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Toward Greater Marketability of Land Titles -- Remedying the Defective Acknowledgment Syndrome

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TOWARD GREATER MARKETABILITY OF LAND TITLES—REMEDYING THE DEFECTIVE ACKNOWLEDGMENT SYNDROME

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> The path of searchers for a safe title to land . . . is beset by more traps, sirens, harpies, and temptations than ever plagued the wandering Ulysses, the faithful Pilgrim, or the investor in gilt edged securities.[1]

This article is one of a series[2] written with a view toward the eradication by statute of a number of rules and practices in the current law of real property that impede commerce in realty, unnecessarily burden title lawyers, and often result in pointless injustices to parties involved in real estate transactions. A re-examination of the mass of cumulative material that must be mastered in the search of every land title engenders conviction that at least some of the laws and practices relating to real property are unnecessary or are in need of modification. Observation and analysis of the law of real property and the practices required of title lawyers raise the following questions: How much of the painstaking and repetitious labor expended on an ordinary, routine title search is the result of some tricky rule of law without any "plus" benefit to society's well-being? How many of these rules or requirements not only do not add to the public benefit but instead substantially impair the marketability of land? How many impede the promotion of the public's interest in having its land freely alienable? How many result in unnecessary burdens on title-searching attorneys who engage in conveyancing practice? Are there potential legislative curatives that not only could reduce the unproductive and time consuming labors of attorneys, but also could make land titles more marketable and fluid to meet the needs of an expanding and increasingly mobile population in a commercial and industrial age? Such analysis sug-

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[1] Rood, *Registration of Land Titles*, 12 MICH. L. REV. 379, 388 (1914).

[2] Webster, *A Relic North Carolina Can Do Without—The Rule in Shelley's Case*, 45 N.C.L. REV. 3 (1966); Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation*, 44 N.C.L. REV. 89 (1965); Webster, *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. REV. 807 (1964).

gests that various changes could be made in the real property laws of North Carolina, and in those of many other states, that would effectively improve the law of conveyancing. One of the problems will be considered in this article, along with proposals for a new statute, deemed feasible to effect correction of the problems perceived and isolated. The emphasis here will be on North Carolina law, although similar problems will be found to exist in almost all other states of the United States.

DEFECTS IN RECORD TITLES RESULTING FROM DEFECTIVE ACKNOWLEDGMENTS AND PROBATE

There is an almost universal rule in the various states of the United States that all deeds and instruments conveying interests in real property must be *acknowledged*[3] before a designated officer[4] before they can be validly recorded.[5] Although unacknowledged deeds of conveyance are valid in most states as against the grantor, his heirs and all other persons against whom a conveyance is operative without being of record,[6] acknowledgments of deeds, mortgages

[3] The "acknowledgment" of an instrument is the act of the grantor going before an officer designated by statute and declaring that he executed an instrument of conveyance as his voluntary act and deed. Its primary purpose is to give authenticity to the instrument by attesting to its due execution by the grantor. The term "acknowledgment" is also a short hand expression descriptive of the act of personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act. It is also often used to mean the official certificate that such declaration was made. C. PATTON & R. PATTON, PATTON ON LAND TITLES § 354 (1957) [hereinafter cited as PATTON ON LAND TITLES]; Freeman v. Morrison, 214 N.C. 240, 199 S.E. 12 (1938).

[4] N.C. GEN. STAT. § 47-1 (1966) provides that instruments may be proved or acknowledged before any one of the following state officials: the several justices of the supreme court, the several judges of the superior court, commissioners of affidavits appointed by the Governor, the clerk of the supreme court; the several clerks of the superior court, the deputy clerks of the superior court, the several clerks of the criminal courts, notaries public, and the several justices of the peace. In addition N.C. GEN STAT. § 47-2 (1966) provides that instruments may be proved and acknowledged outside of North Carolina in other states and in foreign countries by judges and clerks of courts of record, notaries public, commissioners of deeds, commissioners of oaths, mayors and magistrates of incorporated municipalities, ambassadors, ministers, consuls, vice-consuls, consuls general, vice-consuls general, commercial agents, justices of the peace, and by officers of the United States Army, Navy, Marines, Air Force, Coast Guard or Merchant Marine, with the rank of warrant officer or higher.

[5] PATTON ON LAND TITLES § 63.

[6] *Id.* See, *e.g.*, Ballard v. Ballard, 230 N.C. 629, 55 S.E.2d 316 (1949); Woodlief v. Woodlief, 192 N.C. 634, 135 S.E. 612 (1926); Norwood v. Totten, 166 N.C. 648, 82 S.E. 951 (1914).

and deeds of trust are required to entitle them to recordation.[7] In addition, a deed cannot be introduced into evidence in the trial of a lawsuit to show an essential link in the chain of title to land unless the deed has been properly recorded upon an authorized acknowledgment and probate.[8] A concomitant rule is that recordation of a deed upon an imperfect or defective acknowledgment does not constitute due recordation under the recording statutes so as to give constructive notice to purchasers for value or to lien creditors of the grantor,[9] if the defect in the acknowledgment is "substantial" and patent on its face. When these rules are combined with the statutory requirements in force virtually everywhere that valid recordation of a deed, a mortgage, or a deed of trust is necessary to perfect priority in the grantee over purchasers for value and lien creditors of the grantor,[10] many land conveying instruments become subject to negation and defeat because of defective recordations resulting from defective acknowledgments. In North Carolina,[11] a deed recorded upon a patently defective acknowledgment is

[7] "Until a deed is proved in the manner prescribed by the statute, the public register has no authority to put it on his book . . . ." Withrell v. Murphy, 154 N.C. 82, 88, 69 S.E. 748, 751 (1910); Duke v. Markam, 105 N.C. 131, 137, 10 S.E. 1017, 1019 (1890); Todd v. Outlaw, 79 N.C. 235, 237 (1878).

[8] Allen v. Burch, 142 N.C. 524, 55 S.E. 354 (1906); Ray v. Wilcoxon, 107 N.C. 514, 12 S.E. 443 (1890); Walker v. Coltraine, 41 N.C. 79 (1849). See also PATTON ON LAND TITLES § 354.

[9] Todd v. Outlaw, 79 N.C. 235 (1878); PATTON ON LAND TITLES § 354; P. BASYE, CLEARING LAND TITLES § 241 (1953).

[10] *See, e.g.*, N.C. GEN. STAT. § 47-18 (1966): *"Conveyances, contracts to convey and leases of land.*—(a) No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies . . . ." N.C. GEN. STAT. § 47-20 (1966): *"Deeds of trust, mortgages and conditional sales contracts; effect of registration.*—No deed of trust or mortgage of . . . real property . . . shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this article . . . ."

[11] The North Carolina view, and the view of most jurisdictions, is that instruments whose acknowledgments or proofs of probate are defective on their face will fail to impart constructive notice of their execution even if they are otherwise effectively recorded. If the acknowledgment or probate defect is patent, the recorded instrument will be treated as if unrecorded. McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929); County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926); Blanton v. Bostic, 126 N.C. 418, 35 S.E. 1035 (1900); PATTON ON LAND TITLES § 356, n. 21; Annot., 59 A.L.R.2d 1299 (1958). When the incapacity of the acknowledging or probating officer is *latent*, i.e., does not appear upon the record, a recordation of the instrument pursuant to such defective acknowledgment or probate is

simply treated as an unrecorded deed for purposes of notice. In other words, a patent defect in the grantor's acknowledgment of a deed, for example, will render the acknowledgment a nullity, though the defect may not be discovered until years after the execution of the instrument. Even though the grantee has had the grantor's acknowledgment approved by the proper officer[12] as a prerequisite to its recordation, and even though the deed actually has been recorded by the register of deeds, such recordation does not serve to accomplish constructive notice to purchasers for value and lien creditors of the grantor, if there has been a patently defective acknowledgment.[13] This result, that a defectively acknowledged in-

valid and suffices to impart record constructive notice. County Sav. Bank v. Tolbert, 192 N.C. 126, 126 S.E. 558 (1926); PATTON ON LAND TITLES § 356, n. 25; Annot. 59 A.L.R.2d 1299 (1958). A few jurisdictions, however, hold that any defect in acknowledgment will prevent a recorded instrument from imparting constructive notice even if the defect or disqualification of the acknowledging officer is not patently apparent on the instrument recorded. See cases cited in PATTON ON LAND TITLES § 356, n. 23; Annot. 59 A.L.R.2d 1299, 1315 (1958).

[12] See N.C. GEN. STAT. § 47-14 (1966) which provides that when the acknowledgment of any instrument is had before any official other than the clerk of the superior court or his deputy in the county where the instrument is offered for recordation, the clerk of the superior court (or his deputy) shall, before the same is registered, examine the certificate of acknowledgment appearing upon the instrument and adjudicate whether or not it is in due form. If he adjudges the acknowledgment to be in due form, he orders the instrument to be recorded. Until this adjudication is made and certified, which is a judicial function of the clerk of the superior court, the instrument is not entitled to recordation. If recordation of a deed is made without the clerk's adjudication *which is mandatory and not merely directory,* the omission will invalidate the conveyance and its recordation as against the rights or purchasers for value and lien creditors of the grantor. See Woodlief v. Woodlief, 192 N.C. 634, 135, S.E. 612 (1926); Champion Fibre Co. v. Cozad, 183 N.C. 600, 112 S.E. 810 (1922); Cozad v. McAden, 148 N.C. 10, 61 S.E. 633 (1908); White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890): Evans v. Etheridge, 99 N.C. 43, 5 S.E. 386 (1888); and Simmons v. Gholson, 50 N.C. 401 (1858). In all of the above cases the acknowledgments on the instruments on the instruments requiring the clerk's adjudication of validity were made *before officers other than* clerks of court, judges of superior court, or justices of the supreme court. *But see* Champion Fibre Co. v. Cozad, 183 N.C. 600, 112 S.E. 810 (1922), which cites Heath v. Lane, 176 N.C. 119, 96 S.E. 889 (1918), Darden v. Neuse & Trent River Steamboat Co., 107 N.C. 437, 12 S.E. 46 (1890), Young v. Jackson, 92 N.C. 144 (1885) and Holmes v. Marshall, 72 N.C. 37 (1875) setting out the principle that the requirement of adjudication of the validity of prior acknowledgments by the local clerk of the superior court of the county in which the instrument is offered for recordation *is only directory and not mandatory* when the instruments have been acknowledged before another clerk of the superior court, judge of the superior court or justice of the supreme court in North Carolina.

[13] That a defectively acknowledged deed is not rendered valid by an

strument gives no constructive notice even though recorded, is reached almost everywhere in the United States.[14] However, under North Carolina's "pure race" recordation statute, deviant acknowledgements and probates have an even more severe effect. In North Carolina, priority of interests under instruments of conveyance as to purchasers for value and lien creditors is determined solely upon the basis of prior recordation—who has won the race to the recorder's office? Who has made the first *valid* recordation? Perhaps no rule in North Carolina law has been more often repeated than the statement that "no notice, however full and formal, will supply the want of registration."[15] When this statement is considered with the rule that there can be no *valid* recordation without first having a valid acknowledgment of the instrument for which recordation is sought, it becomes evident that a defectively acknowledged and therefore invalidly recorded deed or instrument of conveyance not only does not give constructive notice of its execution to purchasers for value and lien creditors of the grantor, but also it is not effective as *actual* notice to such persons. Thus, in North Carolina, a defective acknowledgment prevents the valid recordation of an instrument and renders it incapable of putting a purchaser for value or a lien creditor on any kind of inquiry upon its discovery. The result is that purchasers for value and lien creditors may en-

adjudication and certificate of its validity by the clerk of the superior court as the judge of probate in North Carolina, see Nat'l Bank v. Hill, 226 F. 102 (E.D.N.C. 1915).

[14] PATTON ON LAND TITLES § 63; Annot. 59 A.L.R.2d 1299 (1958).

[15] That a mortgage registered in a manner not authorized by law is neither actual nor constructive notice, see Todd v. Outlaw, 79 N.C. 235 (1878) and DeCourcy, LaFourcade & Co. v. Barr, 45 N.C. 181 (1853). In the latter case the court said that "where a thing is not done in due form, it is not done at all in contemplation of law." *Id.* at 185. Most states, while in accord with the North Carolina view that defectively acknowledge-defectively recorded instruments do not provide *constructive* notice, hold that the defectively acknowledged-defectively recorded instruments can provide *actual* notice if they are discovered. "The view has usually been accepted that if a subsequent purchaser actually sees the record of a prior instrument, although it was not entitled to be recorded, he is charged with notice thereof. . . ." 5 H. TIFFANY, LAW OF REAL PROPERTY § 1264, n. 65 (3d ed. 1939). *See, e.g.* Bell v. Sage, 60 Cal. App. 149, 212 P. 404 (1922); Lassiter v. Curtiss-Bright Co., 129 Fla. 728, 177 So. 201 (1937): Roebuck v. Bailey, 176 Miss. 234, 166 So. 358 (1936); Farmers Mut. Royalty Syndicate v. Isaacks, 138 S.W.2d 228 (Tex. Civ. App. 1940). But see, 5 H. TIFFANY, LAW OF REAL PROPERTY § 1264, n. 67 (3d ed. 1939) citing Nordman v. Rau, 86 Kan. 19, 119 P. 351 (1911); Kerns v. Swope, 2 Watts (Pa.) 75 (1833) which hold that a deed recorded upon a defective acknowledgment will not furnish notice to anyone, although the person who may be affected has actual notice of the recording of the instrument. See authorities collected in Annot. 59 A.L.R.2d 1299, 1317 (1958).

tirely ignore the record of defectively acknowledged instruments, because the recordation of such instruments is unauthorized.[16]

TYPES OF DEFECTS IN ACKNOWLEDGMENTS AND PROBATE THAT RENDER RECORDATIONS INVALID

As stated before,[17] it is generally held that only acknowledgments that are patently defective have the effect of rendering deeds or other instruments incapable of imparting constructive notice.[18] These defects can be of various kinds. The defect may be a complete absence of acknowledgment.[19] The acknowledgment may have been made before an officer who was not authorized to take acknowledgments, rendering the certificate of acknowledgment a nullity.[20] Or the officer taking the acknowledgment, though otherwise qualified, may have been outside of his territorial jurisdiction when he took the acknowledgment.[21] Or the officer before whom the acknowledgment was taken may have been disqualified to take it because he was interested as grantee, party, trustee, or *cestui que trust* in the

[16] *See* New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 131 S.E.2d 425 (1963) to the effect that registration of an improperly acknowledged deed will be treated as unregistered. McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929) and Quinnerly v. Quinnerly, 114 N.C. 145, 19 S.E. 99 (1894) hold that "no notice to the purchaser, however full and formal, will supply the place of registration."

[17] *See* n. 11 *supra.*

[18] There are some jurisdictions that hold, however, that latent defects in acknowledgments will also prevent instruments recorded thereon from transmitting constructive notice. Annot. 59 A.L.R.2d 1299, 1315 (1958).

[19] New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 131 S.E.2d 425 (1963).

[20] In Sudderth v. Smyth, 35 N.C. 452 (1852) the brother of the clerk of court took probate of a deed while attending the office in the absence of the clerk, with this clerk's assent. The brother held no office. The North Carolina Supreme Court held: "The registration was therefore made on a probate and fiat of a person having no power in the premises, and stands on the same ground as if it had been made by the register in his own head, and without anything purporting to be a probate at all. Hence the registration has no effect to render the deed valid from its regisration. . . ." *But cf* Southern Spruce Co. v. Hunnicutt, 166 N.C. 202, 81 S.E. 1079 (1914) which holds that an acknowledgment taken by a person acting as a justice of the peace was valid. While he was not a proper *de jure* officer qualified to take acknowledgments he was a *de facto* officer and his incapacity did not appear on the record.

[21] Wood v. Lewey, 153 N.C. 401, 69 S.E. 268 (1910); DeCourcy v. Barr, 45 N.C. 181 (1853). The same principle is likewise set out in Dixson v. Robbins, 134 N.C. 102, 19 S.E. 239 (1894), in which a justice of the peace of one county took the private examination of a married woman (then required) in another county in which he held no office. *See also* Ferebee v. Hinton, 102 N.C. 93, 8 S.E. 922 (1889), holding that the private examination of a married woman was invalid because the clerk of court took the acknowledgment of the married woman in another state.

instrument acknowledged.[22] Or the acknowledgment officer may fail to require compliance with some material part of the acknowledgment process; for example, the acknowledgment officer may fail to require an oath as prescribed by statute in certain cases.[23] Or in the case of corporate deeds the acknowledgment officer may have required the acknowledgments of individuals without the designation of their officership or corporate acknowledgment as required by statute.[24] The defect may result from a particular kind of acknowledgment, such as the requirement of a separate acknowledg-

[22] In Long v. Crews, 113 N.C. 256, 18 S.E. 499 (1893), a notary public was held to be disqualified because he was a preferred creditor under the terms of a deed of trust. *See also* Lance v. Tainter, 137 N.C. 249, 49 S.E. 211 (1904). Cowan v. Dale, 189 N.C. 684, 128 S.E. 155 (1925), held that a deputy clerk of court was disqualified to take an acknowledgment because he was one of several mortgagees. *The whole instrument*, even as to the other mortgagees, was treated as unregistered because the probating officer was one of the gratees. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890) and Turner v. Connelly, 105 N.C. 72, 11 S.E. 179 (1890) were cases in which it was held that a clerk of court who has an interest under the instrument cannot adjudicate the validity of an acknowledgment taken before a justice of the peace even if the acknowledgment before the justice of the peace was proper in all respects. Thus even though the acknowledgment was valid, since the clerk's probate was invalid because of the clerk's personal interest, the registration of the instrument based thereon was void. *Accord*, Norman v. Ausbon, 193 N.C. 791, 138 S.E. 162 (1927). *But see* Duplin v. Hall, 203, N.C. 570, 166 S.E. 526 (1932); Watkins v. Simonds, 202 N.C. 746, 164 S.E. 363 (1932); Smith v. Ayden Lumber Co., 144 N.C. 47, 56 S.E. 555 (1907); Wachovia Nat'l Bank v. Ireland, 122 N.C. 571, 29 S.E. 835 (1898); Piland v. Taylor, 113 N.C. 1, 18 S.E. 70 (1893) which hold that acknowledgments taken by notaries public who are clerks, employees, agents officers, or stockholders of a grantee are not invalid if the acknowledgment officer does not himself have any direct personal interest in the property which is the subject of conveyance or mortgage. There is a split of authority in the United States as to whether a notary public who is a stockholder in a corporation may take a valid acknowledgment of a grant to which the corporation is a party. PATTON ON LAND TITLES § 365, n. 12. *Cf.* Armstrong v. Jonas, 204 N.C. 153, 167 S.E. 562 (1933) which holds that a notary public who holds a life estate in land is not disqualified to take an acknowledgment on a conveyance of the remainder interest in the land.

[23] In North Carolina, in the event that an attested deed or mortgage has not been acknowledged by the grantor, it may be proved by a subscribing witness upon his oath that the maker of the instrument either signed it in his presence or acknowledged to him its execution. N.C. GEN. STAT. § 47-12 (Supp. 1965). If the subscribing witness is dead, unavailable or incompetent, an instrument may be proved upon oath by the affiant that he knows the handwriting or the maker and that the signature on the instrument is that of the maker. N.C. GEN. STAT. § 47-12.1 (Supp. 1965). If the required oath is omitted, the probate is defective and the instrument is not entitled to recordation. A statement by the subscribing witness that he "acknowledges" that he saw the grantor sign the deed is inadequate. McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929).

[24] Withrell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910); Bernhardt v. Brown, 122 N.C. 587, 29 S.E. 884 (1898).

ment of married women with regard to contracts and conveyances to their husbands.[25]

SHOULD FAULTY ACKNOWLEDGMENTS IMPAIR THE MARKETABILITY OF LAND?

The foregoing illustrations, while not exhaustive, are typical of the kinds and types of acknowledgment defects that are routinely discovered on the face of instruments *in the records.* Thus any impairment of the marketability of land titles resulting from defective acknowledgments has its genesis in part and receives its perpetuation from the recording system, the very vehicle designed to make certain the status of land titles and thereby to make them safely marketable.

While the courts or statutes may say that unacknowledged and deffectively acknowledged deeds of conveyance cannot be recorded, the evidence is overwhelming that notwithstanding myriad defects in acknowledgments and certificates of probate officers, defectively acknowledged instruments *are* being put on the record books daily.[26] The result is that marketability of land is seriously impaired by the

[25] N.C. GEN. STAT. § 52-6 (Supp. 1965) provides that no contract or conveyance made by a married woman to her husband affecting her real property shall be valid unless acknowledged before a justice of the supreme court, judge of the superior court, justice of the peace, magistrate, or the equivalent officer in other jurisdictions. The officer must examine the married woman, in private and separate and apart from her husband, and certify that the contract or conveyance is not unreasonable or injurious to the wife. Note that a notary public is not among the officers authorized to take the special type of acknowledgment provided for by N.C. GEN. STAT. § 52-6 (Supp. 1965). *Cf.* N.C. GEN. STAT. § 52-7 (Supp. 1965).

Non-compliance with N.C. GEN. STAT. § 52-6 (Supp. 1965) will render a deed or contract between a married woman and her husband absolutely void for *all purposes.* It is therefore not merely an acknowledgment but a *sine qua non* to the validity of a married woman's deed or contract to which her husband is a party. Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915). Prior to 1945, deeds of married women to third persons as well as to their husbands were void unless there was a certificate by the proper officer that he had privately examined any married woman grantor and found the instrument to be her voluntary and free act. This latter rule was repealed by N.C. GEN. STAT. § 47-14.1 (Supp. 1965).

[26] *See* P. BASYE, CLEARING LAND TITLES § 241 (1953): "Anyone of these conditions or a hundred others should cause an alert recording officer to decline to accept it for recording. Alas, too many recording officers have not observed such irregularities and have accepted and recorded countless numbers of imperfect instruments having substantial infirmities in their acknowledgments." This statement of Professor Bayse accords with the comment made to the writer by a lawyer correspondent in North Carolina that the trouble with the records in his county is that "the clerk would allow love letters to be recorded if accompanied by the requisite recording fee."

mounting accumulation of defectively acknowledged deeds in the record books—a result detrimental to individual landowners and to the public alike. This can be illustrated by the following hypothetical factual situation:

> Suppose that Grantor A executes a perfect deed to Grantee B. Suppose that the acknowledgment of the deed, made before one purporting to be a proper acknowledgment officer, turns out to be invalid, its invalidity appearing on its face. Suppose, nevertheless, that when Grantee B takes the deed to the probate officer (the clerk of the superior court in North Carolina), the probate officer is not as careful as he should be and routinely certifies the validity of the faulty acknowledgment and orders its recordation. The instrument with the defective acknowledgment is recorded. Then suppose that Grantee B re-conveys the land to Grantee C, who in turn re-transfers the land to Grantee D. C and D successively record their respective deeds promptly and seasonably. Suppose E now wants to purchase the land involved in this series of deeds from D.

When the title attorney employed by E, the prospective purchaser from D, discovers the defective acknowledgment in the chain dating back to Grantor A's deed to Grantee B, he should and will, in all likelihood, decline to certify the title of prospective grantor D. This course of action is dictated because of the rule previously discussed that a deed recorded upon a defective acknowledgment is not validly recorded and gives no notice of its execution, either actual or constructive, in North Carolina.[27] The attorney for E must advise his client that the title offered by D is vulnerable; indeed, the defective acknowledgment has made the whole chain of title, back to the date of the defect, subject to defeat by the claims of subsequent purchasers for value and lien creditors of the original grantor, A. It might be pointed out here that this same vulnerability occurs even when there have been perfect deeds and perfect acknowledgments if there is a defect in a certification or probate made by the probate officer in adjudicating the validity of the acknowledgments somewhere in the recorded chain of title.[28]

The results of the rule, that instruments recorded upon defective acknowledgments and probate are not deemed to be validly recorded and thus give no notice to purchasers for value and lien creditors, are harmful for several reasons. The first has already been men-

[27] *See* n. 15 *supra.*
[28] *See* n. 12 *supra.*

tioned, that the innocent parties, B, C, and D, at any point after they have recorded their deeds upon the defective acknowledgment or probate, can have their title defeated by a subsequent purchaser for value or lien creditor of A. Thus even if B, C, and D were innocent, even if their deeds were perfect, even if they were perfectly indexed and recorded, and even if the indexing and recordation were perfectly and easily discoverable on a routine title search, still the purchasers for value or lien creditors of A need show no innocence, reliance, or reason to justify their priority. It results from showing only the acknowledgment defect with its non-recordation consequence. The injustice of this result is made apparent when it is realized that the deed has been accepted and approved for recordation by the public officer whose duty it was to refuse recordation of the instrument unless the acknowledgment and probate were made in accordance with law. By approving the acknowledgment and by allowing the deed to be recorded, the probate or recording officer has lulled the completely innocent grantee into feeling secure that his instrument has been properly recorded and that his rights and interests in the land are protected. A defect which may have been promptly corrected has been allowed to ride uselessly on the record books, perhaps until the rights of purchasers for value or lien creditors intervene, at which point correction may no longer be possible or effective.[29]

D's title is not only rendered unmarketable because of the defective acknowledgment; other odd consequences result from this fact. In the likely event that A, B, or C has made a warranty deed in the chain of title, D may have an action for breach of the covenant of warranty if D is evicted either by a purchaser for value from A or pursuant to an execution sale to satisfy a judgment lien against A. Although A had good title at the time of the conveyance to B and conveyed good title as between himself and B, since the deed was not effectively recorded because of the defective acknowledg-

[29] The rights of a purchaser for value or a lien creditor may have intervened before the correction is made. In addition, *see* Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915), indicating that a notary public, justice of the peace or clerk of court becomes *functus officio* after making and delivering an acknowledgment and cannot thereafter alter or amend his certificate. *Accord,* Best v. Utley, 189 N.C. 356, 127 S.E. 337 (1925). *But see* Banks v. Shaw, 227 N.C. 172, 41 S.E.2d 281 (1947) to the effect that a notary public who inadvertently omits the name of the grantor in his certificate of acknowledgment can amend his certificate before any rights of third parties or creditors have intervened.

ment, events *subsequent* to the date of the conveyance could give rise to a title superior to that of the grantee B and his subsequent grantees.[30] Thus, A would be liable to subsequent grantees for breach of any covenant or warranty of quiet enjoyment in his deed. Grantees B and C would also be liable for breach of these covenants if D is evicted by a superior claimant. That B and C likewise will have a cause of action against the original warrantor if they are sued will be small consolation if he has disappeared at the time the eviction occurs or if he is found to be insolvent. Thus without reference to the promotion of justice or of beneficial policy, the rule—that bad acknowledgments ipso facto make bad recordations—applies and gives an advantage to subsequent purchasers for value and to lien creditors and works a real hardship on the grantees of the original grantor.

The foregoing possibilities frighten title attorneys. No title attorney who certifies a title to land having within its chain of title a defective acknowledgment is safe, for *no valid record* chain of title *exists* if there is a defective acknowledgment anywhere in its history that has not been validated by curative statute. A defect as minor as an acknowledgment taken by a notary public after the expiration of his commission as a notary will send the careful title searcher scurrying in quest of a curative statute or for a correction deed. Although the defect of acknowledgment is not fatal in North Carolina, and in most other states, unless it is "patent" and "substantial,"[31] to certify that a defect is only "latent" and "insubstan-

[30] Eviction of the covenantee, by reason of a paramount title derived from the covenantor subsequent to his conveyance constitutes a breach of the covenant of warranty. 21 C.J.S. *Covenants* § 110(b) (1940). This would include the situation where the grantor conveys to a second grantee who takes without notice of a prior grant and records his conveyance before the prior conveyance is properly recorded with the result that the prior grant conveys nothing. H. TIFFANY, THE LAW OF REAL PROPERTY § 1012 (1939). See Curtis v. Deering, 12 Me. 499 (1835). This is equally true with reference to subsequently imposed judgment liens. Even if the grantor had good title and made a valid conveyance to his grantee, if the grantee does not duly record, the purchaser at an execution sale to satisfy a judgment rendered subsequent to the grant will take title superior to that of the prior unrecorded grant. The anomaly is that the grantor who gave good title at the time of the conveyance is liable to his grantee for breach of the covenant of warranty because the land was taken by an execution purchaser on a judgment rendered subsequent to his grant, notwithstanding that the lack of recordation was not attributable to the grantor-warrantor. Clark v. O'Neal, 13 La. Ann. 381 (1858).

[31] The Supreme Court of North Carolina has said that certificates of acknowledgment will be liberally construed and will be upheld if in "substan-

tial" is hazardous.[32] Litigation will almost always be necessary for a final determination of whether or not an acknowledgment substantially meets the statutory requirements. If a title searcher deems the defect to be "insubstantial" or "merely nominal" and certifies the record title, he gambles that the next title searcher will reach the same conclusion and will not require a lawsuit for its determination. This gamble that an acknowledgment "substantially complies" with the statutory requirements has disastrous potentials for the title lawyer and his grantee-client who purchases upon receiving the lawyer's certification of title. Even if there is no intervening purchaser for value who might cut off the client-grantee, the title he acquires may not be marketable because of an apparently defective acknowledgment. The requirements of a marketable title are not satisfied by the nebulous standard provided by the courts that instruments must be acknowledged only in "substantial compliance" with the statutes. A correction deed or a re-acknowledgment may be impossible to obtain[33] and marketability may not be established except by resort to the courts in an action to quiet title, or otherwise. Title-searching attorneys are naturally reluctant to guess on the materiality or substantiality of acknowledgment defects that might involve their clients in costly and time consuming lawsuits that often may be necessary to establish good and marketable titles.

The legislatures of North Carolina, and the legislatures of most states, from time to time have enacted numerous curative statutes designed to afford relief to landowners and to title lawyers by validating many defectively acknowledged deeds and by making their prior recordations effective.[34] North Carolina has enacted and col-

tial compliance" with the statute. Freeman v. Morrison, 214 N.C. 240, 199 S.E. 12 (1938). The Freeman case is helpful in suggesting the minimum requirements for a valid acknowledgment: (1) name and title of the official taking the acknowledgment; (2) name of grantor; (3) personal appearance of the grantor before the officer; (4) acknowledgment of grantor to the officer of the execution of the instrument ; (5) date; and (6) signature of the officer, and, if required by law otherwise, his seal.

[32] "Until some sure light can be furnished by the courts or legislatures as to the point of demarcation in certificates of acknowledgment between fatal defects and minor irregularities of no consequence title examiners will continue to hesitate in assuring purchasers and mortgagees as to which side of the line a given case will fall on." P. BASYE, CLEARING LAND TITLES § 249 (1953).

[33] *E.g.*, in the event that the grantor has since died, is not available because his whereabouts are unknown or is non compos mentis, etc.

[34] "Of all healing statutes those curing faulty certificates of acknowledgment are the most numerous and probably the most effective in serving to

lected at one place in her statutes at least seventy-seven curative statutes aimed at validating acknowledgments, probates, and defective registrations under certain specifically designated circumstances.[35] A reading of these statutes indicates that they have been enacted haphazardly since 1871 by various sessions of the legislature. They are set up to deal with highly particularized and narrowly defined problems arising where instruments have been defectively acknowledged, probated, or recorded.[36] These statutes have been effective to cure only particular defects occurring within specified dates, and they have not been reënacted or kept up to date in any systematic way. In their present condition, they are really "run away" or "lost" statutes, useless for the most part to aid in the prediction of the soundness of titles until they are stumbled on, thoroughly researched, and, with luck, matched to fit some particular defect that has occurred at some appropriate time to which the statute is applicable. The utility of most of these statutes must be accidental.[37]

Though it is true that the state legislature may eventually get around to curing some of the defects not covered by the earlier curative statutes, at the present time many defects of record caused by faulty acknowledgments, probates, and recordations are simply clogging the marketability of land. The old statutes need to be weeded out or brought up to date, and new ones need to be enacted to remedy the existing situation. Ideally, a pattern should be designed to affect, both retrospectively and prospectively, all types of defects

clear up land titles which would otherwise be likely to remain unmarketable for decades." P. BASYE, CLEARING LAND TITLES § 241 (1953).

[35] See N.C. GEN. STAT. §§ 47-47—108.16 (Supp. 1965). There are additional curative statutes at other places in the statutes relating to similar defects.

[36] The curative statutes show the earmarks of having been drafted and introduced by lawyer-legislators to validate and to make marketable title to specific lands in which the particular lawyer-legislators were personally and professionally interested.

[37] A brief analysis of the first five of North Carolina's curative statutes will illustrate this statement. N.C. GEN. STAT. § 47-47 (1950) applies to instruments registered prior to 1905. N.C. GEN. STAT. § 47-48 (Supp. 1965) cures another defect, occurring *prior to 1964*, having been enacted in 1917, and amended in 1945 and again in 1965. N.C. GEN. STAT. § 47-49 (1950) remedies a defect in acknowledgments and probates which occurred *prior to 1919*. N.C. GEN. STAT. §47-50 (Supp. 1965) relates to a certain type of defect which occurred *prior to 1960*, not having been amended for eleven years previous to 1960, or since. N.C. GEN. STAT. § 47-51 (Supp. 1965) validates instruments with specified defects that were executed *prior to 1959*. This same lack of pattern runs through all of the curative statutes located in North Carolina.

in acknowledgments, probates, and regisrations in general and comprehensive terms.

CONCLUSION: A STATUTORY PROPOSAL

In the event that a case has been adequately made out above that innocent landowners and mortgagees are adversely and unjustly affected by the defective acknowledgment rules, legislation should be enacted to eliminate this anomaly. If the possibility of persons being unjustly deprived of their lands because of mere formalistic accidents can be decreased by the legislature, it should be done. If land titles can be rendered more easily marketable without causing injustice to any person, it should be done. If legislation can diminish the inconvenience, delay, expense, and uncertainty resulting from the unnecessary requirements of bringing quiet title suits, procuring re-acknowledgments, or procuring correction or quitclaim deeds to validate mere formal defects, it should be so designed. If the burdens and labors of title lawyers can be lightened and their certificates of land titles made subject to fewer gambles without a dislocation of the beneficial purposes and effects of existing recordation statutes, the legislative body of a state interested in improving the law of conveyancing should hasten to accomplish these ends.

Pursuant to these conclusions, a proposed statute is set out below for consideration by the bar of North Carolina and by the state's General Assembly. Comparable statutes have already been enacted in a few states.[38]

PROPOSED STATUTE TO BE SUBSTITUTED FOR NORTH CAROLINA GENERAL STATUTES, SECTIONS 47-47 THROUGH 47-108.16(1965)

Section 1. *Recordation or evidentiary value of legal instruments not affected by defective acknowledgment or probate.*—All legal instruments of record which by law are directed to be recorded or are otherwise entitled to be recorded, and which have been duly executed by the proper party or parties, notwithstanding the instruments have not been acknowledged before an officer authorised by the laws of North Carolina to take acknowledgments or which have not been otherwise properly acknowledged, or the acknowledgments of which have not been taken and certified in

[38] *See* CONN. GEN. STAT. ANN. § 47-17 (1960); 25 DEL. CODE ANN. tit. 25, § 132 (1953); ILL. REV. STAT. ch. 30, § 30 (1959); MICH. STAT. ANN. § 26.823 (1953); MINN. STAT. ANN. § 507.251 (Supp. 1965); N.D. CENT. CODE § 47-19-08 (1960).

conformity with the laws of this State in force at the time each such instrument was executed, are severally made as valid and effective in law as if each instrument had been correctly acknowledged and the acknowledgment correctly certified. The record of each such instrument, or any office copy thereof, or the original instrument itself shall be admitted as evidence in all courts of this State and shall be as valid and conclusive evidence as if such instrument had been in all respects acknowledged and the acknowledgment certified in accordance with the then existing law. PROVIDED, that nothing in this section shall impair the right of any person under a purchase heretofore made prior to (effective date of the statute) for a valuable consideration nor affect the rights of any person who has procured a valid lien upon real property prior to (effective date of the statute) and upon which an action is brought to declare or enforce such right within (one year from the effective date of the statute).

Section 2. *Recording Officers, Liability Not Affected.*—This section shall not be construed as relieving the Clerk of the Superior Court or Register of Deeds of any county of this State, from any penalty or liability imposed by law for accepting and recording or filing an instrument not legally entitled to record or filing.[39]

A rule that dictates that a perfectly executed, perfectly recorded instrument is incapable of giving either constructive or actual notice under the recordation statutes, or which bars the admissibility of such instrument as evidence in a lawsuit, has little to commend it. It is a "tricky rule" and "law for law's sake only," and it is a perfect example of the triumph of useless form over substance and reason. The injustices and uncertainties arising from such a rule can be easily corrected for the benefit of everyone, and to the detriment of no one.[40]

[39] *Cf.* Daniel v. Grizzard, 117 N.C. 105, 23 S.E. 93 (1895) which indicates that clerks and registers of deeds are liable on their official bonds not only for all acts "done" by virtue of and under the color of their offices but also for their failure to do what they should have done. This case holds, however, that the cause of action arises and the statute of limitations begins to run from the time of the negligent omission of the public officer to perform his duty and not from the discovery of this fact.

[40] A statute such as the one here proposed will allow third persons searching a title to discover instruments recorded on defective acknowledgments and probates. In fact they cannot help but find such recorded instruments as readily as if they had been duly acknowledged and properly recorded. Not to have such a rule as proposed by the statute, to give full effect to instruments recorded even upon defective acknowledgments and probates, is to disappoint legitimate and reasonable expectations of the parties. The statute subserves both the requirements and purposes of the recording system to give notice *and* the reasonable expectations of the parties.