ or release of other security or sureties may be value.⁷⁴

If only part performance has occurred before notice but the purchaser has received an interest within Article 6627, then he

⁶⁹ *Grogan-Cochran Lumber Co. v. McComb*, 192 S. W. 2d 313 (Tex. Civ. App. 1945) *er. ref.*; *Dallas Land & Loan Co. v. Sugg*, 237 S. W. 955 (Tex. Civ. App. 1922) *er. ref.* These two exceptions seem to be treated as arising out of the *Eylar* case, cited note 67 *supra*, in *National Bond & Mortgage Corp. v. Davis*, 60 S. W. 2d 429 (Tex. Comm. App. 1933).

In *Linthicum v. Greer*, 75 S. W. 2d 315 (Tex. Civ. App. 1939) *er. disp.*, and *Hamilton v. Ingram*, 35 S. W. 748 (Tex. Civ. App. 1896), the exception was applied to a lease though this exception is frequently held inapplicable to tenants, 5 *TIFFANY, REAL PROPERTY* (3d ed. 1939) § 1291.

⁷⁰ *Collum v. Sanger Bros.*, 98 Tex. 162, 82 S. W. 459, 83 S. W. 184 (1904).

⁷¹ *Keenon v. Burkhardt*, 162 S. W. 483 (Tex. Civ. App. 1913) *er. ref.*

⁷² *McKamey v. Thorp*, 61 Tex. 648 (1884); *Walter Connally & Co. v. Gaston*, 295 S. W. 953 (Tex. Civ. App. 1927) *er. disp.* The *McKamey* case also holds that TEX. REV. CIV. STAT. (Vernon, 1948) art. 3818 does not make an antecedent debt value in execution sales. Compromise held value in *Janes v. O'Fiel*, 280 S. W. 163 (Tex. Comm. App. 1926), *later proceedings*, 299 S. W. 640 (Tex. Comm. App. 1927).

If the land is the bargained-for consideration for services, the performed services are value, *Masterson v. Crosby*, 152 S. W. 173 (Tex. Civ. App. 1912), but if the land is an accord and satisfaction of payment for the same services (release of antecedent debt), the release is not value. This may need explaining.

For a list of cases where value was held inadequate, see *McAnally v. Panther*, 26 S. W. 2d 478 (Tex. Civ. App. 1930).

⁷³ *Red River National Bank in Clarksville v. Latimer*, 110 S. W. 2d 232 (Tex. Civ. App. 1937).

⁷⁴ Case cited in note 73; *Reserve Petroleum Co. v. Hutcheson*, 254 S. W. 2d 802 (Tex. Civ. App. 1952).

will be protected pro tanto under the rule of *Durst v. Daugherty*.⁷⁵ But if one of the two conflicting interests is not within Article 6627, then the subsequent purchaser must have got legal title to be protected pro tanto against an earlier equitable claim.⁷⁶

2. *Operation as to purchasers.*

There is very little discussion of the word "subsequent" in connection with purchasers under the recording act.⁷⁷ The word "subsequent" means later in point of time, but the question is, later than what? It must mean later than an earlier deed executed by the admitted common source, but must the subsequent deed be executed by the common source? For example, *X* conveys to *A* and then *X* conveys to *R*, *A* then conveys to *B*, and *R* then conveys to *S*. All deeds are subsequent in point of time to the deed to *A*, but are we restricted to calling the deed to *R* the subsequent conveyance, or could we call the deed to *S* or even the deed to *B* subsequent?

To present the problem as clearly as possible it would seem necessary to set up three situations, designated Situations (a), (b), and (c).

(a) *X* conveys first to *A* who records. *X* then conveys to *R* after *A* has recorded. *R* then records.

X	Deed	1 2	A
X	Deed	3 4	R

⁷⁵ 81 Tex. 650, 17 S. W. 388 (1891).

⁷⁶ *Stahl v. Westerman*, 250 S. W. 2d 325 (Tex. Civ. App. 1952), is *contra*. The court labored to show the earlier interest was equitable without noting that the later interest was also equitable. The earlier interest was unrecordable—heirs of the spouse not named in the deed into the community; the later interest was a contract of sale—an equitable though recordable interest. So this case is contrary to my conclusion in question IV, but the point was not discussed and no writ of error was applied for.

⁷⁷ See discussion in Williams, *Recordation Hiatus and Cure by Limitation*, 29 Tex. L. Rev. 1, 3-9 (1950).

(b) *X* conveys first to *A*. Thereafter *X* conveys to *R*. *A* then records and later *R* records.

<i>X</i>	Deed _____	$\frac{1}{3}$	A
<i>X</i>	Deed _____	$\frac{2}{4}$	R

(c) *X* conveys first to *A*. Thereafter *X* conveys to *R*. *R* records and thereafter *A* records.

<i>X</i>	Deed _____	$\frac{1}{4}$	A
<i>X</i>	Deed _____	$\frac{2}{3}$	R

(The number on top of the line indicates the order of delivery of the deeds; the number below the line indicates the order of recordation. This establishes the sequence.)

These diagrams will be helpful in discussing *White v. McGregor*⁷⁸ and *Houston Oil Co. v. Kimball*⁷⁹ because the first case falls in Situation (a) whereas the second falls in Situation (c). The decisions in these two cases are correct; it is the reasoning which gives trouble.

In *White v. McGregor*, *B*, a purchaser from *A*, paid value without notice of *R*'s conveyance and claimed priority. *B* was awarded priority. This case can be stated to be an application of the well-settled rule that a purchaser is not charged with record notice of a conveyance *executed after* the recordation of deed in his (*B*'s) chain.⁸⁰

The discussion in the case to the effect that the recordation of deeds in *R*'s chain did not affect purchasers in the *A* chain is unreliable and meaningless to a title examiner. In the first place,

⁷⁸ 92 Tex. 556, 50 S. W. 564 (1899).

⁷⁹ 103 Tex. 94, 122 S. W. 533, 124 S. W. 85 (1909).

⁸⁰ 5 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1268.

a member of the court which decided this case explained the decision away by stating that *A* was an innocent purchaser for value and *B* prevailed because *A* would.⁸¹ Secondly, the rule that *B* need not search for a possible conveyance to *R* is true only in Situation (a). This was demonstrated in *Houston Oil Co. v. Kimball*.

So if the announced rule was needed, it applies in only one of three possible situations.⁸²

Houston Oil Co. v. Kimball belongs in Situation (c). *A* conveyed to *B*, and *R* conveyed to *S*, both conveyances being executed after both *A* and *R* had recorded.

It was previously stated that under the recording law a power resides in the common source (*X*) to displace earlier conveyances from the common source until one of the grantees from *X* records. In *Houston Oil Co. v. Kimball*, *X* lost this power when *R* recorded. As *A* also recorded before *B* and *S* purchased, the rights of the parties were then crystallized. There was no possibility then that *B* or *S* could do better than his respective grantor, *A* or *R*.

This is mentioned because the court stated that *B* could not have done better than *A* even though *R* had not recorded. This statement was dictum and harmful to proper functioning of the recording system. It interprets subsequent to mean subsequent in chain as opposed to the broader meaning of subsequent in time.

Putting these two cases together, they hold that a prospective purchaser, *B* (from *A*), need not search for deeds executed by *X* later than the recordation of the deed to *A*. (*White v. McGregor*.) This is Situation (a). But *B* (a purchaser from *A*) must search for a deed executed by *X* to *R* after the deed to *A*, when the deed to *A* is recorded after the deed *R* (Situation (c)). (*Houston Oil*

⁸¹ 31 Tex. Assn. J. 104 ff. (1912).

⁸² But it was applied in Situation (b) in *Fullenwider v. Ferguson*, 70 S. W. 222 (Tex. Civ. App. 1902) *er. ref.*, to protect *B*, a purchaser from *A*, although *A* would have lost to *R*.

Co. v. Kimball.) No extra search is involved in the latter case as *B* would have to search as to *X* down at least to the date of the recording of the deed to *A*, and this would disclose the deed of *X* to *R*.

Must *B* search for a possible deed from *X* to *R* executed after the deed to *A*, but before the recordation of *A*'s deed, but not recorded until after *A*'s deed? This is Situation (b).

There are no decisions in Texas on this point but there is a decision where *S* is purchasing from *R* in Situation (c).⁸³ It is held that *S* must search down to the time of the purchase by *S*. If this is true, *B* in making his search to make sure that he is not actually *S*, will find any deed recorded up to the time of *B*'s purchase. To be sure, *Houston Oil Co. v. Kimball* states in dictum that *B* would not be protected even if *R* has not recorded up to the time of *B*'s purchase, but this is such an undesirable result that only a clearcut holding would be given credence.⁸⁴

Ideally, a purchaser *B* (from *A*) should not have to check later than date (3) in Situation (b). This would in effect make such a state a race-notice jurisdiction as to purchasers from *A*. But Texas does not so limit search.⁸⁵

*Breen v. Morehead*⁸⁶ restricts the beginning of search as to *X* to the date of the deed into *X*. So the period of search in Texas,

⁸³ *Delay v. Truitt*, 182 S. W. 732 (Tex. Civ. App. 1916) *er. rej.*

⁸⁴ In *Fletcher v. Ellison*, 1 Posey 661 (Tex. Comm. App. 1880), it was held that *B* could prevail if *R* had not recorded up to time of *B*'s purchase. *Accord*, *Requa v. Joseph*, 225 S. W. 585 (Tex. Civ. App. 1920). These decisions are in accord with the argument in *White v. McGregor* but not that in *Houston Oil Co. v. Kimball*.

⁸⁵ *Philbrick*, *supra* note 37, fully discusses the burden imposed by *Delay v. Truitt*, cited note 83 *supra*. *Williams* refers to the matter at p. 14 of the article referred to in note 77 *supra*, though the statement that the result in the *Kimball* case would have been otherwise is not understood.

⁸⁶ 104 Tex. 254, 136 S. W. 1047 (1911). Foreshadowed in *Copelin v. Shuler*, 6 S. W. 668 (Tex. 1887).

as to each person, is from the date of the deed into each person in the title down to the present.⁸⁷

One further word—the purchaser, to get more than his grantor had, must take by deed and not by quitclaim.⁸⁸ If this means that the purchaser is warned thereby that the grantor is conferring only the rights he has, there is some justification for the view.⁸⁹ But there is little justification for the alternate view that the quitclaim itself warns the purchaser that there is something wrong with the title.

Two matters ameliorate this position. First, the grantor in the quitclaim cannot himself set up a claim as against a bona fide purchaser.⁹⁰ And second, if value is paid, the form of the deed is ignored.⁹¹ As value has to be paid in any event to qualify a bona fide purchaser, the latter view removes the quitclaim deed rule.⁹²

B. Creditors.

This group is defined as those who acquire a lien by judicial proceedings — abstracting a judgment, or levy of execution or attachment.⁹³ It also includes one who obtains a lien voluntarily

⁸⁷ Note 82 refers to a case which, if followed, would state that in the search by *B* a deed to *R* in Situation (b) could be ignored. This leaves the extended search by *S* for Situation (c) still required under *Delay v. Truitt*, quoted note 83 *supra*.

⁸⁸ *Benton Land Co. v. Jopling*, 300 S. W. 28 (Tex. Comm. App. 1927); *Houston Oil Co. of Texas v. Niles*, 255 S. W. 604 (Tex. Comm. App. 1923); *Wilkins v. Abercrombie*, 162 S. W. 2d 445 (Tex. Civ. App. 1942). This rule applies in both the recording and the bona fide purchase situations.

But heirs and devisees of a grantor in an unrecorded conveyance can create rights in an innocent purchaser under the recording act though they should not be in a better position than a taker under a quitclaim.

⁸⁹ 5 *TIFFANY, REAL PROPERTY* (3d ed. 1939) § 1277.

⁹⁰ *Meacham v. Halley*, 103 F. 2d 967 (5th Cir. 1939), *cert. denied*, 308 U. S. 572 (1939).

⁹¹ *Wallace v. Crow*, 1 S. W. 372 (Tex. Comm. App. 1886); *Moore v. Swift*, 67 S. W. 1065 (Tex. Civ. App. 1902).

⁹² See Comment, 6 *Tex. L. Rev.* 518, 521 (1928). There is this much difference— if *X* conveys to *R*, and *R* to *S*, *S* could ordinarily prevail by showing either *R* or *S* was a bona fide purchaser. But if the conveyance to *R* is by quitclaim, *S* will be able to prevail only by showing *R* is a bona fide purchaser.

⁹³ *Brown & Co. v. Chancellor*, 61 *Tex.* 437 (1884).

from the debtor as security for an antecedent debt.⁹⁴ The only difference between the two is that the voluntary lienor has the burden to prove absence of notice of a preceding interest while in the case of the involuntary lienor the burden of proof as to notice is on his opponent, the earlier claimant.⁹⁵ (Under Article 6627 as to purchasers, the burden of proof as to notice is on the subsequent purchaser,⁹⁶ but if the earlier claimant has only an equitable interest the burden of proof is on him.⁹⁷)

The voluntary lienor apparently need not record to win except as to subsequent purchasers (however that is defined). This means that an antecedent debt is not value in deeds but it is value in mortgages!

The involuntary lienor must attach, levy execution, or abstract his judgment as a lien. If the lienor has no notice at the time he secures his lien, he is protected.⁹⁸ But apparently the abstracted lien catches no more than an attachment or levy would catch.⁹⁹

An exception without much reason is made if the deed *into* the

⁹⁴ *McKeen v. Sultenfuss*, 61 Tex. 325 (1884). Not true as to personal property, *Lindig v. Johnson City State Bank*, 41 S. W. 2d 222 (Tex. Comm. App. 1931).

⁹⁵ *Turner v. Cochran*, 94 Tex. 480, 61 S. W. 923 (1901).

⁹⁶ See case cited in the preceding note.

⁹⁷ *Farmers Mutual Royalty Syndicate, Inc. v. Isaacks*, 138 S. W. 2d 228 (Tex. Civ. App. 1940); *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208 (1939), *rev'g* 100 F. 2d 294 (5th Cir. 1938), 101 F. 2d 314 (1939) (rehearing). But what if the equitable interest is recordable under Article 6627? No discussion has been found.

But if the equity is that of rescission for fraud, the burden appears to be on the purchaser. *Morrison v. Cotton*, 152 S. W. 866 (Tex. Civ. App. 1912).

A claimant under an unrecorded title judgment (Article 6628) has the burden of proof as to a later conveyance. *Permian Oil Co. v. Smith*, 129 Tex. 413, 73 S. W. 2d 490, 107 S. W. 2d 564 (1937).

⁹⁸ *Blum v. Schwartz*, 20 S. W. 54 (Tex. 1892); *Linn v. LeCompte*, 47 Tex. 440 (1877); *Grace v. Wade & Mains*, 45 Tex. 522 (1876); *Ayres v. Duprey*, 27 Tex. 593 (1864).

⁹⁹ *Munzesheimer v. Leopold*, 163 S. W. 2d 663 (Tex. Civ. App. 1942) *er. ref. w.m.*; *South Texas Lumber Co. v. Nicoletti*, 54 S. W. 2d 893 (Tex. Civ. App. 1932) *er. dism.*; *Sugg v. Mozoch*, 293 S. W. 907 (Tex. Civ. App. 1927) *er. ref.*; *J. S. Brown Hardware Co. v. Marwitz*, 32 S. W. 78 (Tex. Civ. App. 1895); *Davis v. Wheeler*, 23 S. W. 435 (Tex. Civ. App. 1893).

judgment debtor is not recorded.¹⁰⁰ In that case abstracting the judgment is not enough to catch prior unrecorded though recordable interests out of the judgment debtor; there must be a levy or attachment.¹⁰¹

The creditor does not catch earlier unrecorded interests not within Article 6627, and this probably includes in the term "creditor" the voluntary creditor who takes to secure an antecedent debt.¹⁰² This is a situation where the ability to recognize an unrecordable interest is very important.

Of course, if a third person purchases at the execution sale, he can qualify under the equitable doctrine of bona fide purchase, provided the legal title passes and the prior interest is an unrecordable equitable interest. The third person could also qualify under the recording act as a purchaser if at the time of sale he had no notice, although the lienor had notice, and prevail over recordable though unrecorded interests, legal or equitable. But the judgment creditor cannot be such a purchaser, as crediting his judgment is not a value transaction.¹⁰³

A final matter — it has not been definitely decided in Texas whether a creditor is precluded from prevailing against a prior unrecorded (though recordable) interest as to credit extended before the creation of the unrecorded interest. It is so limited in some states.¹⁰⁴ The only case discussing the matter in Texas

¹⁰⁰ In a Comment, 3 Southw. L. J. 91 (1949), the writer seems to assume that the situation is that of deeds *out of* the judgment debtor. This would appear to be erroneous.

¹⁰¹ *Peurifoy v. Wiebusch*, 132 Tex. 36, 117 S. W. 2d 773 (1938); *Sugg v. Mozoch*, 293 S. W. 907 (Tex. Civ. App. 1927) *er. ref.*; *Lewis v. San Antonio Belt & Terminal Ry.*, 208 S. W. 552, 991 (Tex. Civ. App. 1919) *er. ref.*; *Hooker v. Eakin*, 176 S. W. 80 (Tex. Civ. App. 1915) *er. ref.*

¹⁰² *Shear Co. v. Currie*, 295 Fed. 841 (5th Cir. 1923). But *Bowles v. Belt*, 159 S. W. 885 (Tex. Civ. App. 1913) *er. ref.*, had held that an assignment of a vendor's lien is within Article 6627 and is subordinated to an abstract of judgment.

¹⁰³ *Ayres v. Duprey*, 27 Tex. 593 (1864).

¹⁰⁴ See 5 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1282.

seems to say it is only to the extent credit was previously extended that there can be protection to the creditor.¹⁰⁵ But this seems dubious.

*McDonald v. Powell Lumber Co.*¹⁰⁶ is an excellent case to indicate the operation of the recording act as to creditors. *X* executed a deed to *A*; this deed was not recorded. *X* then executed a mortgage to *R*. It was not stated whether it was to secure an antecedent debt to *R* or a present extension of credit by *R*. So we cannot tell from the opinion whether *R* was a voluntary creditor or was a purchaser.

R foreclosed in court, suing *X* but not *A* and secured judgment of foreclosure. Forty-eight days later an order of sale issued, and the property was purchased by *R* (presumably). *R* conveyed to *S*, and *S* sued *A*.

Two questions were involved: (1) was *R*'s lien prior to *A*; and (2) was *A* foreclosed?

The fact that these questions are radically different is frequently unnoticed. A decision awarding priority to the lien does not excuse nonjoinder in a court foreclosure of the displaced grantee in the deed.

It was assumed that *R* had priority over *A*, and this could be true whether *R* was originally a creditor or a purchaser within Article 6627.¹⁰⁷ As to the foreclosure it was held that *R* became a creditor within Article 6627 either at the time of judgment or the time of levy of the order of sale, a choice not being necessary. (It probably would be necessary in rationalizing *Gamble v. Mar-*

¹⁰⁵ *Farley v. McAlister*, 39 Tex. 602 (1873). And see *Barrett v. Barrett's Adm.*, 31 Tex. 344 (1868). Both were decided by the Reconstruction court. The confusion centers around the assumption that the creditor prevails on the theory of fraudulent conveyance. This might be an additional ground for recovery but is not a necessary basis for protection under Article 6627.

¹⁰⁶ 243 S.W. 2d 192 (Tex. Civ. App. 1951) *er. ref.*

¹⁰⁷ See case cited note 95 *supra*.

tin,¹⁰⁸ as the deed to Ashby S. James completing the record chain of title, was recorded four days after judgment and, presumably, before issuance of order of sale.)

As *R* became a creditor (possibly for the second time — first voluntary and later involuntary), it was held that *A* was cut off by the sale unless *A* could prove *R* had notice before the judgment or levy of the order of sale. If *R* purchased at the sale he could get no more than the levy caught, as *R* would be crediting the judgment, not a value transaction.¹⁰⁹ If a third person purchased at the sale, he would have a chance to qualify as a purchaser under the recording act, though not under the equitable doctrine, as *A*'s interest was legal.¹¹⁰

This decision offers the possibility of curing defective foreclosures — surely a worthwhile project in a state where *lis pendens* has only its common law effect of catching interests created after notice of *lis pendens* is filed, by persons made parties to the suit.¹¹¹

It might be remarked that if the foreclosure had been out of court by exercise of a power of sale, *A* would have been cut out. It seems to be the rule that exercise of a power of sale in a deed of trust cuts out all junior claimants who have notice of the power of sale.¹¹² This elimination in such an easy manner may account for a frequently displayed reluctance to hold that in a court foreclosure an overlooked junior claimant to the equity of redemption is not barred.¹¹³

¹⁰⁸ 151 S. W. 327 (Tex. Civ. App. 1912) *er. ref.*

¹⁰⁹ See text at note 103 *supra*.

¹¹⁰ Brinkman v. Tinker, 117 S. W. 2d 139 (Tex. Civ. App. 1938) *er. ref.* And see Winchester v. Boggs, 112 S. W. 2d 207 (Tex. Civ. App. 1937).

¹¹¹ Martin v. Marquardt, 111 S. W. 2d 285 (Tex. Civ. App. 1937).

¹¹² Harper v. Over, 101 S. W. 2d 830 (Tex. Civ. App. 1937).

¹¹³ For example, State v. Forest Lawn Lot Owners Assn., Tex., 254 S. W. 2d 87 (1953); McDonald v. Miller, 90 Tex. 309, 39 S. W. 89 (1897).

Two examples of the resolution of conflicts are given to illustrate, one hypothetical and one actual.

An admitted record owner, *X*, conveys to a husband (*H*) property purchased with community funds. This places legal title in *H*, with *H*'s wife, *W*, getting an equitable half interest.¹¹⁴ But *H* fails to record. A creditor of *X* levies an execution on the land without notice of the interest of *H* and *W*. If the creditor purchases at the sale, he will get only an undivided half interest (that of *H*) as *W*'s interest is unrecordable.¹¹⁵ If a stranger purchases at the sale and has no notice at the time of the sale, he could get *W*'s interest too, not by the recording act but under the equitable doctrine of bona fide purchase.¹¹⁶

The second example — *X* owns the property of record, but *A* has an unrecordable half interest therein based on an equity of reformation. A judgment creditor of *X*, *C*, levies without notice, and at the sale *C* and *D* purchase together, *C* crediting the judgment for half the purchase price and *D* paying the sheriff the other half of the purchase price. It was held that *D* gets an undivided one-half interest as he is a bona fide purchaser under the equitable doctrine; *A* had an undivided fourth left, as he could be displaced only by bona fide purchase and here only to the extent of half of his half; *C* got the remaining fourth, a half of what the execution lien actually caught. This case¹¹⁷ illustrates the inter-play of the applicable rules properly applied.

¹¹⁴ See text at note 6 *supra*.

¹¹⁵ In *Davis v. Wheeler*, 23 S. W. 435 (Tex. Civ. App. 1893), *X* conveyed to a married woman, the property becoming presumptively community. Purchase money notes were executed to *X*, but no express vendor's lien was retained. This created a grantor's lien, an equitable lien. The deed was not recorded. Subsequently *C*, a creditor of *X*, levied execution as the property of *X*. *C* purchased at the sale but had notice at that time. An assignee of the grantor's lien was allowed foreclosure against *C*. The levy did not catch the actual interest of *X* (even if *X* then still owned the notes) as it was not subject to levy of execution. In addition, a creditor does not catch an unrecordable interest. The levy did catch the legal title and one-half beneficial interest of the wife. It is not clear whether the court held the husband's half interest caught by the levy. The husband did not appeal. The husband's interest is in the same category as the equitable lien; neither was recordable.

¹¹⁶ *McKamey v. Thorp*, 61 Tex. 648 (1884).

¹¹⁷ Substantially *Cetti v. Wilson*, 168 S. W. 996 (Tex. Civ. App. 1914) *er. ref.*

CONCLUSION

This discussion would indicate that the scope of the recording act in Texas is more nearly that described by *Johnson v. Darr*¹¹⁸ than by *Moran v. Wheeler*.¹¹⁹

1. That only an interest in writing is within the recording law.
2. That only those equitable interests which are described in a writing and are specified in the recording act are within the recording law.
3. That only those transfers specified in the recording act are within the recording law.
4. That the recording act does not resolve conflicting claims unless both are specified transfers within the recording law.
5. That while a subsequent purchaser under the equitable doctrine of bona fide purchase must acquire the legal title and cut off precedent equitable claims, the subsequent purchaser under the recording law need only acquire a specified transfer under the recording law, whether legal or equitable, and can cut off any type of preceding transfer if specified in the recording law, whether legal or equitable.
6. It is difficult to summarize the restricted area within which the recording act actually operates, but it may be said that *White v. McGregor* is an over-rated authority. If the rule announced in either *White v. McGregor* or the *Kimball* case had been applied in the other, the result would have been different. Restricted to their facts the decisions are sound. It is to be hoped that it is still possible to construe subsequent purchaser to mean subsequent in time, as this furthers recording policy.

¹¹⁸ Quoted at note 2 *supra*.

¹¹⁹ Quoted at note 1 *supra*.