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Changes in Washington Land Title Record Law

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CHANGES IN WASHINGTON LAND TITLE RECORD LAW

Among the many laws enacted by the recent Legislature, which were approved by the Governor, and took effect at 12 o'clock midnight June 8, is one which governs the filing of land title instruments for recordation and repealing the existing statute, Section 10596 of Remington's Compiled Statutes. The title and the sections of this act material to this discussion are set forth below.[1]

[1]Sess. L. 1927, Ch. 278, p. 670. *"An Act relating to the recording of instruments concerning real property and repealing section 10596 of Remington's Compiled Statutes of Washington.*

"Section 1. (1) The term 'real property' as used in this act includes lands, tenements and hereditaments and chattels real and mortgage liens thereon except a leasehold for a term not exceeding two years.

(2) The term 'purchaser' includes every person to whom any estate or interest in real property is conveyed for a valuable consideration and every assignee of a mortgage, lease or other conditional estate.

(3) The term 'conveyance' includes every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be effected, including a instrument in execution of a power, although the power be one of revocation only, and an instrument releasing in whole or in part, postponing or subordinating a mortgage or other lien, except a will, a lease for a term of not exceeding two years, an executory contract for the sale or purchase of lands, and an instrument granting a power to convey real property as the agent or attorney or the owner of the property. 'To convey' is to execute a 'conveyance' as defined in this subdivision.

(4) The term 'recording officer' means the county auditor of the county.

"Section 2. A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law) may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

"Section 9. A recording officer is not liable for recording an instrument in a wrong book, volume or set of records if the instrument is properly indexed with a reference to the volume and page where the instrument is actually of record.

"Section 10. A recording officer, upon payment or tender to him of

For a proper understanding of the new law, it is necessary to observe the statute which it expressly repealed, viz., Section 10596 of Remington's Compiled Statutes. This latter reads as follows:

> "All deeds, mortgages and assignments of mortgages shall be recorded in the office of the auditor of the county where the land is situated, and shall be valid as against *bona fide* purchasers from the date of their filing for record in said office, and when so filed shall be notice to all the world."

(For convenient reference this statute will be hereinafter referred to as the former law, or former statute.)

The writer is informed that the code of New York state was copied or used as a guide in drafting this new act.[2] Some provisions of the latter are the same as in the New York code, but other provisions are different or do not appear in that code. Hence the New York decisions construing the New York statutes cannot be accepted without qualification as true interpretations of the provisions of this new act.

The statute expressly repealed by this new act provided for the recordation of "deeds, mortgages and assignments of mortgages" only, so that it is specific in designation of instruments and limited in scope. The right to record other instruments arose from the express terms of other sections of the code, or has been judicially determined or merely assumed, rightly or wrongly, to exist by implication from still other sections. A statute[3] prescribing the duties of county auditors as recorders requires them to record not only deeds and mortgages, but also "grants and transfers of real property," releases of mortgages, "powers of attorney to *convey* real estate,"[4] leases which have been acknowledged, contracts concerning real estate, marriage contracts, instruments relating to the separate or community property of married

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the lawful fees therefor, shall record in his office any instrument authorized or permitted by this act to be so recorded."

(For convenient reference this act will be hereinafter referred to as the new law or new act.)

[2] The sections of this new act (the number of which is that first given) and the corresponding section of the New York Code as shown in chapter 51, Cahill's Consol. L. N. Y. 1923 (the second number given), are as follows: 1—290; 2—291, 3—294, 4—295, 5—296, 6—297 7—324, 8—326. The last sentence in Section 2 is not in the corresponding section of the New York Code. Instead the latter has a section which reads:

"Every instrument, entitled to be recorded, must be recorded by the recording officer in the order and as of the time of its delivery to him therefor, *and is considered recorded from the time of such delivery.*" Ch. 51, § 317.

[3] P C. § 1640, Rem. Comp. Stat. § 10601.

P C. § 1640-1, Rem. Comp. Stat. § 10601-2.

women, patents to land and receiver's receipts, "and all such other papers or writings as are required by law to be recorded and such as are required by law to be filed." [5] Prior to the inclusion, by an amendment, in this section of "contracts concerning real estate," such contracts had been held recordable by implication from the direction that auditors record "grants and transfers of real property." [6] And notwithstanding the only "powers of attorney to *convey* real estate" have been designated as recordable, powers of attorney for any and every purpose touching real property have been filed and recorded. The section[7] which requires county auditors to keep indexes to the records and prescribes the form thereof, directs the indexing of "every instrument concerning or affecting real estate, which by law is required to be recorded." In this section the mode is specified for indexing "any *lis pendens,* judgment, notice of lien, order of sale, execution, writ of attachment, or claims of separate or community property" In another section[8] of the chapter prescribing the duties of county auditors, the recordation of copies of final judgments or decrees partitioning or affecting the title or possession of real property is authorized and the record thereof declared to impart constructive notice. This gives support to the legal policy in this state of reading and construing together these several sections relating to the duties of county auditors and the statute concerning the recording of deeds, mortgages and assignments of mortgages and the effect thereof as notice. Particular sections of the code relate respectively to the filing and recording of notices of *lis pendens*[9] (declared to be constructive notice), mechanics' liens,[10] attachment[11] and execution levies,[12] declarations of homestead,[13] abandonments of homestead,[14] notices of husband's or wife's interest in community real property,[15] mixed mortgages,[16] assignments[17] and satisfactions of mortgages,[18] laborers' liens on property of corporations,[19] and other matters. Even these divers statutes do not provide, either

[5] Note 3, *supra.*
[6] P. C .§ 1640, Rem. Comp. Stat. § 10601, *Bernard v. Benson,* 58 Wash. 191, 108 Pac. 439, 137 Am. St. Rep. 1051 (1910).
[7] P. C. § 1641, Rem. Comp. Stat. § 10603.
[8] P C. §1643, Rem. Comp. Stat. § 10605.
[9] P C. § 8452, Rem. Comp. Stat. § 243.
[10] P. C. §§ 9710, 9711, Rem. Comp. Stat. §§ 1134, 1135.
[11] P. C. § 7391, Rem. Comp. Stat. § 2013.
[12] P C. § 7893-4, Rem. Comp. Stat. § 578-4.
[13] P. C. § 7889, Rem. Comp. Stat. § 558.
[14] P C. § 7867, Rem. Comp. Stat. § 536.
[15] P C. § 1449, Rem. Comp Stat. § 10578.
[16] P C. § 9774, Rem. Comp. Stat. § 10597.
[17] P C. § 9742, Rem. Comp. Stat. § 10616.
[18] P C. § 9743, Rem. Comp. Stat. § 10617.
[19] P. C. § 9738, Rem. Comp. Stat. § 1150.

expressly or by reasonable implication, for the recordation of some instruments which are proper, valid, and effective between the parties thereto. For example, agreements between mortgagees and other lien claimants for subordinating or postponing the prior to a junior incumbrance or lien do not appear to be within the terms of any statute relating to recordation, and so have not been recordable.[20] The practical benefits of recordation have and do induce disregard of the limitations of the law, and give rise to a custom to file and record instruments not within the letter of the law, as heretofore illustrated, but a custom does not make the law,[21] though it may aid in interpretation of the law in instances of uncertainty.[22] Thus, prior to the Act of 1897, authorizing recordation of assignments of mortgages, these were recorded though not entitled to be, as observed in *Howard v. Shaw*.[23] And, likewise, executory contracts for the sale of real estate were assumed to be recordable and were recorded long prior to the decision in *Bernard v. Benson*,[24] holding them by implication from various statutes to be within the recording laws.

In striking contrast to the narrow and insufficient designation of recordable instruments in the former statute are the comprehensive provisions of the new act. It authorizes recordation not merely of "deeds, mortgages and assignments of mortgages," as did the repealed statute, but of every "conveyance," which includes, by express definition, "every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument releasing in whole or in part, postponing or subordinating a mortgage or other lien, except a will, a lease for a term of not exceeding two years, an executory contract for the sale or purchase of lands, and an instrument granting a power to convey real property as the agent or attorney for the owner of the property." Instruments by which the holders of paramount or prior mortgages or other liens may subordinate the same to otherwise subordinate and junior mortgages and liens, and assignments of leases, neither of which were by express terms or by clear implication within the scope of the recording system

[20] *Gillig v. Maass*, 28 N. Y. 191 (1863) holding such paper not within recording act.

[21] *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746 (1894).

[22] Note 6, *supra*.

[23] Note 21, *supra*.

[24] Note 6, *supra*.

prior to this new act, are expressly brought within and given the benefit of that system by this new law.

The statute repealed by the new act declares "deeds, mortgages and assignments of mortgages" shall be valid against *bona fide* purchasers from the "date of their filing" for record, and when so filed should be "notice to all the world." This statute imposes on a *bona fide* for value grantee, mortgagee or assignee of a mortgage the obligation of giving constructive notice of his claim, if he desires the protection afforded by the statute, by filing his instrument, and not only to file it, but to file it before a subsequent *bona fide* purchaser or mortgagee pays his money and obtains his instrument. If the first purchaser fails to do so, the subsequent purchaser prevails although the latter does not file his instrument for record before the first purchaser files his own.[25] For example, suppose A, owner of land, conveys the same to B, who does not at once file his deed for recordation. While B's deed is unrecorded, A sells and conveys the same land to C, who pays value, in good faith, without notice or knowledge of B's deed. Then B files his deed, and later C files his deed for record. Under this statute C prevails over B, because B, by his neglect to file his deed, failed to give constructive notice thereof to C before C paid his money and secured his deed. Manifestly, this rule gives a *bona fide* purchaser for value full protection against the claims of prior purchasers not of record at the moment he completes his transaction. The fact that subsequent to that moment the instrument, deed or mortgage of a prior purchaser may be filed for record before the subsequent purchaser can get to the recorder's office to file his own instrument cannot affect the latter. Under this rule a *bona fide* purchaser is enabled to rely upon the record of disclosing the true state of the title, so far as he is concerned, at the moment he completes his transaction. While such purchaser is under no obligation to file his instrument and secure priority of record in order to defeat the claim of a prior purchaser, yet he is obligated to give notice by filing his instrument in order to secure protection against a transaction subsequent to his own—against a subsequent *bona fide* purchaser for value. Thus, in the supposed case, if, after the sale and conveyance to C, and while his deed is unrecorded, B sells and conveys to E, E would prevail over C, C's situation with regard to E being similar to B's with regard to C. This rule has the disadvantage that one who has paid his money, taken his instrument and filed the same, and who is undisputed record owner, is not thereby

[25] *Swanstrom v. Washington Trust Co.*, 41 Wash. 561, 83 Pac. 1112 (1906) *Miller v. Merine*, 43 Fed. 261 (1890).

assured of ownership, unless his instrument were filed for record at the moment his transaction was completed. If any time elapsed between completion of his transaction and the filing of his instrument, his apparent absolute record ownership may be defeated by one who made a subsequent purchase without notice. And the latter party is under no obligation to give record notice of his claim to such prior apparent record owner. Thus, in the supposed case, when B filed his deed, he was record owner, and the owner so far as he knew, but actually not owner at all by reason of the sale and conveyance by A to C. Manifestly, under this rule priority of record does not necessarily confer priority of claim. A *bona fide* purchaser is protected from the moment he pays his money and takes his deed or mortgage against prior purchasers whose claims are not then of record, but not against subsequent purchasers except those who become such after his instrument has been filed for record. Protection is secured by the simultaneous completion of transaction and filing of instrument.

In sharp contrast to the foregoing rule and its consequences are the rule and its effects established by the new act. This act declares an unrecorded conveyance void as to a subsequent *bona fide* purchaser or mortgagee, for value, of the same land or part thereof, from the same vendor, whose conveyance is "first duly recorded." [26] In other words, the deed or mortgage of the first purchaser is always valid except and until a subsequent *bona fide* purchaser for value files his instrument for record before the first purchaser files his own. As between two *bona fide* purchasers for value of the same estate or interest, priority of record determines priority in fact and law A simple, definite standard or test is established for the determination of priority in such cases. This rule does not require, as did the rule under the former statute, that the first purchaser file his instrument and thereby give constructive notice of his claim before the subsequent purchaser pays

[26] This rule obtains in the majority of jurisdictions. While the statutes are not worded alike, they are given a like construction. *Brown v. Jackson*, 3 Wheat. 449, 4 L. ed. 432 (1818) *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430 (1901) *Schott v. Dash*, 49 Nebr. 187, 68 N. W 346, 59 Am. St. Rep. 531 (1896) *Jackson v. Given*, 8 Johns (N. Y.) 137, 5 Am. Dec. 328 (1811) *Ledyard v. Butler* 9 Paige (N. Y.) 132, 37 Am. Dec. 379 (1841) *Wilhelm v. Wilken*, 149 N. Y. 447, 44 N. E. 82, 32 L. R. A. 370, 52 Am. St. Rep. 743 (1896) *Musgrove v. Bonser* 5 Ore. 213, 20 Am. Rep. 737 (1874) *Parrish v. Mahany*, 10 S. D. 276, 73 N. W 97, 66 Am. St. Rep. 715 (1897). Notes: Ann. Cas. 1912A, 195, 197 7 Ann. Cas. 367 21 L. R. A. 33; 13 L. R. A. 238. The rule referred to in *Swanstrom v. Washington Trust Co.*, note 25, *supra*. It is the statutory rule in Oregon (Sec. 9874, Olson's 1920 Oregon Laws) and in Idaho (Sec. 5424 Comp. Stat.) This Idaho statute is like the new Washington act in regard to the "first duly recorded" instrument prevailing.

his money and takes his deed or mortgage. The latter may pay and get his deed or mortgage in ignorance of the prior transaction and with the utmost good faith, and yet lose because the first purchaser gets to the recorder's office and files his instrument "first," that is, before or ahead of the subsequent purchaser. Apply this rule to the hitherto supposed case, and the result is B, and not C, prevails, merely because B filed his deed before C filed his. This rule gives a purchaser, in the situations under consideration, who sees his deed first of record a certainty of ownership not *always* afforded by the former statute. But this new act does not give a purchaser record protection at the time he closes his transaction—pays his money and gets his instrument—since notwithstanding he does so in reliance upon what the record shows, he may be defeated by another party, whose claim is not disclosed by the record, who files his instrument first. This system does not give the protection against all prior parties as of the moment a transaction is completed as the former statute did. But when an instrument is filed for record, full protection is given against all prior and subsequent parties whose claims are not of record at the time the instrument is filed. To secure protection under this system, as under the other heretofore mentioned, the closing of a transaction and the filing of instruments should be simultaneous events.

An instrument must, of course, be filed before it can be recorded—indexed and transcribed in a book in the manner prescribed by law. It is the obligation of the grantee, mortgagee, or vendee to see that his instrument is filed for recordation. It is the duty of county auditors as recorders to index and transcribe instruments filed for that purpose. Necessarily a more or less period of time elapses between the moment an instrument is filed and the moment it is indexed, and between either or both of these and the moment the transcription of the instrument is completed. Even a minute of time may be a vital element in the determination of priority. The new act gives priority to the conveyance *"first duly recorded."* Standing alone this phrase would mean that instrument which is first properly recorded in the mode prescribed by law prevails. To avoid the uncertainty of that moment of time, the declaration is made, "an instrument is deemed recorded the minute it is filed for record."

It is the obligation of the grantee or mortgagee to file his deed or mortgage, and it is the duty of the county auditor as recorder to do the indexing and transcribing the law requires to be done. Due to fraud, negligence, mistake, or other cause, the auditor may not properly or accurately index or transcribe an instrument in the mode required

by law, or may fail to index or transcribe it at all.[27] Consequently a party, using the index to ascertain what is of record in the chain of title to the land he contemplates dealing with, may fail to find an instrument, or a given transcription may not inform him of the true contents of the instrument it purports to be a copy of, as, for example, a deed duly transcribed may not be indexed,[28] or the transcription of a mortgage may show it given to secure a smaller amount than the mortgage itself secures.[29] This party, knowing of no facts save what he has found and been advised of by the record, completes his transaction in reliance thereon. Now, either he must be protected by the record as it stands, or the grantee or mortgagee whose instrument was not recorded as it should have been must be. One or the other must lose. As to who loses in situations of this kind there is a conflict of authority [30] As the recording system in every state is a statutory creation, the decisions are supposed to be based upon the provisions of the statute of the particular jurisdiction, but one or the other of certain general principles are given great weight. In some jurisdictions it is held that a grantee or mortgagee is only obligated to file his instrument, and that thereafter he is fully protected no matter whether it be subsequently indexed and copied correctly or not at all. This means

[27] In this state an instance of omission is disclosed in *Ritchie v. Griffiths*, 1 Wash. 429, 25 Pac. 341, 22 Am. St. Rep. 155, 12 L. R. A. 384 (1890), (deed not indexed) and an instance of error in *Bernard v. Benson*, note 6, *supra* (contract recorded in wrong book) Other cases are: *Chamberlain v. Bell*, 7 Cal. 292, 68 Am. Dec. 260 (1857) *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250 (1878) *Prouty v. Marshall*, 225 Pa. St. 570, 74 Atl. 550, 25 L. R. A. (N. S.) 1211 (1909) *Bedford v. Tupper* 30 Hun. (N. Y.) 174 (1883) *Merrick v. Wallace*, 19 Ill. 486 (1858) *Brydon v. Campbell*, 40 Md. 331 (1874) *Fincher v. Hanegan*, 59 Ark. 151, 26 S. W 821, 24 L. R. A. 543 (1894) *Parsons v. Lent*, 34 N. J. Eq. 69 (1889) *Crews v. Taylor* 56 Tex. 461 (1882) *Hartwell v. Riley*, 62 N. Y. S. 317 (App. Div. 1900) *Reeder v. State*, 98 Ind. 114 (1884) State v. Davis, 96 Ind. 539 (1884) *Nichols v. Reynolds*, 1 R. I. 30, 36 Am. Dec. 238 (1840) *Zenner v. Edgar Zinc Co.*, 79 Kan. 406, 99 Pac. 614 (1909) *Mims v. Mims*, 35 Ala. 23 (1859) *White v. Himmelberger-Harrison Lumber Co.*, 240 Mo. 13, 139 S. W 553, 42 L. R. A. (N. S.) 151 (1911) *Beekman v. Frost*, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246 (1820).

[28] *Ritchie v. Griffiths*, note 27, *supra*.

[29] *Gilchrist v. Gough*, note 27, *supra* ($5000 mortgage transcribed $500) *Beekman v. Frost*, note 27, *supra* ($3000 mortgage transcribed as $300).

[30] Specific examples of this conflict in decisions involving like situations are manifested, for example, in these two cases: where mortgage for $1000 transcribed as mortgage for $100, the subsequent purchaser held charged with notice of what mortgage showed, the mortgagee not being responsible for the error of recorder, *Zear v. Boston, etc., Tr Co.*, 5 Kan. App. 505, 43 Pac. 977 (1896). But in *Gilchrist v. Gough*, note 27, *supra*, where a mortgage for $5000 was transcribed as given for $500, held that the record was notice to subsequent purchaser of what it showed and no more; mortgagee being deemed responsible for accuracy of record held to be the loser.

that an instrument which has been duly filed for record thereafter imparts constructive notice of its existence and contents no matter whether it be incorrectly indexed or transcribed, or be not indexed or copied at all. Any injury resulting from an error or omission is held to fall upon the subsequent purchaser, who may recover from the recorder therefor.[31] In other jurisdictions a grantee or mortgagee is obligated to see that his instrument is correctly transcribed—the record is notice only of what it shows—but does not have to see that it is indexed.[32] In yet other jurisdictions, a grantee or mortgagee is responsible for both indexing and transcribing, which means that unless his instrument is indexed and transcribed it will not operate as notice, and the record copy of the instrument is notice of what it shows and nothing else.[33] This rule was established in this state at an early date by the decision in *Ritchie v. Griffiths*.[34] In this case a deed, duly filed for record, had been copied in a book of deeds, but not indexed, and the record as made was held not to have imparted constructive notice, so a subsequent purchaser, without actual notice, of the same land was held to have the superior title. In support of this rule it is said, since the statute imposed upon a grantee the obligation to give constructive notice of his deed, that obligation required him to see that his deed was indexed and transcribed in the manner prescribed by law, so that a subsequent party could obtain from the record information of the first party's claim. A grantee controls his own deed, can record it or not as he sees fit, and has the opportunity and the right as no one else has to see that recordation of it is properly made. In doing that work, the recorder is agent of the grantee, who pays him for that service. And it is said.

> "It may be a hardship, but where one of two innocent persons must suffer, the rule is that the misfortune must rest on the person in whose business and under whose control it

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[31] *Chapman v. Johnson*, 142 Ala. 633, 38 So. 797, 4 Ann. Cas. 559 (1905), and note; *Deming v. Miles*, 35 Nebr. 739, 53 N. W 665, 37 Am. St. Rep. 464 (1892) and note; *Parrish v. Mahany*, 10 S. D. 276, 73 N. W 97, 66 Am. St. Rep. 715 (1897), and note; *Neas v. Whitener-London Realty Co.*, 119 Ark. 301, 178 S. W 390, Ann. Cas. 1917B, 780, L. R. A. 1916A, 525 (1915) *Atlas Lumber Co. v. Canadian-American Mtg. and Tr. Co.*, 36 N. D. 39, 161 N. W 604 (1917) *Gillespie v. Rogers*, 146 Mass. 613, 16 N. E. 711 (1888) *Hodges v. Simpson*, 89 Okla. 80, 213 Pac. 737 (1923) *Beverly v. Ellis*, 1 Rand (Va.) 102 (1822) *Mims v. Mims*, note 27, *supra*, *Mangold v. Barlow*, 51 Miss. 593, 48 Am. Rep. 84 (1874) Notes, Ann. Cas. 1913B, 69.

[32] *Bishop v. Schneider* 46 Mo. 472 (1891).

[33] *Ritchie v. Griffiths*, note 27, *supra*, *Gilchrist v. Gough*, note 27, *supra*, *Barney v. McCarty*, 15 Ia. 510, 83 Am. Dec. 427 (1864) *White v. Minnelberger-Harrison Lumber Co.*, note 27, *supra*, *Prouty v. Marshall*, note 27, *supra*.

[34] Note 27, *supra*.

> happened, and who had it in his power to avert it. Any other rule would be abhorrent to our natural ideas of right, and would render perilous every business enterprise."

Under this rule the instrument itself is deemed notice of its existence and contents after it is filed for record and until it is indexed and transcribed, then the instrument is superseded by the record as made, which is notice of what it shows and no more. To support this view the statute imposing on grantees and mortgagees the obligation of giving notice of their instruments, and the statutes prescribing the duties of county auditors as recorders in indexing and transcribing instruments filed for record, are read and construed together. Statutory requirements as to the contents of the index, the necessity of the index as a means to find what matters are of record relating to or concerning a particular property, the reliance thereon by searchers, and the consequent need that the indexes be a dependable source of information, are emphasized to support the view that they are an essential part of the record of every instrument.

It must be observed that the statute in force when the *Ritchie* case, *supra,* was decided, declared deeds and mortgages should

> "be valid against *bona fide* purchasers, from the date of their filing *or recording* in said office, and when so filed *or recorded* shall be notice to all the world." [35]

This statute was amended in 1897,[36] after the decision in the *Ritchie* case, *supra,* in order to include assignments of mortgages, the latter having been held not to be within the statute.[37] The words "or recording" and "or recorded" were omitted from the statute as amended, which is that statute expressly repealed by the new act. Notwithstanding that the amended statute declared an instrument should prevail and be notice from the time it was "filed," the rule in the *Ritchie* case has been considered as existing under the amended statute as evidenced by its recognition and application in various cases. Thus, in *Malbou v. Grow* [38] the *Ritchie* case *supra,* is cited and quoted, the rule therein announced stated and applied, and the issue whether the description of property in a mortgage had been sufficiently and properly indexed so as to impart constructive notice was determined in the light of the rule. In *Sawyer v. Vermont Loan and Trust Company,*[39] the

[35] Hill's Ann. Codes and Stat. § 1439.
[36] Sess. L. 1897, p. 5, § 1.
[37] *Howard v. Shaw,* note 21, *supra, Fischer v. Woodruff,* 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742 (1901).
[38] 15 Wash. 301, 46 Pac. 330 (1896)
[39] 41 Wash. 524, 84 Pac. 8 (1906).

contention that notice of the filing of a deed would be good for only twenty days, unless the deed was actually recorded, is answered in the negative, the Court saying:

> "When a person has filed in the county auditor's office for record an instrument authorized to be recorded, we do not think delay or neglect of the county auditor in actually recording said instrument can militate against the party who duly filed said instrument for record, *if it* was promptly and properly *indexed* in the book required by law to be kept for that purpose."

In *Bernard v. Benson*,[40] the statutes governing the duties of recorders and the statute authorizing the recording of deeds, etc., and declaring their effect as notice, were, as in the *Ritchie* case, construed together as *in pari materia* for the determination of the issue whether executory contracts for the sale of land were entitled to be recorded, and, if recorded, whether the record thereof had effect as constructive notice. And it was therein held that such instruments were recordable, and that the record thereof in the wrong book—Miscellaneous Records instead of Book of Deeds—did not impart notice, thereby adhering to the declaration in the *Ritchie* case, which is cited, "that constructive notice does not arise from an attempt to comply with the registry laws." In *Jones v. Berg*,[41] it was held that an index of the record of a deed, in which index the description of the premises was noted as "part" of lots designated by number and the name of the addition, imparted notice to a purchaser of adjoining property which was part, though not the same part, of the property so indexed, of the grant of an easement over such adjoining property. And in the relatively recent case of *Haggerty v. Building Investment Co.*,[42] the various statutes relating to the duties of recorders and the statute governing the effect of the records of deeds, mortgages, etc., as notice, were, as in the *Ritchie* case, *supra*, construed together to determine the issue whether a deed, absolute in form, but intended as a mortgage, recorded and indexed as its form suggested—as a deed—imparted constructive notice. In holding it did, the Court said,

> "since every searcher gains the information from the general index which leads him to the instrument desired, we think all must take notice of what the general index reveals, and none may be heard to say that, because the auditor may, for his own convenience or that of the public, record some of the

[40] Note 6, *supra*.
[41] 105 Wash. 69, 177 Pac. 712 (1919).
[42] 111 Wash. 638, 191 Pac. 760 (1920).

> instruments there indexed in one book and some in another, he may shut his eyes to what the index, speaking as the statute directs, tells him."

A careful study of the briefs filed and the decision rendered in the *Ritchie* case indicates that the words "or recording" and "or recorded" as alternatives after the words "filing" and "filed" in the statute in force when that case was decided did not influence that decision at all. So that it appears that the rule therein established was as applicable to the succeeding amended statute as it was to the one so amended.

Does the new act abrogate the rule in the *Ritchie* case, *supra?* The statutes prescribing the mode of recording and the duties of county auditors in indexing and transcribing referred to in that case have not been changed in material particulars and remain in force. A grantee or mortgagee is still under obligation to file his instrument. Section 10 of the new act expressly commands county auditors, upon payment of their fees therefor, to record instruments, and thereby may appear to make those officers agents, as held in the *Ritchie* case, *supra,* for parties filing instruments in doing the work of recordation. Applicable also may appear to be the equitable principle applied in that case, that where one of two innocent persons must suffer, the misfortune must rest upon the one in whose business and under whose control it happened, and who had it in his power to avert it. All that is said in the *Ritchie* case, *supra,* touching the index being an essential part of the record is as true now as when uttered, and even more so because of the vastly increased volume of the records. An instrument can and ought to be indexed immediately on its reception, the notation of the book and page of transcription being made when ascertained. It does not seem to impose any hardship on a grantee or mortgagee to see that his instrument is properly indexed. But, while these various general principles may appear applicable, they are not under the new act. The whole argument in the *Ritchie* case, *supra,* is based upon the statutory obligation of a grantee or mortgagee to give *constructive* notice of his instrument by recordation thereof in the manner prescribed by law The new act sets aside that obligation, and establishes a different principle. Between a prior and subsequent *bona fide* for value purchaser or mortgagee of all or part of the same land from the same grantor, priority is determined merely by priority of record, without regard to the fact the first grantee or mortgagee had not given constructive notice of his claim at the time the second grantee completed his transaction. This is the object and purpose of the new law While a grantee

or mortgagee pays a fee for recording his instrument, the recorder is not thereby made his agent. The moment an instrument, duly acknowledged, with that fact certified, is filed, it is deemed recorded, although it be improperly indexed or transcribed or not indexed or transcribed at all. In support of this new rule it is argued that the parties to a transaction, having exchanged consideration and instrument, and the latter having been filed for record, and being then shown to be first of record, should not be prejudiced by subsequent acts or omissions of the recorder in making recordation. To permit that renders perilous every transaction by imparting to it a hazard the parties cannot control. And it is said, other things being equal, the maxim is, he who is prior in time is prior in right.[43] Under this new act it is the view that when a grantee or mortgagee files his instrument, he does his full duty, and is under no obligation to see that his instrument is properly indexed or recorded. That requirement is for the convenience and benefit of subsequent parties, and they, when injured by an error in or omission from the record, must seek recovery in damages from the recorder.[44] Obviously, under this rule, a subsequent party may not find, by reason of some error in or omission from the record, all that is necessary for his protection—the existence of an instrument and its true contents. In extenuation it is pointed out that the records may fail to give full information of many matters, even if properly made.

> "For example, an apparently perfect record title may be bad, because the grantor in a deed may have been disseized or insane, or because the title has been defeated by adverse possession. In either of these cases, resort must be had to extrinsic evidence to determine where the title is; and whoever searches the title upon the records, if he would be absolutely safe, must do so with a knowledge of facts not disclosed by the records themselves." [45]

Which is the better rule, that existing under the former statute or that established by the new act, is a matter of opinion. Considering the enormous number of instruments filed, and the fewness of decisions involving either rule, it appears that one offers no superior advantage over the other from a practical standpoint.

Section 9 of this new act declares a recording officer shall not be liable for recording an instrument in the wrong book, volume or page, if the instrument is properly indexed with reference to the volume and page of the book where actually recorded. It has been held that

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[43] *Oats v. Wells*, 28 Ark. 244 (1873).
[44] See cases under note 31, *supra*.
[45] *Gillespie v. Rogers*, note 31, *supra*.

the record of an executory contract of sale of realty in a book which the auditor entitled "Miscellaneous Records," and the index of the contract with reference thereto, did not operate to give constructive notice.[46] The object of this section is to avoid that result in like situations. Since the title to this new act declares it concerns instruments to real property, Section 9 necessarily applies to such instruments only, and, therefore, its provisions afford no protection to an auditor in cases of transcription of instruments relating to personal property in the wrong book. Section 9 makes the index a part of the record of instruments affecting real property. This is of no consequence to a grantee, mortgagee or vendee who has filed his paper, as he is not prejudiced by an erroneous record of it, but is of importance to subsequent purchasers, since it requires them to take notice of whatever the index shows in the line of title to the property they deal with.

Leases for one year and upward must be acknowledged, and it seems, therefore, that this act could well have been made applicable to leases for that minimum instead of to leases only for two years or more. The differentiation accomplishes no purpose and may produce confusion. While a specified statute is expressly repealed by this new act and this act substituted therefor, yet the act is far more comprehensive in provisions and scope than the statute which it repealed, since it includes and is applicable to various instruments which are the subject-matter of particular statutes. The act, therefore, repeals by implication certain sections of the code or provisions therein in conflict with this act. To have specifically set forth and expressly repealed in this act the statutes it conflicts with and impliedly repeals would have given a certainty and definiteness to the law that is highly desirable, especially in a matter like this which so vitally concerns the mass of people.

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[46] Note 6, *supra.*

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