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# OFF-RECORD RISKS FOR BONA FIDE PURCHASERS OF INTERESTS IN REAL PROPERTY

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## INTRODUCTION

This article will examine the extent of off-record risks for bona fide purchasers of interests in real property. As used herein, off-record risks are those circumstances which may operate to divest a bona fide purchaser of part or all of his interest but which would not be disclosed by the public records or a prima facie examination of the premises. The disclosure afforded by public land records is limited to matters within the bona fide purchaser's chain of title.[1] Bona fide purchasers are purchasers for a valuable consideration without notice of the circumstances which operate as off-record risks; interests in real property include fee simple interests, security interests, easements, and leases.

As the definition of off-record risks indicates, matters of public record which might be outside the scope of a normal title search will not for the most part be considered off-record risks. Thus, eminent domain proceedings, lis pendens, and divorce decrees affecting title to realty, which in some jurisdictions may not appear in the public records usually inspected by title examiners and abstracters, are not off-record risks. Although such matters may be risks to the bona fide purchaser because not normally investigated in determining good title, and although title insurance companies insure against them, they are not truly off-record, for they can be uncovered without excessive effort or cost in judicial or other governmental records open to public examination.

An exception is the risk posed in certain circumstances by the federal bankruptcy law. It is considered in this article as an off-record risk because, although the bankruptcy petition is of record, it is of record in a jurisdiction other than that in which the subject property is located. Therefore, it could only be discovered through an examination of records which are normally irrelevant to the title examiner. Furthermore, only a highly impractical and prohibitively expensive search of the bankruptcy records of every federal district court in the country would eliminate this risk.

1. *See* 6 R. POWELL, THE LAW OF REAL PROPERTY 778-79 (1965).

Other off-record risks, such as those arising from an instrument senior in date but junior in record or from the doctrine of estoppel by deed, would be similarly disclosed by an impractical search; that is, one including examination of records outside the chain of title. Likewise, a fraudulent release of a mortgage could be ascertained by the bona fide purchaser if after recording his interest he made periodic checks to see that it was still properly recorded. Off-record risks such as possession not prima facie inconsistent with the purchaser's interests might be revealed by a thorough survey of the premises. Still others, such as incapacity to convey and defrauding of a grantor, might be uncovered by investigation into the personal circumstances of grantors in the bona fide purchaser's chain. On the other hand, off-record risks such as prior adverse possession and those arising from grace periods for filing are almost undiscoverable until suit against the purchaser is filed. In any event, the burden of uncovering any off-record risk is normally so great that the bona fide purchaser will seek other means of protection. These means include title insurance, title warranties, and, in those few states where it is possible, registration under a Torrens act.

Title insurance, of course, is the predominant method in the United States of guarding against off-record risks; hence off-record risks for bona fide purchasers are especially important to title insurance companies. Since title insurance policies will usually except from coverage record defects in title, off-record risks are a major source of potential liability for title insurance companies.[2] In addition, vendors who by covenant warrant good title should be aware of the extent of off-record risks, if only to exclude them from the warranty. The conscientious title examiner certifying a title for his client also ought to be cognizant of off-record risks extant in his jurisdiction, even though he will not normally be responsible for losses resulting therefrom.[3]

It is in the latter field of title examination and certification that off-record risks assume their greatest importance for the practitioner. As the volume of land sales rises with our expanding population and with that population's ever increasing mobility, the threat of off-record risks will increase correspondingly. The practitioner unaware of the nature and scope of such risks and of judicial exposition on the subject will be significantly disadvantaged in handling his client's real property transactions and capable of doing the client a great deal of harm. Nor is the problem of off-record risks a matter of concern to the property specialist alone:

> It is commonly believed that real property law and the appraisal of titles are essentially within the province of the property or title specialist. In one sense this is true. But

2. *See* Johnstone, *Title Insurance*, 66 YALE L.J. 492, 494-96 (1957).
3. *See* 1 T. PATTON, TITLES 198-201 (2d ed. 1957).

> it is also true that a title practice cuts across the lines of many branches of law which lie outside the particular field of so-called "property law." Such other branches of law include the law of wills and administration, including guardianship, the law of persons, corporations, evidence, procedure and constitutional law not to mention certain aspects of trusts, accounting and taxation.[4]

Thus, counsel for trusts, estates, or corporations involved in real estate transfers will also be disadvantaged by lack of knowledge of the extent and bases of off-record risks. On the other hand, an elementary understanding of off-record risks will in many cases lead to resolution, or at least avoidance, of the problems they pose.

It is hoped, therefore, that this article will serve a practical purpose in an area which, despite its importance in terms of potential money, time and energy saved, seems to have been generally neglected in the literature. Only a few articles have attempted to deal with off-record risks and most of them are of pre-1930 vintage.[5] Moreover, those articles are generally unsatisfactory. Their lists of off-record risks are incomplete and there is little consideration of actual cases involving defeasance of bona fide purchasers' interests by off-record claims.

It should be realized, however, that off-record risks are an anomaly in American law. Courts in this country have generally protected the bona fide purchaser whose interest in real property is threatened by the off-record rights of another.[6] There appear to be two basic reasons for this protection. When applicable to the facts of the case, the first reason is often the salutary equitable doctrine that as between two innocent parties, he who placed the means in the hands of a third party to commit a wrong (that is, the holder of the off-record interest) must bear the loss.[7] The second and more general reason is concern for stability of land titles and the integrity of land records.[8] As shall be seen, cases in which the off-record interest holder prevailed over the bona fide

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4. *Preface* to P. BAYSE, CLEARING LAND TITLES at v (1953).

5. *See* Rood, *Registration of Land Titles*, 12 MICH. L. REV. 379, 389-92 (1914); Haymond, *Title Insurance Risks of Which the Public Records Give No Notice*, 1 S. CAL. L. REV. 422 (1928); *cf.* Webster, *The Quest for Clear Land Titles*, 44 N.C. L. REV. 89, 90-98 (1965).

6. *See, e.g.*, Marlenee v. Brown, 21 Cal. 2d 668, 134 P.2d 770 (1943); Burch v. Nicholson, 157 Iowa 502, 137 N.W. 1066 (1912); Mid-Kansas Fed. Sav. & Loan Ass'n v. Binter, 197 Kan. 106, 415 P.2d 278 (1966); Colgin v. Coursege, 106 La. 684, 31 So. 144 (1902); Brown v. Khoury, 346 Mich. 97, 77 N.W.2d 336 (1956); Phillips v. Buchanan Lumber Co., 151 N.C. 519, 66 S.E. 603 (1909); Dixon v. Kaufman, 79 N.D. 633, 58 N.W.2d 797 (1953); Strong v. Efficiency Apart. Corp., 159 Tenn. 337, 17 S.W.2d 1 (1929); Pure Oil Co. v. Swindall, 58 S.W.2d 7 (Tex. Ct. App. 1933).

7. *See, e.g.*, Mid-Kansas Fed. Sav. & Loan Ass'n v. Binter, 197 Kan. 106, 415 P.2d 278 (1966).

8. *See, e.g.*, United States v. Krause, 92 F. Supp. 756 (W.D. La. 1950); Floyd County Bd. of Educ. v. Johnson, 260 S.W.2d 217 (Ky. Ct. App. 1953).

purchaser are usually distinguished by the court's ignorance of or disregard for these principles.

Generally, however, this article will not attempt to deal with the overwhelming weight of authority holding that bona fide purchasers are to be protected against off-record risks. Also, an off-record risk that will defeat a bona fide purchaser's interest in one jurisdiction will not do so in all jurisdictions. Thus, the concern herein will be with possibilities rather than probabilities. A broad outline of the off-record risks which have manifested themselves in various American jurisdictions and an analysis of the justifications offered for them by the courts is contemplated.

## I. Forgeries and Frauds

By far the greatest number of cases in which a bona fide purchaser's interest in real property has been defeated by an off-record risk are those involving forgeries and frauds in the purchaser's chain of title: (1) a forged instrument in the purchaser's chain of title; (2) a fraudulent release of a mortgage or other security interest in the purchaser's chain of title; (3) defrauding of a grantor in the purchaser's chain of title, that is, a prior holder in the purchaser's chain has been induced by deceit, duress, or overreaching to part with his interest. The courts usually group these three off-record risks under the general heading of forgeries, saying that when an instrument has been procured by fraudulent misrepresentation or the like, its execution amounts in law to a forgery.[9] Likewise, such policy considerations as the courts have articulated in these cases are substantially identical. It is submitted, however, that the facts of these three groups of cases are sufficiently different to call into play different policy considerations and that, therefore, they should be distinguished.

There are primarily two policy reasons which the courts have given for their decisions in these cases. The first is protection of the rights of the innocent victim of the fraud or forgery. In the fraud cases especially, an integral component of this policy is protection of the rights of widows, orphans and other minors, elderly people and illiterates. The second policy ground is the prevention of forgery or fraud. Hopefully, it will be demonstrated that these two considerations are not very convincing today, however persuasive they may have been when first articulated.

Where it is held that the forgery or fraud renders nugatory an essential formal element in the execution of an instrument, such as delivery or acknowledgment by a necessary party, the policies underlying those requirements are called into play. Thus, in the fraudulent delivery cases lack of intent to convey on the part of the original grantor supports the decision against the bona fide purchaser—a fairly persuasive result. On the other hand, in the

9. *See* Prather v. LaRue, 200 Okla. 151, 191 P.2d 214 (1948).

forged acknowledgment cases, the forged acknowledgment usually being that of a spouse, the underlying rationale is often nothing more than an anachronistic attempt to preserve the homestead interest at the expense of bona fide purchasers via a legal technicality.

*A. Forged Instruments*

Typically in those cases in which the rights of a bona fide purchaser were defeated by those of the victim of a forged instrument, the one committing the forgery was an individual having a special relationship with the victim and who thereby gained the opportunity to perpetrate the forgery. Thus, *Prater v. Prater*[10] was a suit by a husband against his former wife to cancel certain deeds to jointly held property, one of which had been forged by the wife to make her appear as sole owner. In reversing a lower court decision dismissing the plaintiff's suit, and holding that even as to the subsequent bona fide purchasers without notice the conveyance under the forged deed operated to pass only a one-half interest in the subject property, the Mississippi Supreme Court said:

> An altered instrument does not operate to pass title, and when Mrs. Stribling [Mrs. Prater's grantee] purchased on the faith of the public records she does not occupy the position of an innocent purchaser for value as to the interest of Neal Prater. . . . This is true for two reasons; one reason is that the title as to his one-half interest has never passed out of Neal Prater by instrument of writing required by the Statute of Frauds, and secondly, a purchaser under a forgery is not exalted by law into the preferred position of innocent purchaser and a thief can give no title. Consequently Mrs. Stribling was vested with an undivided one-half interest in the property by the deed from Mrs. Prater.[11]

It is submitted that the question whether title did pass out of Neal Prater should have been decided not by a mechanical application of the Statute of Frauds, but by a comparison of Mr. Prater's equities as against those of subsequent purchasers. Whether Mrs. Stribling and her successors in title were innocent purchasers should not have turned on the moral character of their grantor. As to Mrs. Stribling, it could be said that one who records his deed, as she did, on the same day as his grantor should be on notice of possible chicanery. As between Neal Prater and the other bona fide purchasers, however, it is suggested that one who does not record his deed and then leaves his estranged wife in

10. 208 Miss. 59, 43 So. 2d 582 (1949).

11. *Id.* at 67, 43 So. 2d at 584. In a subsequent proceeding, Prater v. Prater, 208 Miss. 59, 44 So. 2d 538 (1950), Mrs. Stribling was given a lien on Prater's interest for one-half the amount of mortgage payments made by her on a mortgage which had been assumed by Mr. and Mrs. Prater.

possession of jointly held property deserves whatever the wiles of alienated womanhood allot him.[12]

*Vanhoose v. Fairchild*[13] was an action to reform or cancel certain deeds. The Kentucky Court of Appeals affirmed the reformation by the lower court of a deed forged by the son and brother of the plaintiffs and its cancellation of the deed to defendant George Vanhoose. Regarding the latter's contention that he was an innocent purchaser, the court said:

> [I]t is not material whether he knew or was ignorant of the unauthorized alteration by Frank Fairchild of the deed from C. B. Vanhoose to Abner Fairchild.
>
> Where no title, legal or equitable, passed by a conveyance to the purchaser, for the reason that title was in another person than the vendor, the fact that the purchaser paid value and had no notice is immaterial.[14]

The plaintiffs' allegations and the facts of the case were such that the court may well have thought that George Vanhoose was not a bona fide purchaser. Moreover in 1911, before social security, medicare, and aid to dependent children, when ours was still a land-based rather than a commercial society, the court would have been anxious to protect the rights of the widow and the other children of Abner Fairchild. If so, it is regrettable that those considerations were ignored in favor of the ossified principle quoted above.[15]

In some cases the grantor himself apparently alters an instrument after its execution. *Reck v. Clapp*[16] was an action of ejectment by the purchaser of the subject property at an execution sale in which a judgment had been rendered in the lower court for defendant Clapp, a bona fide purchaser. In reversing that judgment the Pennsylvania Supreme Court said:

> The second point of the plaintiffs was answered by the court below by their saying in effect, that the defendant would not be affected by the forgery, because he could assert the rights of an innocent purchaser without notice if he used reasonable diligence to obtain access to the original

12. A similar case is Gioscio v. Lautenschlager, 23 Cal. App. 2d 616, 73 P.2d 1230 (1937) (husband given preference over bona fide purchasers claiming under forged deed from estranged wife).

13. 145 Ky. 700, 141 S.W. 75 (1911).

14. *Id.* at 704, 141 S.W. at 76.

15. For similar cases, see Lowther Oil & Gas Co. v. McGuire, 189 Ky. 681, 225 S.W. 718 (1920) (purchaser of father's interest at execution sale prevailed over bona fide purchasers from son who forged deed from father to himself); Succession of Rosinski, 158 So. 2d 467 (La. Ct. App. 1963) (defense of bona fide purchaser not available to defendants who held under will alleged to have been forged by decedent's sister who was defendant's grantor); Continental Oil Co. v. Walker, 238 Miss. 21, 117 So. 2d 333 (1960) (purchaser of son's interest preferred over bona fide purchaser of oil and gas lease claiming under mineral deed forged by father).

16. 98 Pa. 581 (1881).

> paper, but without success, and the title, as recorded, was fair and free from blemish. The consequences of such a doctrine would be of a most serious character if it received the sanction of the courts. For then it would be only necessary for the forger of a deed or mortgage, after having it placed on record, to lose or destroy the original instrument and convey his title to an innocent third person for value, pretending to him that the original paper was mislaid and would be subsequently discovered. Of course, a purchaser who examines the records is protected by them as far as they can protect him, but he necessarily takes the risk of having the actual state of the title correspond with that which appears of record.[17]

The court in effect subordinates the policy of having safe land titles reflected by the records to that of discouraging forgery. It would seem, however, that the deterrence of forgery could best be accomplished by criminal sanction without compromising the integrity of the public land records.[18]

*Lincoln Building & Loan Association v. Cohen*[19] involved a forgery by an agent, one Frankenberger, of the purported grantors, Mrs. Woodward and Mrs. Snyder. When plaintiff Lincoln Building and Loan Association, a bona fide purchaser, sought to foreclose its mortgage obtained under the forged deed, the foreclosure action was consolidated with an action by Mrs. Snyder and Mrs. Woodward to cancel the forged deed and the Association's mortgage. Although the court held that the Association should have a lien against the property for the value of benefits received by Woodward and Snyder from the plaintiff's loan, it said:

> The judgment to the extent that it cancelled the deed and mortgage is correct. A forged deed is void, and, of course a mortgage is of no higher dignity than the deed on which it is based. . . . [T]he purchasers from the vendee in a forged deed obtained no better title than that possessed by the vendor and are not entitled to the protection afforded to innocent purchasers. . . . It is argued by appellant, however, that Frankenberger was the agent and attorney of the appellees Mrs. Woodward and Mrs. Snyder, and that his acts while acting as agent bound his principals and made them liable to appellant for the entire amount advanced by it on the real estate. Frankenberger was the agent of appellees to negotiate a loan to be secured by a mortgage on the real estate, and after the mortgage had been executed to deliver it to the mortgagee. He had no authority, express or implied, to alter the mortgage and,

17. *Id.* at 585-86.

18. Another case in which a grantor altered a deed is Arrison v. Harmstead, 2 Pa. 191 (1846), wherein the grantor added a ground rent reservation without the knowledge of the grantee (Harmstead) and then recorded. Harmstead prevailed against a subsequent bona fide purchaser of the ground rent.

19. 292 Ky. 234, 165 S.W.2d 957 (1942).

> certainly, no authority to convert it into a deed. Under the circumstances the alteration of the instrument by Frankenberger is to be regarded as the act of a stranger.[20]

Again there is a smokescreen of question-begging cliches camouflaging the equities of the case. Of course Frankenberger was not authorized to alter the mortgage, but he did indeed alter it and Mrs. Snyder and Mrs. Woodward afforded him the opportunity to do so. Perhaps the court thought that elderly ladies should not be held to too strict account for the actions of those they engage to transact their business, but what happened to the maxim that as between two innocent parties he who put it in the power of another to do the wrong must bear the loss?[21]

As indicated above, in some cases the forgery nullifies an essential formality in the execution of an instrument and thereby voids the instrument itself. Thus, in *Kline v. Mueller*,[22] wherein a nonexistent notary public had "certified" that plaintiff Mueller's husband was a single man, the Oklahoma Supreme Court said:

> [T]he evidence in impeachment of the [notarized] certificate of acknowledgment was of that quality, as by the controlling rules of law required, to carry conviction to the judicial mind that the Hanson deed, relied on by defendants as the basic instrument of their title, was a forgery. . . .[23]

The court then uttered the usual shibboleths to the effect that a forged deed is ineffective as a muniment of title even as to subsequent bona fide purchasers.[24]

In *Wheelock v. Cavitt*[25] the plaintiff contended that a deed, although purportedly signed and acknowledged by both her husband and herself, had not in fact been signed or acknowledged by her. The court held that if the acknowledgment was a forgery, it was not binding upon the plaintiff even in favor of an innocent purchaser for value without notice.

> The rights of property are too sacred to allow them to be swept away without the knowledge of the owner, when he

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20. *Id.* at 238-39, 165 S.W.2d at 960.

21. In Barbee v. Armory, 106 W. Va. 507, 510, 146 S.E. 59, 61 (1928), it was said that "this principle has no application in the case of forged instruments." In that case bona fide purchasers under a forged deed from Barbee to his agent, Armory, lost to Barbee. *See also* Graham v. Sinderman, 238 Mich. 210, 213 N.W. 200 (1927). Other cases in which bona fide purchasers lost their interests acquired under an instrument forged by an agent are Pry v. Pry, 109 Ill. 466 (1884); Gross v. Watts, 206 Mo. 733, 104 S.W. 30 (1907); Wooldridge v. Powers, 178 Okla. 56, 61 P.2d 734 (1936).

22. 135 Okla. 123, 276 P. 200 (1928).

23. *Id.* at 129, 276 P. at 206.

24. In a similar case, Haller v. Hawkins, 245 Ill. 492, 92 N.E. 99 (1910), a bona fide purchaser was subordinated to a dower interest because a deed in his chain of title falsely recited that the grantor was single when he was in fact married.

25. 91 Tex. 679, 45 S.W. 796 (1898).

> has made no contract of sale with the pretended purchaser. No consideration of public policy can justify the robbing of a married woman of her separate estate.[26]

Again, the above considerations may have had more force in 1898 before the evolution of the various present forms of state-supported social insurance. Even so, the court failed to explain why the property rights of the subsequent bona fide purchaser, acquired in reliance on the public records, are not as sacred as those of the plaintiff, presumably acquired in the same manner.

*McCarley v. Carter*[27] involved a forgery in a will calculated to cut off the rights of a pretermitted child. In holding that plaintiff McCarley acquired no interest from the forger and devisee under the will, the court said:

> Nor can we sustain appellant in his contention that he is an innocent purchaser. This court [has] held that one purchasing land from a person who obtained his title by forgery cannot be treated as an innocent purchaser.[28]

There are, of course, many other cases in which a subsequent bona fide purchaser has lost rights in real estate because of a forged instrument in his chain of title.[29] As in the above cases, none appears to offer a satisfactory explanation for the result. They rely for the most part on the rule that a forged deed passes no title and on citation of older cases. When rationalization of a decision is offered, it is usually found in the older cases and put in terms of the prevention of forgery[30] or protection of the victim of the forgery.[31] These considerations, while perhaps cogent in the nineteenth century, are unpersuasive in the latter half of the twentieth. In addition, a deed or similar instrument is no longer regarded with the same mixture of solemnity and awe that derived from the social values of an agrarian culture. Therefore, a more functional approach is required; if an instrument in a bona fide purchaser's claim has been forged, courts should not be blinded

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26. *Id.* at 684, 45 S.W. at 798, *quoting from* Pickins v. Knisely, 29 W. Va. 1, 4 (1886). In a similar case, Lee v. Duncan, 220 Miss. 234, 70 So. 2d 615 (1954), the homestead interest of a wife whose signature and acknowledgment were forged on a mineral deed prevailed over the interests of subsequent bona fide purchasers of the mineral deed. Also see Lummus v. Alma State Bank, 4 S.W.2d 195 (Tex. Civ. App. 1928); Colonial & United States Mortg. Co. v. Thetford, 27 Tex. Civ. App. 152, 66 S.W. 103 (1901); Thompson v. Johnson, 24 Tex. Civ. App. 246, 58 S.W. 1030 (1900).

27. 187 Ark. 282, 59 S.W.2d 596 (1933).

28. *Id.* at 285, 59 S.W.2d at 597.

29. *See, e.g.*, Tate v. Potter, 216 Ga. 750, 119 S.E.2d 547 (1961); Cole v. Long, 44 Ga. 579 (1872); Curry v. Hinton, 191 Ky. 681, 231 S.W. 217 (1921); Skupinski v. Provident Mortg. Co., 244 Mich. 309, 221 N.W. 338 (1928); Austin v. Dean, 40 Mich. 386 (1879); King v. DeTar, 112 Neb. 535, 199 N.W. 847 (1924); N.M. Long Co. v. Kenwood Co., 85 Utah 524, 39 P.2d 1088 (1935).

30. *See* Reck v. Clapp, 98 Pa. 581 (1881).

31. *See* Wheelock v. Cavitt, 91 Tex. 679, 45 S.W. 796 (1898).

by the criminal alteration of a solemn legal instrument, but should look beyond that fact, as most have done, to the justly aroused expectations engendered by that instrument and the need for secure land titles in a highly mobile society. Finally, the cases above demonstrate that the forger is most often a person in some relationship to the victim. In those cases, it is unthinkable under any well-reasoned concept of justice that one who fails to record his joint deed,[32] or accepts a personal check from an agent as the proceeds of a mortgage loan,[33] or allows an ancestor's will to go unprobated for two years while in the hands of another heir,[34] should prevail over the rights of an innocent purchaser arising in part from his own carelessness.

*B. Fraudulent Releases*

A second group of cases involving forgeries or frauds in which the interests of subsequent bona fide purchasers have been held defeasible concerns the fraudulent release of a security interest in the property, usually a mortgage. Insofar as the victim of the fraud in these cases is less able to prevent the fraudulent act, the decisions are more persuasive than those concerned with forged instruments. Yet, in this area also the courts demonstrate a predilection for deciding cases on the basis of absolutist rules without giving close attention to the facts and equities of each case.

In *Lacour v. Ford Investment Co.*[35] a partial release of a mortgage signed by plaintiff Lacour was fraudulently altered to include certain unreleased properties which were then acquired by subsequent bona fide purchasers. The latter intervened in plaintiff's mortgage foreclosure suit seeking to enjoin foreclosure. The court below rendered judgment for the intervenors but the court of appeals reversed, saying:

> In contradistinction to popular legal opinion, the law of registry does not create rights, but instead makes them effective against third persons. If an act of release of mortgage constituted irrebuttable proof of its own validity irrespective of forgery or material alteration, third persons would be fully protected in acquiring property in sole reliance on the public records. However, if this were so, no title to real property would be safe, since it could be divested from its true owner through a forged or altered document by means of the mere recordation thereof.[36]

The above may be true, but why the neglect of the fact that Lacour executed a release and apparently left it in the hands of

32. Prater v. Prater, 208 Miss. 59, 43 So. 2d 582 (1949).
33. Lincoln Bldg. & Loan Ass'n v. Cohen, 292 Ky. 234, 165 S.W.2d 957 (1942).
34. McCarley v. Carter, 187 Ark. 282, 59 S.W.2d 596 (1966).
35. 183 So. 2d 463 (La. Ct. App. 1966), *writ of review denied*, 250 La. 459, 196 So. 2d 275 (1967).
36. 183 So. 2d at 466.

his mortgagor without taking care to see that it was properly recorded? Significantly, the court relied on an earlier Louisiana case, *Zimmer v. Fry*,[37] in which the defrauded mortgagee never granted the release which was forged by a notary. In such a case, admittedly, there is not much a mortgagee can do to prevent a fraudulent release; perhaps subsequent bona fide purchasers should be left to their remedies with the title insurance company.

Lest it be thought that the threat to bona fide purchasers of a fraudulently released mortgage is present only in the civil law jurisdiction of Louisiana, the case of *Farmers & Ginners Cotton Oil Co. v. Hogan*[38] is offered for consideration. In that case a mortgagee sought to cancel a purported satisfaction of his mortgage. The court said: "A forged satisfaction of a mortgage on the mortgage record is void and not effectual even in favor of one who has purchased the mortgaged premises in the honest belief that the satisfaction was in all respects genuine."[39]

A better justification than the stock phraseology above was offered for a like result on similar facts in *Hellweg v. Bush*:[40]

> [I]n practically all these cases, we are dealing with a situation where one of two innocent purchasers must suffer because of the fraud of another. In such cases, where the equities are equal in all respects save that of time, the first in point of time should prevail.[41]

If the equities are in fact equal a rule favoring the first in time might be a proper one. However, close examination of the cases seldom reveals this equality. On the other hand, in the area of fraudulent releases[42] the equities will more often be on the side of the victim of the forgery than in the forged instrument cases, because the nature of the forgery may give rise to a situation in which the victim has no notice of the fraudulent release, while the bona fide purchaser, if he checks the records, does. In such cases the latter should bear the burden of investigating the authenticity of the release.

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37. 190 La. 814, 183 So. 166 (1938). For other Louisiana cases in which bona fide purchasers lost to mortgagees whose mortgages had been fraudulently released of record see Freeland v. Carmouch, 177 La. 395, 148 So. 658 (1933); Gallagher v. Comer, 138 La. 633, 70 So. 539 (1915). In both cases the forger was the mortgagor.

38. 267 Ala. 248, 100 So. 2d 761 (1957).

39. *Id.* at 252, 100 So. 2d at 763.

40. 228 Mo. App. 876, 74 S.W.2d 89 (1934).

41. *Id.* at 882, 74 S.W.2d at 93.

42. Other cases in which the rights of a victim of a fraudulent release prevailed over those of subsequent bona fide purchasers are: Meyer v. Ritter, 268 F. 937 (8th Cir. 1920); Luther v. Clay, 100 Ga. 236, 28 S.E. 46 (1897); DeWolf v. Hadyn, 24 Ill. 528 (1860); Crecelius v. Home Heights Co., 217 S.W. 508 (Mo. 1919); Stratton v. Cole, 203 Mo. App. 587, 216 S.W. 976 (1919).

*C. Defrauding of a Grantor*

The third off-record risk under the general heading of frauds and forgeries occurs when a prior grantor in the bona fide purchaser's chain of title has been induced by deceit, overreaching, or duress to execute an instrument. Typically, these cases involve aged or illiterate individuals, or persons inexperienced in business transactions. Often the rationale for the decisions is phrased in terms of forgery or lack of delivery, the necessary intent of the grantor being absent.[43] In this area also the cases can best be decided by an examination of their facts rather than by manipulation of legal pigeonholes. Specifically, these cases call for close consideration of the circumstances under which the grantor was fraudulently induced to execute the instrument in question.

A step in this direction seems to have been taken through a distinction made by many courts between fraud in the factum or execution and fraud in the treaty or negotiation. A case indicative of this approach and typical factually of those cases in which the defrauded grantor has been moved to execute the instrument by misrepresentations is *Parker v. Thomas*.[44] The court below had held that a note and trust deed found by the jury to have been procured by fraud and misrepresentation, but now in the hands of a defendant bona fide purchaser, were valid obligations. In awarding a new trial the North Carolina Supreme Court defined the dominant issue to be whether the transaction constituted fraud in the factum or fraud in the treaty:

> There are . . . certain well-recognized indicia of fraud in the treaty or negotiations between the parties. These may be classified as follows: (1) Where there is misrepresentation as to the contents of the instrument and the person signs the identical instrument which he intended to sign. (2) Where there is undue influence exerted upon the party signing an instrument; provided of course, he has legal capacity. (3) Where the complaining party can read the instrument which he signs, seals, and delivers, but fails, refuses, or neglects to do so.
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> There are also well marked indicia of fraud in the factum, which may be classified as follows: (1) Surreptitious substitution of one paper for another. (2) The false reading of a deed or other instrument, upon request, to a blind or illiterate person. (3) Fraud, imposition, or artifice practiced upon the person signing an instrument by means of which his signature is procured. (4) Where the execution of the instrument is procured by trick, artifice, or imposition other than false representation as to the contents of the instrument. (5) Want of identity between the

43. *See, e.g.*, Horvath v. National Mortg. Co., 238 Mich. 354, 213 N.W. 202 (1925) (forgery); Lee v. Parker, 171 N.C. 144, 88 S.E. 217 (1916) (no delivery).

44. 192 N.C. 798, 136 S.E. 118 (1926).

instrument executed and the one to be executed.[45]
The court further said that if there was fraud in the factum the deed of trust never existed in contemplation of law and the bona fide purchaser could not recover upon it. This issue was to be decided by the jury.

The court's statement above makes sense insofar as it attempts to distinguish the cases in which the perpetration of the fraud is beyond the control of its victim from those in which the fraud is invited by the negligence of the defrauded party. The danger of deciding cases on the basis of sweeping generalizations is yet inherent in these remarks, however, for example when the surreptitious substitution of one paper for another is made possible by the negligence of the victim.

In another misrepresentation case, *Prather v. LaRue*,[46] the court took a less discriminating approach. The case is somewhat unique in that the actual misrepresentation was made by defendant Prather to plaintiff's grantor and was made possible by a belatedly discovered misdescription in plaintiff's deed. LaRue brought suit to cancel the fraudulently procured deed of Prather and the deeds of bona fide purchasers from Prather. The judgment below was for plaintiff and the supreme court affirmed, noting that as the misrepresentation constituted forgery in the second degree,[47] the deeds to the bona fide purchasers were also void.[48] This decision is incredible in view of the facts: (1) that LaRue had two months after his grantor Elliot returned to Oklahoma, and before the fraudulent procuring of the deed by his grantee Prather, in which to have Elliot execute and acknowledge a deed to him with a correct description; (2) that LaRue knew over a year before the fraudulent acts occurred of the mistaken description, yet he apparently took no steps to prevent the acquisition of rights in the land by innocent purchasers; and (3) that it took LaRue over two years in which to discover the mistaken description in the first place.

Indeed, many of the misrepresentation cases are not compelling insofar as the fraud could have been exposed upon exercise of minimum due care by the defrauded grantor, often nothing more

45. *Id.* at 802-03, 136 S.E. at 120. Other courts have adopted this approach; *see, e.g.*, Rosenquist v. Harris, 138 F. Supp. 21 (D.N.D. 1956) (fraud in the treaty, bona fide purchasers prevailed); Nixon v. Nixon, 260 N.C. 251, 132 S.E.2d 590 (1963) (nonsuit against allegedly defrauded plaintiff reversed; dictum that deed procured by fraud in factum is void even against bona fide purchasers); Dixon v. Kaufman, 79 N.D. 633, 58 N.W.2d 797 (1953) (fraud in the treaty, court held for bona fide purchaser on fraud issue); Hauck v. Crawford, 75 S.D. 202, 62 N.W.2d 92 (1953) (fraud in the treaty, lower court decision for defrauded plaintiff as against bona fide purchasers reversed).

46. 200 Okla. 151, 191 P.2d 214 (1948).

47. OKLA. STAT. tit. 21, § 1593 (1958).

48. 200 Okla. at 159, 191 P.2d at 219.

than reading the instrument.[49] Admittedly, such cases as *Hegeman v. Fetty*,[50] in which a notary public participated in the fraud, and *Zahrek v. Gorczyca*,[51] in which the instrument was misread to illiterate plaintiffs, present closer decisions and do seem to call for equitable relief in favor of the victim as against bona fide purchasers.

Another type of case in which a grantor has been defrauded and then had his interest declared superior to that of a bona fide purchaser has occurred when the grantor has been tricked into executing the instrument by overreaching. These cases are similar to the misrepresentation cases, but distinguishable on the ground that the misrepresentation does not go to the contents of the instrument executed, but to its effect once executed. Here especially a judicial tenderness for illiterates and elderly ladies is present.

In *Trout v. Taylor*,[52] for instance, plaintiff Trout, an elderly woman of limited schooling, was induced to execute a deed in blank in exchange for worthless stock. In reversing a lower court decision in favor of the bona fide purchasers under the fraudulently procured deed, the California Supreme Court stated that:

> Numerous authorities have established the rule that an instrument wholly void, such as an undelivered deed, a forged instrument, or a deed in blank, cannot be made the foundation of a good title, even under the equitable doctrine of bona fide purchase. . . . Consequently, the fact that defendant Archer acted in good faith in dealing with persons who apparently held legal title is not in itself sufficient basis for relief.[53]

The court held that the plaintiff was guilty of neither negligence

49. For other cases involving defrauding of a grantor, in all of which the grantor was plaintiff and prevailed over the rights of bona fide purchasers, see Oswald v. Newbanks, 336 Ill. 490, 168 N.E. 340 (1929) (fraudulent misrepresentation by real estate agent that plaintiff was executing a contract of exchange); Hegeman v. Fetty, 103 Ind. App. 291, 7 N.E.2d 518 (1937) (plaintiff thought she was only executing lease with option to buy; fraud participated in by notary public); Zaharek v. Gorczyca, 87 Ind. App. 309, 159 N.E. 691 (1928) (plaintiffs did not speak English; agent had them sign a deed misrepresenting it to be a building contract which he "translated" into Polish for them); McGinn v. Tobey, 62 Mich. 252, 28 N.W. 818 (1886) (question as to purchaser's good faith); Julia Oil & Gas. Co. v. Cobb, 128 Okla. 260, 262 P. 650 (1927) (after day-long carousal, agents of bona fide purchaser's grantor induced illiterate plaintiff to execute deed on pretext that it was an oil and gas lease); Turner v. Nicholson, 115 Okla. 56, 241 P. 750 (1925) (misrepresentation by plaintiff's future husband that deed was timber contract); Smith v. Markland, 72 Pa. 605, 72 A. 1047 (1909) (deeds signed by grantor on misrepresentation that they were for purpose of showing potential purchasers that there were no liens against the property).

50. 103 Ind. App. 291, 7 N.E.2d 518 (1937).

51. 87 Ind. App. 309, 159 N.E. 691 (1928).

52. 220 Cal. 652, 32 P.2d 968 (1934).

53. *Id.* at 656, 32 P.2d at 970.

nor laches and said:

> The loss resulting from the fraud must fall, therefore, where the course of business has placed it. . . . Defendants Archer and Arnold must seek their recourse against the fraudulent defendants who occasioned the loss.[54]

The court in this decision relied largely on the doctrine that a deed in blank is absolutely ineffectual to pass title. Yet the plaintiff did not deny that she fully intended to execute the deed. Why should the courts make themselves the guardians of credulous persons at the expense of individuals who acquire interests in property in good faith and in reliance upon the records, when the state invited reliance upon such records?[55]

The cases involving a defrauding of the grantor by means of duress are considerably more persuasive. In *Chestnut v. Weekes*[56] a deed procured by the putative grantor's doctor after he had administered a hypodermic needle to the grantor was held to convey no title to a subsequent bona fide purchaser claiming thereunder. The court relied more on the delirium of the grantor precipitated by the duress and on the lack of intended delivery than on the fraud exercised in procuring the deed. This indicates, perhaps, that when the equities of the case require, more persuasive legal doctrines than fraud can be marshalled in support of a decision protecting a defrauded grantor as against a subsequent bona fide purchaser.[57]

## II. Incapacity of a Grantor

After frauds and forgeries the most serious off-record risk threatening a bona fide purchaser's interest is probably the incapacity of a prior grantor in his chain of title. The cases can be grouped under three headings: (1) where the grantor's incapacity derives from mental incompetence; (2) where the incapacity is due to infancy; and (3) where the incapacity is purely legal in nature. Of course all three types involve incapacity in a legal sense, but what distinguishes the third type is that the incapacity is imposed by operation of law alone rather than derived from an internal condition of the grantor.

The mental incapacity cases are most persuasive, if not in terms of their reasoning at least on the basis of their facts. In

54. *Id.* at 657, 32 P.2d at 970.

55. For additional cases involving overreaching where bona fide purchasers have had their interests defeated, see Bryce v. O'Brien, 5 Cal. 2d 615, 55 P.2d 488 (1936); Horvath v. National Mortg. Co., 238 Mich. 354, 213 N.W. 202 (1927); Baldridge v. Sunday, 73 Okla. 287, 176 P. 404 (1918).

56. 183 Ga. 367, 188 S.E. 714 (1936).

57. *See also* Inhabitants of Worcester v. Eaton, 13 Mass. 371, 7 Am. Dec. 155 (1816) (deed executed under threats of unlawful imprisonment); Lee v. Parker, 171 N.C. 144, 88 S.E. 217 (1916) (sick grantor's hand held to deed); Abee v. Bargas, 65 S.W. 489 (Tex. Civ. App. 1901) (sick grantor's hand held to deed).

this area also, however, even more than in the area of fraud and forgeries, it seems courts which have divested bona fide purchasers of their interests are prone to decide cases by means of conclusionary phrases such as "void deed" and "lack of power to convey" rather than by close examination of the facts and competing policy considerations.

*A. Mental Incapacity of a Grantor*

The mental incapacity cases are persuasive because the better reasoned decisions such as *Erickson v. Bohne*[58] cite the lack of effective delivery or intent to convey on the part of the grantor.[59] Some cases refer to the grantor's lack of understanding of the nature of the transaction.[60] If a bona fide purchaser is to be deprived of his interest, the most compelling case is when a grantor never intended, or was incapable of intending, to convey. On the other hand, there are varying degrees of incompetency; incompetents usually have guardians or relatives to protect their interests, and a decision against the bona fide purchaser necessarily entails a diminution in the security of the record title and discourages land transactions, or at least makes them more burdensome because of the need for more extensive title checks and title insurance.

*Stallworth v. Ward*,[61] for example, is one of the more unconvincing insane grantor cases. The court in holding against Stallworth, the bona fide purchaser, said:

> Nor did . . . Stallworth, though uninformed of Miss Ward's mental condition and placing full reliance on the unimpeachable character of the Florida decree,[62] receive any better title. The latter deed was also ineffectual to convey title and the decree of the trial court must be affirmed in so holding.[63]

Stallworth was awarded restitution, however, from the heirs of the insane grantor, who had died before final adjudication of the case.[64]

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58. 130 Cal. App. 2d 553, 279 P.2d 619 (1955).
59. *Id.* at 555, 279 P.2d at 621.
60. *E.g.*, Jones v. Lind, 211 S.W.2d 587 (Tex. Civ. App. 1948).
61. 249 Ala. 505, 31 So. 2d 324 (1947).
62. A Florida court of competent jurisdiction had recently declared that when the deed was given the grantor was sane and competent to transact business. Powell, Stallworth's grantor and the grantee in the original deed, apparently relied on this decree as conclusive protection against invalidation. In an earlier phase of the same case, Ward v. Stallworth, 243 Ala. 651, 11 So. 2d 374 (1943), the court had held that if Powell had notice of his grantor's mental incapacity, then despite the Florida decree, his deed was void. At a subsequent trial it was found that Powell had such notice.
63. 249 Ala. at 508, 31 So. 2d at 326.
64. *Id.* For other cases holding a bona fide purchaser's interest defeasible because of a mentally incompetent grantor in his chain, see Liv-

Under the Alabama rule, the rights of a bona fide purchaser turn on the question whether the grantee in the original deed from the insane grantor had notice of the insanity. From the point of view of a subsequent bona fide purchaser, who has no contact with the insane grantor, this is a meaningless distinction; and for the purpose of balancing the rights of such a purchaser against the rights of the insane grantor it is an irrelevant consideration, except insofar as it may be indicative of the capacity of that grantor to conduct his own business affairs. The *Stallworth* case itself is doubly impeachable in that both the original grantee and Stallworth relied on a valid adjudication that the grantor was sane.[65]

*B. Infant Grantor*

The cases in which a bona fide purchaser's interest has been defeated because of the infancy of a prior grantor are much fewer in number than those dealing with an insane grantor. In *Ware v. Mobley*,[66] the most recent case, the Georgia Supreme Court reversed a judgment in favor of a bona fide purchaser against an infant grantor, holding:

> In 14 R.C.L. sect. 23, it is stated that "It has frequently been declared that the right of an infant to avoid his contract is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against purchasers from the grantee, although they bought bona fide and without knowledge that their title came through an infant." In 31 C.J. 1019, it is said that "The right of avoidance is superior to all equities of other persons, and may therefore be exercised against or regardless of the existence of, a bona fide purchaser or mortgagee." . . . What efficacy would there be in a rule that an infant, on reaching majority, could disaffirm a deed made by him during his infancy, if the right could be circumvented by his grantee placing the legal title in a third person for value and without notice? In order to give vitality to the doctrine that an infant is incapable of irretrievably alienating his property, it is necessary to hold that he can pursue his rights even as against an innocent purchaser. The

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ingston v. Livingston, 210 Ala. 420, 98 So. 281 (1923) (but bona fide purchasers prevailed because their grantor had acquired title by adverse possession); Erickson v. Bohne, 130 Cal. App. 2d 553, 279 P.2d 619 (1955); Gibson v. Westoby, 115 Cal. App. 2d 273, 251 P.2d 1003 (1953); Tate v. Potter, 216 Ga. 750, 119 S.E.2d 547 (1961); Chestnut v. Weeks, 183 Ga. 367, 188 S.E. 714 (1936); Hull v. Louth, 109 Ind. 315, 10 N.E. 270 (1887); Dewey v. Algire, 37 Neb. 6, 55 N.W. 276 (1893); Connecticut Gen. Life Ins. Co. v. Cochran, 95 Okla. 111, 218 P. 313 (1923); Patterson v. Causey, 119 S.C. 12, 111 S.E. 725 (1922); Jones v. Lind, 211 S.W.2d 587 (Tex. Civ. App. 1948); Mitchell v. Inman, 156 S.W. 290 (Tex. Civ. App. 1913).

65. *See* note 62 *supra*.

66. 190 Ga. 249, 9 S.E.2d 67 (1940).

court erred in instructing the jury to the contrary.[67]

Typically, the *Ware* case is more concerned with the efficacy of a rule allowing an infant to disaffirm his deed than with balancing the equities of infant and bona fide purchaser. Perhaps there was more reason for such a rule when education was a sometime thing and experience the one great teacher. With the progress in education and the resulting sophistication of "minors" such a rule is an anachronism. At least, when an infant within two years of his majority and a bona fide purchaser are involved, as in *Ware*, the application of such a rule today would evince a servile allegiance to legal antiquity.

### *C. Legal Incapacity*

In a few cases the interest of a bona fide purchaser was defeated because a prior grantor was without power to convey for purely legal reasons. *Wall v. Lubbock*,[68] for instance, involved revocation of an agent's authority because of death of the principal.[69] The court vested title in the heirs of the principal as against the defendants who claimed under the deed executed by the agent. The defendants' contention that the trial court erred in refusing to submit the issue of innocent purchaser to the jury was rejected.

> The jury having found that John S. Chiveral was dead when Frazier, purporting to act as his agent, attempted to convey the land, that conveyance was void; and, such being its character, and it being a link in the defendant's chain of title, the question of innocent purchaser is not in the case.[70]

The court further held, in what must surely be a masterpiece of Draconian decision making, that since a link in defendants' chain was absolutely void they had no color of title to support a contention of adverse possession, although defendants had apparently been in continuous possession since 1846.[71]

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67. *Id.* at 251-52, 9 S.E.2d at 69. For other cases involving an infant grantor see Buchanan v. Hubbard, 96 Ind. 1 (1884); Sewell v. Sewell, 92 Ky. 500, 18 S.E. 162 (1892); Searcy v. Hunter, 81 Tex. 644, 17 S.W. 372 (1891) (but it was subsequently held in Simpkins v. Searcy, 10 Tex. Civ. App. 406, 32 S.W. 849 (1895), that the suit brought by the heirs of the infant grantor to disaffirm the deed was not brought within a reasonable time).

68. 52 Tex. Civ. App. 405, 118 S.W. 886 (1909).

69. The plaintiffs Lubbock claimed as heirs of John Chiveral. Defendants Wall claimed under a deed executed by Frazier purporting to act as agent for Chiveral. The deed records were later destroyed and, although defendants had been in continuous possession, the jury found that John Chiveral had died before Frazier executed the deed. Title was vested in the plaintiffs.

70. 52 Tex. Civ. App. at 410, 118 S.W. at 888.

71. *Id.*

As in *Wall v. Lubboch*, the rationale of the legal incapacity cases seems to be that the doctrine of bona fide purchaser does not apply to a purchaser of legal title when someone in his chain was without power to convey.[72] Stated thus the doctrine of bona fide purchaser becomes meaningless because the only time it matters is when someone in the purchaser's chain of title was for some reason without power to convey good title. In the *Bowman*[73] and *Daniels*[74] cases the court might have thought that the purchaser should have made a closer examination of crucial facts bearing on the validity of his interest. If so, such considerations should have been the focus of the opinions, not pushed into the background by meaningless legal rhetoric.

## III. Lack of an Essential Formality in the Execution of an Instrument

A third group of cases wherein a bona fide purchaser's interest has been defeated because of an off-record risk involves the absence of an essential formal element in the execution of an instrument in the purchaser's chain of title, that is, lack of delivery or lack of acknowledgment. These cases often involve forgeries or frauds which vitiate delivery or acknowledgment. Thus, cases such as *Chestnut v. Weekes*,[75] *Lee v. Parker*,[76] and *Abee v. Bargas*,[77] in which the grantor was defrauded and the courts' decisions were based to a greater or lesser degree on lack of delivery should be considered under that section below. Also, cases such as *Erickson v. Bohne*[78] involving an insane grantor where lack of effective delivery was cited as a reason for voiding the conveyance should be considered under the lack of delivery section. Similarly, *Whee-*

72. *See, e.g.*, Bowman v. Oakley, 212 S.W. 549 (Tex. Civ. App. 1919); Daniels v. Mason, 90 Tex. 240, 38 S.W. 161 (1896). In the first case the substitute trustee under certain trust deeds held a foreclosure sale. This sale was found to have been made without the request of the beneficiary as required by the trust deeds although there were recitals in the deeds to the effect that such a request had been made. It was further found that the purpose of sale was to extinguish certain second lien notes. The plaintiffs, holders of the second lien notes, were held to be entitled to a sale of the land as against defendants who deraigned their title from the void foreclosure sale. In the second case, *Daniels v. Mason, supra*, the plaintiff bought the land in question from a married woman, but had no notice that her grantor was under coverture. The grantor's husband did not join in the deed. In an action to remove a cloud on plaintiff's title asserted by her grantor's heirs the Texas Supreme Court held that the plaintiff was not entitled to protection as a bona fide purchaser and reversed the decision of the lower courts in her favor.

73. Cited in note 72 *supra*.

74. *Id.*

75. 183 Ga. 367, 188 S.E. 714 (1936).

76. 171 N.C. 144, 88 S.E. 217 (1916).

77. 65 S.W. 489 (Tex. Civ. App. 1901).

78. 130 Cal. App. 2d 553, 279 P.2d 619 (1955).

*lock v. Cavitt*[79] and related cases[80] which involve forged acknowledgments should be considered under the lack of acknowledgment section.

The underlying rationale of the lack of delivery cases is that the grantor never intended to make the conveyance. Thus, in *Steffian v. Milmo National Bank*[81] it was said:

> To complete a delivery in its legal sense, two elements are . . . essential. The instrument must not only be placed within the control of the grantee, but this must be done by the grantor with the intention that it shall become operative as a conveyance. It follows from these first principles that an instrument which passes into the possession of the grantee, without such intention on the part of the grantor is wholly inoperative; and that a purchaser from the former acquires in law no title to the property which it purports to convey. It is accordingly held that even a vendee from the grantee who has paid value without knowledge of the facts is not an innocent purchaser in such a case.[82]

As suggested above in the discussion of the off-record risk of an insane grantor, the fact that a grantor did not intend to convey is probably as persuasive a reason as can be urged against the rights of a bona fide purchaser. However, many of the cases referred to in this article involve grantors who did not intend to convey in one sense or another; the crux of the problem in the delivery cases as elsewhere should be whether, despite his intentions, the grantor wittingly or unwittingly created a situation which made possible the intervention of a bona fide purchaser's rights.

The lack of acknowledgment cases are much less satisfactory than those involving lack of delivery. The reasoning runs something like this: a deed which is unacknowledged is void; therefore a bona fide purchaser can acquire no rights under it. The courts in these cases, as in the cases dealing with forgeries and frauds, seem so blinded by a defect in the execution of the instrument as to be unable to see beyond that to the competing equities. Two policy considerations which do favor the grantor or those claiming under him are the protection of homestead rights and the prevention of undue influence exerted by a husband upon his wife. But usually these considerations are merely cited without any examination of their relevance to the factual context of the case.

### *A. Lack of Delivery*

The typical lack of delivery case concerns an escrow arrange-

79. 91 Tex. 679, 45 S.W. 796 (1898).
80. *See* cases cited note 26 *supra*.
81. 69 Tex. 503, 6 S.W. 823 (1888).
82. *Id.* at 518, 6 S.W. at 824.

ment in which the instrument is wrongfully procured by the grantee. Thus, in *Mosley v. Magnolia Petroleum Co.*,[83] the plaintiffs whose mineral deed had been tortiously procured from escrow by the grantee of an option were held entitled to cancellation of deeds deraigned therefrom despite the fact that the defendant petroleum company was a bona fide purchaser. The New Mexico Supreme Court stated:

> The deed in question was void for three reasons: First, *it was never delivered*; second, it was fraudulently obtained from the escrow holder without complying with the escrow agreement . . . ; and third, the unauthorized substitution of Burke's name as grantee for that of Asbury was a material alteration of an undelivered deed, and destroyed its force as a conveyance; and defendants who purport to have paid value without knowledge of the invalidity of the Burke deed are not protected. . . .[84]
>
> . . . .
>
> A land owner is neither estopped to claim title nor is he barred from asserting it by laches, if his only fault is failure to sue to expunge from the public records a forged or void deed to land in the actual possession of no one, which he neither made nor had recorded; although he knew, or should have known, that one of the public unknown to him might purchase the property, assuming the validity of the record of the void instrument.[85]

In a strong, correct dissent it was argued that the plaintiffs' conduct and defendant's position should have led to affirmance of the trial court decree against the plaintiffs.[86]

Another group of lack of delivery cases does not involve escrow arrangements but merely the wrongful procuring of an executed instrument by the grantee. Such a case is *Watts v. Archer*,[87] where there was both coercion to sign the deed and a subsequent wrongful taking by the plaintiff's grantor. The Iowa Supreme Court in holding against the bona fide purchaser quoted from 16 AM. JUR. *Deeds* section 12:

"Unless the grantor has ratified the deed by his acts

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83. 45 N.M. 230, 114 P.2d 740 (1941).

84. *Id.* at 242, 114 P.2d at 748 (emphasis original).

85. *Id.* at 252, 114 P.2d at 754.

86. *Id.* at 263, 114 P.2d at 761 (dissenting opinion). For other cases in which a bona fide purchaser's interest was held defeasible because of wrongful procuring of an instrument in escrow, see Houston v. Forman, 92 Fla. 1, 109 So. 297 (1926); Jackson v. Lynn, 94 Iowa 151, 62 N.W. 704 (1895); Golden v. Hardesty, 93 Iowa 622, 61 N.W. 913 (1895); Blakeney v. Home Owners' Loan Corp., 192 Okla. 158, 135 P.2d 339 (1943); Home Stake Royalty Corp. v. McClish, 187 Okla. 352, 103 P.2d 72 (1940); Clevenger v. Moore, 126 Okla. 246, 259 P. 219 (1927); Hapgood v. City Nat'l Bank, 230 S.W. 775 (Tex. Civ. App. 1913); Houston Land & Trust Co. v. Hubbard, 37 Tex. Civ. App. 546, 85 S.W. 474 (1904). *See also* Montgomery v. Bank of America, 85 Cal. App. 2d 559, 193 P.2d 475 (1948).

87. 252 Iowa 592, 107 N.W.2d 549 (1961).

> since the grantee obtained the custody of it or is estopped from asserting that the deed was never delivered, an undelivered deed is inoperative even in favor of an innocent purchaser or of one who had no notice that a deed in his chain of title had never been delivered. Thus, a subsequent purchaser for value without notice can acquire no right or title under a stolen deed."[88]

The above reasoning is persuasive because in a case like *Watts* the bona fide purchaser is placed in the position of a receiver of stolen goods. When the grantor has not himself contributed to his loss, as in *King v. Diffey*[89] and *Garner v. Risinger*,[90] justice would seem to require a return of the stolen property even at the expense of subsequent innocent purchasers. Not only is the maxim "first in time, first in right" applicable, but practically, the bona fide purchaser is usually in a much better position to investigate the validity of his grantor's title than is the innocent party who has been wrongfully deprived of his interest. The need for secure record title, however, requires that the burden of proof be on the party seeking to defeat the interest of a subsequent grantee after the latter has proven himself to be a bona fide purchaser.

### *B. Lack of Acknowledgment*

The typical lack of acknowledgment case is *Wheelock v. Cavitt*,[91] where the acknowledgment is defective because it is a forgery. In other cases the acknowledgment was on record, as in the forgery cases, but found for one reason or another to be defective by subsequent judicial inquiry.

Thus, in *Dixon v. Kaufman*[92] the grantors were not present when the acknowledgment certificate was executed by the notary. Therefore, it was held that:

> The *mineral deed* to Kaufman was absolutely void as to the homestead because it was not acknowledged as the statute prescribes and the bona fide purchasers from Kaufman obtained no title with respect to the homestead minerals. *As to the remainder of the land*, the deed was voidable and subject to being set aside as to Kaufman but it is valid and enforceable as to the rights of those defendants who are innocent purchasers for value.[93]

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88. *Id.* at 597, 107 N.W.2d at 551. For other cases in which a bona fide purchaser's interest has been held subject to defeasance because of a wrongful procuring of a deed from the grantor, see Gould v. Wise, 97 Cal. 532, 32 P. 576 (1893); Taylor v. Davis, 72 Mo. 291 (1880); King v. Diffey, 192 S.W. 262 (Tex. Civ. App. 1917); Garner v. Risinger, 35 Tex. Civ. App. 378, 81 S.W. 343 (1904); Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S.W. 824 (1888).

89. 192 S.W. 262 (Tex. Civ. App. 1917).

90. 35 Tex. Civ. App. 378, 81 S.W. 343 (1904).

91. 91 Tex. 679, 45 S.W. 796 (1898).

92. 79 N.D. 633, 58 N.W.2d 797 (1953).

93. *Id.* at 649, 58 N.W.2d at 806 (emphasis added). *See also* Logue v.

One authority has said that "the purpose of the homestead laws is to provide a safeguarded base for family living and for family operation."[94] Whatever the merits of such a policy in modern real property law, its extension in acknowledgment cases to mineral interests as in *Dixon* at the expense of subsequent innocent purchasers is highly questionable. Why must a safeguarded base for family living include the windfall of a valuable mineral interest beneath the "homestead" surface when the rights of a bona fide purchaser have intervened? If the development of mineral resources is to be encouraged, the burden of investigating the circumstances of every acknowledgment in every preceding deed should not be placed on the oil or gas company. Likewise, the policy of requiring a wife's separate acknowledgment privately before a notary to insure her genuine acquiescence in a conveyance of jointly held property seems blatantly irrelevant to a case such as *Humble Oil & Refining Co. v. Downey*,[95] where the wife apparently concurred in the transaction but is seeking to reacquire a valuable mineral interest at an innocent purchaser's expense.

## IV. MECHANICS' LIENS

Another off-record risk is posed by mechanics' liens which take effect against subsequent bona fide purchasers on the date when the mechanic first furnishes his labor or materials, although they need not be recorded until thirty to sixty days after completion of the work. The policy underlying the enforcement of such liens against bona fide purchasers is a salutary one involving protection of those whose labor has added to the value of the property,[96] but it could be realized without detriment to bona fide purchasers simply by requiring the mechanic to file notice of his potential claim at the commencement of his labor or furnishing of materials for it to be valid against subsequent innocent purchasers. Although it is true that inspection of the premises will sometimes, though not always, reveal the possible existence of mechanics' liens, the relation back doctrine of such liens serves, *inter alia*, to mislead innocent purchasers.

Thus, in *Rural Plumbing & Heating Co. v. Hope Dale Realty Co.*,[97] the North Carolina Supreme Court enforced a mechanic's lien against innocent subsequent purchasers, noting that:

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Von Almen, 379 Ill. 208, 40 N.E.2d 73 (1942) (mineral interests of bona fide purchasers defeated by homestead rights of original grantor when mineral deed was acknowledged before notary who had a financial interest in the transaction); Dokter v. Crawford, 65 N.W.2d 691 (N.D. 1954) (grantors purportedly acknowledged but did not appear before notary); Humble Oil & Ref. Co. v. Downey, 143 Tex. 171, 183 S.W.2d 426 (1944).

94. 1 R. POWELL, THE LAW OF REAL PROPERTY 450 (1965).

95. 143 Tex. 171, 183 S.W.2d 426 (1944).

96. *See* Equitable Life Assur. Soc'y v. Basnight, 234 N.C. 347, 67 S.E.2d 390 (1951).

97. 263 N.C. 641, 140 S.E.2d 330 (1965).

> In North Carolina, and in other jurisdictions, a laborers' and materialmen's lien on property takes priority over all the property conveyances to purchasers for value and without notice subsequent to the time when labor and materials are furnished, provided notice of the lien is filed for record within the statutory time, and action to enforce the lien is instituted within the statutory time.[98]

The court also stated that:

> To hold plaintiff's liens invalid would permit appellants to take advantage of their failure to follow the prudent practice of requiring Hope Dale to furnish proof that it had obtained releases from laborers, mechanics, and materialmen for the specific houses they bought from it, before they paid the money to it for such houses. If Hope Dale . . . perpetrated a legal wrong on appellants to the effect that all the mechanics', laborers', and materialmen's liens had been paid by Hope Dale on these houses when they had not been paid, they must seek redress from the doer of the legal wrong.[99]

It is submitted, however, that the prudent practice of requiring proof of releases from mechanics' liens merely represents another clog in the free flow of real estate in commerce and is not a very satisfactory means of protection for bona fide purchasers. Fraud is always a possibility, or the purchaser may be misled by the appearance of the property into believing that there are no outstanding liens against it and, as was true in *Rural Plumbing*, the seller may be insolvent.

The failure to accommodate the policy underlying mechanics' liens with those manifested in the recording acts is another of those instances prevalent throughout the field of off-record risks where ancient doctrines continue their absolute reign without regard to present needs. Of course, the risk in this instance is perpetuated in part by the insistence of a politically powerful industry on a procedure which it finds expedient. Moreover, it may be impractical to require immediate recording of a mechanic's lien below a certain amount—fifty or one hundred dollars. In such cases the risk to bona fide purchasers is minimal, and the imposition of a possibly excessive burden on small businesses and recorders is avoided. Yet, with respect to major construction jobs there is no reason, given the minimum education required before implementing any legal change, for not exacting the small expenditure and effort involved in immediate recordation. If necessary, provision could be made for lower recording fees and for an informal recording, perhaps by telephone if a method for preventing abuses could be developed. In any event, secure record title and resultant benefits to commerce, and therefore to the construction industry, more than offset the disadvantages of requiring those favored

98. *Id.* at 653, 140 S.E.2d at 339.
99. *Id.* at 656, 140 S.E.2d at 340-41.

with special status as creditors to record before their liens are effective against bona fide purchasers.

The *Rural Plumbing* decision and others like it,[100] however, are probably correct in the context of present recording acts. The defendants had received the value of the plaintiff's labor, and it is better that they, in effect, pay twice for such labor than that defendants go unpaid.

## V. Unrecorded Family Rights

Certain family rights not appearing of record may operate to deprive a bona fide purchaser of his interest in realty. These rights include the rights of a pretermitted or after-born child of a decedent and the dower and community property rights of a spouse. The homestead interest may also operate as an off-record risk and might well have been considered under this heading, but since the homestead cases are decided in terms of lack of acknowledgment by a necessary party, reference here will only be made to the homestead cases discussed and cited previously in the acknowledgment section.

It should be noted, however, that the homestead interest may operate as an off-record risk in two ways.[101] The first occurs when there is a misrepresentation of the grantor's true marital status and the wife, or the lawful wife, does not join in the conveyance.[102] The second may occur when there is confusion or lack of knowledge as to property covered by the homestead interest.[103]

The rationale underlying the preference for holders of other unrecorded family rights over bona fide purchasers, although rarely articulated, appears similar to that which underlies the homestead and some of the forgery and fraud cases. These family interests were the reasonable product of a society in which land was the principal form of wealth and represented an attempt to provide some form of social security for surviving spouses and children.[104] Thus, courts in the latter nineteenth and early twentieth centuries probably thought that they were implementing enlightened social policy when they rendered decisions declaring such interests capable of defeating the interests of bona fide purchasers. But again, society has outgrown its land-based origins, other means

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100. *See, e.g.*, White v. Chaffin, 32 Ark. 59 (1877); State Bank v. Plummer, 54 Colo. 144, 129 P. 819 (1912); Cogel v. Mickaw, 11 Minn. 475 (1866); McNeal Pipe & Foundry Co. v. Howland, 111 N.C. 615, 16 S.E. 857 (1892); Keating Implement & Machine Co. v. Marshall Elec. Light & Power Co., 74 Tex. 604, 12 S.W. 489 (1889).

101. *See* 2 T. Patton, Titles 207 (2d ed. 1957).

102. *See* Haller v. Hawkins, 245 Ill. 492, 92 N.E. 99 (1910) & note 24 *supra*.

103. *See* Bowman v. Bowman, 201 Okla. 384, 206 P.2d 582 (1949).

104. 2 R. Powell, *supra* note 94, at 140; 4 R. Powell, *supra* note 94, at 673-74.

of providing for dependents now exist, and the need for clear land titles is presently a more compelling social policy than giving dependents a share of the old home place without regard to intervening interests. Therefore, if there are to be such family interests in real property, it is submitted that provision for their recordation or for their extinguishment if they are not pursued within a short time after they become effective be made[105] and that, in any event, the rights of bona fide purchasers should generally prevail over such interests.

*A. Dower*

Dower does not seem to be a favored interest of modern courts[106] and only a few cases were found in which dower rights or their equivalent defeated interests of subsequent bona fide purchasers. In *Bridgeford v. Groh*[107] the lawful wife, who had been separated from her husband for twelve years, was held to have a one-half fee interest in lands which her husband bought and then conveyed to his bigamous second wife. "[T]itle came to the defendants from the reputed wife to whom the prior deed had been made and there was nothing to indicate to them that she was not the lawful spouse of her husband; indeed, everything indicated that she was. Defendants paid her full value for the land."[108] The court further said that "a grantee under such circumstances should not be made to suffer beyond the clear requirements of the law,"[109] but, in view of the facts of the case it is incredible that the law required any suffering by bona fide purchasers. Why should a woman, who for the last twelve years of her husband's life had

105. *See* Hutchinson v. Olderding, 150 Iowa 604, 130 N.W. 139 (1911).

106. *See* 2 R. POWELL, *supra* note 94, § 170.23.

107. 306 Pa. 566, 160 A. 451 (1932).

108. *Id.* at 572-73, 160 A. at 452. *See* Johnson v. Stephens, 240 Ala. 419, 199 So. 828 (1941) (bill by a widow to have a tax sale declared fraudulent and to sell land for division).

The *Johnson* court stated:

> If the alleged tax sale was collusive it did not serve to cut off her [plaintiff's] dower, and the purchaser at that tax sale will in equity be treated as a voluntary alienee of her husband under the influence of section 7450 Code. And she may have a dower right . . . even though the tax sale was not collusive. Whether a tax sale of the land of her husband bars her right to dower has had much consideration by the courts. Many of them hold that if the tax sale statute provides for a sale of the *right, title and interest* of the husband, as our statute. . . , notwithstanding the revenue act, such as our[s] . . . provides that the tax lien shall be superior to all other liens since the inchoate right to dower is said not to be a lien.

*Id.* at 421, 199 So. at 829 (emphasis original). The *Johnson* court's reversal of the lower court decree sustaining a demurrer to the bill, however, was based on the fact that the widow's action was not barred by the statute of limitations as the lower court had held. Dower interests apparently need not be recorded in Alabama.

109. 306 Pa. at 573, 160 A. at 452.

been effectively divorced from him, be permitted to assert dower rights against innocent purchasers?

*B. Rights of Pretermitted or After-Born Children*

*Conroy v. Conroy*[110] was a suit in trespass to try title by a pretermitted child against, among others, the holder of a trust deed who allegedly took the lien in good faith and without notice of any claim by plaintiff. In reversing dismissal of the suit by the lower courts on the theory that it was a collateral attack on probate and therefore the court did not have jurisdiction, the Texas Supreme Court said:

> [L]et us assume that the written will of Mrs. Conroy read as follows: "I, Thalia Conroy, hereby devise and bequeath unto my husband, R. E. Conroy, all of my estate. If at my death I should leave a child born after the execution of this will, then this instrument shall have no effect as to said child, unless such child shall die before attaining the age of twenty-one years. In that event this will shall be binding and shall vest all of my estate in my said husband, R. E. Conroy. But in the event such child, if any, shall attain the age of twenty-one years, then this will, in so far as it affects the legal rights of said child, shall be null and void." No one would doubt that such an instrument would be entitled to probate, and nothing would be added to or taken from its effect by reason of its admission to probate. It being true that the [pretermitted child] statute becomes engrafted upon the will as an unwritten part of the same, it follows, in this instance, that the instrument as probated, with the statute superimposed thereon, reads, in substance, exactly as set out above.
>
> It necessarily follows that there can be no innocent purchaser in a case of this kind.[111]

The *Conroy* case exemplifies the most pernicious effect of the rights of pretermitted children on bona fide purchasers. Lands are devised under a will, innocent purchasers acquire rights therein, and some twenty years later the pretermitted child upon attaining his majority brings suit to enforce his claim on the property. The child's interest is held to have "vested" upon probate of the will in the manner set forth in *Conroy*, or upon death of the ancestor through inheritance, the will being held inoperative as to the child.[112] Therefore, the interest of the "subsequent" purchaser who cannot be a bona fide purchaser is subject to defeasance by the child's "prior" right. It is submitted that if this method of

110. 130 Tex. 508, 110 S.W.2d 570 (1937).

111. *Id.* at 512-13, 110 S.W.2d at 570.

112. For other pretermitted heir cases using this approach to hold subsequent purchaser's rights subject to defeasance, see Chicago, B. & Q. Ry. v. Wasserman, 22 F. 872 (C.C. Neb. 1885); Rowe v. Allison, 87 Ark. 206, 112 S.W. 395 (1908); Smith v. Olmstead, 88 Cal. 582, 26 P. 521 (1891); Smith v. Rovertson, 89 N.Y. 556 (1882).

deciding cases by legal word-magic is to be used in contests between pretermitted children and subsequent purchasers, some provision should be made at probate for putting subsequent purchasers on notice.

### C. *Community Property Rights*

In *Bowman v. Bowman*,[113] homestead and community property rights both operated to divest bona fide purchasers of their interest in the realty. In reversing a lower court decree for the latter and canceling their deed, the court remarked:

> All of the findings of the trial court were for the plaintiff, except the very important one that Mr. Jones and his wife were the only innocent persons involved in the litigation and should be protected. In this the court erred, as the record title was sufficient to put the Joneses on notice that the plaintiff might have some interest in the land, since it was shown to have been acquired during coverture *and after our community property law became effective in 1945*.[114]
>
> . . . .
>
> Disregarding entirely the grantees of T. P. Bowman, was Ollie Bowman or T. P. Bowman entitled to the land in question? The undisputed evidence shows it was acquired during coverture. We conclude that by no principle of equity or justice could the court have deprived Ollie Bowman of the land as between her and her husband, even if the homestead issue should be eliminated from consideration; and Mr. and Mrs. Jones could acquire no greater interest than that of their grantor, T. P. Bowman.[115]

With record title in the husband and the other facts of the case as they were,[116] one wonders by what process of mental telepathy the Joneses were put on notice of plaintiff's claim. Here again is a case where the plaintiff has contributed to, or at least acquiesced in, a situation misleading to subsequent purchasers and then is

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113. 201 Okla. 384, 206 P.2d 582 (1949).

114. *Id.* at 387, 206 P.2d at 584 (emphasis added).

115. *Id.* at 388, 206 P.2d at 585.

116. Plaintiff was defendant Bowman's common law wife. On July 11, 1947, she commenced this action against her husband for divorce and settlement of property rights. The Joneses were subsequently added as additional defendants. The real estate had been acquired during the period of the Bowmans' marriage and paid for with Mrs. Bowman's money, but record title was in Mr. Bowman. The property in question had no house on it, only a livable garage in which Mr. Bowman lived from January to April, 1946, and in which Mrs. Bowman, who worked nights, sometimes slept during the day. On July 19, 1947, defendant Bowman, not having yet been served with summons or restraining order in this action, conveyed to the Joneses. At that time the Bowmans were no longer living on the property and apparently had not done so since April, 1946. Of course the Joneses were technically on notice of lis pendens, but the *Bowman* court seemed to rely mainly on the issue of community property and homestead.

permitted to recover against such purchasers despite her negligence.

## VI. Prior Adverse Possession and Undisclosed Easements

Unrecorded rights in land may be acquired by adverse possession. Subsequent to the acquisition of such rights the owner thereof may abandon possession so that a subsequent bona fide purchaser has no means of ascertaining their existence either by an examination of the public records or of the premises. Nevertheless, courts have held the interest of the bona fide purchaser defeasible by the rights of the adverse possessor. Similarly, unrecorded easements not revealed by an examination of the premises may have been acquired by adjoining owners through prescription or implication, and there are cases holding that such easements will, pro tanto, defeat the interest of a bona fide purchaser.

The easement cases are least disturbing because they are grounded on doctrines of public necessity and convenience: they usually involve drains or rights of way. Furthermore, the damage to the bona fide purchaser's interest is often nominal, as in the case of a properly constructed underground drain. When an open right of way or road is involved, the contention of a subsequent bona fide purchaser that he was without notice would not appear to be well taken.[117] On the other hand, the prior adverse possession cases are less satisfactory. The doctrine of adverse possession is said to rest "upon social judgments that there should be a restricted duration for the assertion of 'aging claims,' and that the elapse of a reasonable time should assure security to a person claiming to be owner."[118] Perhaps there is also a social utility theory inherent in the doctrine: that one advancing society's net worth by making use of land should be preferred over the record owner who for a long time has abandoned the land and would allow it to be undeveloped. When the adverse possessor himself has abandoned the property, however, and the record owner reasserts his claim by conveying to a bona fide purchaser who presumably will use the property, the considerations favoring the adverse possessor are not so compelling. They become even less so when secure record title to land is a social objective.

### *A. Prior Adverse Possession*

*Mugaas v. Smith*[119] illustrates the problems engendered by this off-record risk. In affirming a judgment for the adverse possessor against the bona fide purchasers, the court said:

> The fact that the respondent had ceased to use the strip in question in such a way that her claim of adverse

117. *See, e.g.*, Heard v. Bowen, 184 S.W. 234 (Tex. Civ. App. 1916).
118. 6 R. Powell, *supra* note 94, at 709.
119. 33 Wash. 2d 429, 206 P.2d 332 (1949).

> possession was apparent, did not divest her of the title she had acquired. Appellants' principal contention is that we have held, in a long line of cases, that a bona fide purchaser of real property may rely upon the record title. The cases cited by appellants construe our recording statute . . . , and involve contests between those relying upon record title and those relying upon a prior unrecorded conveyance as conveyances are defined by [the statute]. The holdings in the cases cited give effect to that provision . . . which states that any unrecorded conveyance ". . . is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisers, of the same real property or any portion thereof whose conveyance is first duly recorded."
>
> [But] appellants cite no cases, and we have found none supporting their contention that, under a recording statute . . . , a conveyance of the record title to a bona fide purchaser will extinguish a title acquired by adverse possession.[120]

The *Mugaas* case bears, in light of its facts,[121] certain indicia of a legally sanctioned holdup on the part of the plaintiff. The case is yet another example of the mechanical application of hoary legal doctrines precluding consideration of possibly supervening equities of bona fide purchasers. The facts of some prior adverse possession cases might be said to require a decision for the prior adverse possessor over the bona fide purchaser,[122] but *Mugaas v. Smith* is not such a case. Certainly, the court's implication that defendants should have inquired of plaintiff as to the boundary line places an excessive, unnecessary burden on bona fide purchasers when the records seem to clearly indicate the boundaries of their property.[123]

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120. *Id.* at 431-32, 206 P.2d at 334.

121. Mugaas claimed title by adverse possession to a narrow strip between her property and that of defendants dating back to 1910. Between 1910 and 1928 a fence clearly marked the boundary line for which plaintiff contended, but this fence had disintegrated over the years. When defendants purchased the property in 1941 by legal description and with record title to the disputed land in their vendor, there was no fence and nothing to mark the dividing line between the property of defendants and plaintiffs or to indicate to defendants that plaintiff was claiming title to the strip in question. The defendants subsequently built a house encroaching on the disputed strip although plaintiff had notified them as to her claim before any work was done on the strip or the house encroaching on the strip was set in place. Although the court does not say, defendants had started work on the house, but not that part lying on the strip, before plaintiff gave them notice.

122. *See, e.g.*, Fairley v. Howell, 159 Miss. 665, 131 So. 109 (1930) (the prior adverse possessor had a recorded deed which because not properly acknowledged did not operate as constructive notice and the bona fide purchaser had not been in continuous possession).

123. For other adverse possession cases, see Louri v. David, 134 Miss. 296, 98 So. 684 (1924); Bowles v. Ryan, 277 S.W. 760 (Tex. Civ. App. 1925).

*B. Undisclosed Prescriptive Easements*

In *McKeon v. Braumer*,[124] a case involving an underground water drain, the court held for the prescriptive easement owner:

> [W]hat will we say as to an easement that is created by implication or prescription, and hence not subject to recordation, and is of such nature that it cannot be seen or is not apparent from any marks on the servient land? Will the bona fide purchaser for value of the servient estate without actual notice take title free from the servitude? Will such a transfer work an extinguishment of the easement? If so, then the acquisition of such an easement, by prescription or by implication, the character of which is not apparent, is of little value. In such a situation there are two innocent parties. On the one hand we have the innocent purchaser, in the sense that he purchased the servient estate without notice of an easement that was not apparent. On the other hand we have the owner of the dominant estate in full possession of an easement that is not apparent, which he has gained by prescription or one which the law will imply upon a severance. He has no instrument to record that will give constructive notice to prospective purchasers of the servient estate. It is difficult to see how plaintiffs or their grantor in this case could give actual notice to anyone. . . . The McKeons were under no duty to notify R. D. Holliday's prospective grantee that they held this easement.[125]

The court also pointed out that "an easement appurtenant is an incorporeal right that does not carry title to the servient land and the possessor of the servient land is not dispossessed of his land by reason of the servitude."[126]

As the court indicates,[127] the problem could be resolved by bringing prescriptive and implied easements within the recording acts as some states have done. It is submitted that this should be done everywhere. Since the McKeons could not record their easement, however, the decision is probably correct. They needed the drain to properly farm their land, their crops had been damaged for lack thereof, and the easement did not seem to impose an excessive burden on the servient estate. The McKeons also had a duty to keep the drain in good repair so as not to injure Braumer's lands.[128] Finally, such rights, even when enforced against bona fide purchasers without notice, appear justifiable on the ground of land planning policy and resource allocation in an integrated society.[129]

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124. 238 Iowa 113, 29 N.W.2d 518 (1947).
125. *Id.* at 113, 29 N.W.2d at 522-23.
126. *Id.* at 125, 29 N.W.2d at 525.
127. *Id.* at 126, 29 N.W.2d at 525.
128. *See* Stuyvestant v. Early, 58 App. Div. 242, 246, 68 N.Y.S. 752, 753 (1901).
129. Other cases where prescriptive easements were enforced against

### C. *Undisclosed Implied Easements*

An implied easement arises when the owner of two parcels employs one in such a way as to create a servitude on the other and later transfers one parcel without specific grant or reservation of the easement in the conveyance.[130] Such easements have sometimes been enforced against bona fide purchasers; for example, in *Wiesel v. Smira*,[131] a case involving an underground sewer, the court said:

> Once conceding the existence of an easement by severance of the quasi dominant and quasi servient tenements, we see no way by which the owner of the latter can convey it even to an innocent purchaser freed from said easement without the knowledge or approval of the owner of the dominant tenement. Rights in real property can not be thus divested. Admittedly there is hardship upon complainants in a case like the present one, but by reason thereof the court is not warranted in destroying respondents' settled property rights and saying to them that they can secure as good results by a different use of their property which they are under no obligation to make. So to do would be an arbitrary exercise of power which is not warranted, however desirable and simple the making of new connections may be.[132]

The court also noted that though the easement was not apparent in a visible sense, it was apparent in that disappearance of waste from the dominant estate was evident.[133]

Although the last sentence in the quotation above may be open to objection in some cases, the considerations which justify enforcement of prescriptive easements against innocent purchasers without notice in those states with no provision for recording such easements would seem to apply also to implied easements. Again, however, it is suggested that provision for recording should be made in those states in which this has not been done.

## VII. Failure to Inquire with respect to Possession Not on its Face Inconsistent with Purchaser's Rights

When facts suffice to impose a duty of investigation on a purchaser of real property, he is placed on notice of what the investi-

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bona fide purchasers include Shaughnessy v. Leary, 162 Mass. 108, 38 N.E. 197 (1894) (underground drain); Heard v. Bowen, 184 S.W. 234 (Tex. Civ. App. 1916) (a road of which purchaser should have had notice); *cf.* Croker v. Lewis, 217 Ga. 762, 125 S.E.2d 50 (1962); Ferguson v. Standley, 89 Mont. 489, 300 P. 245 (1931). *See also* Snell v. Levitt, 110 N.Y. 595, 18 N.E. 370 (1888) (holding that an easement contained in a bona fide purchaser's recorded title was extinguished by prescription).

130. McKeon v. Braumer, 238 Iowa 113, 119, 39 N.W.2d 518, 522 (1947).
131. 49 R.I. 246, 142 A. 148 (1928).
132. *Id.* at 254, 142 A. at 151.
133. *Id.* at 251, 142 A. at 150.

gation would have disclosed whether or not it was actually made. One fact said to impose a duty of investigation upon a purchaser is that possession is in one other than the vendor.[134] Such possession, however, even if in another, may still be consistent with the title of the purchaser's grantor. One example is when the possessor is the grantor's former lessee. Some authorities have held that occupation of this kind, consistent with the record title, does not put the purchaser on notice[135] although, as shall be seen, other authorities do not so hold. Similarly, there may be an encroachment by an adjoining owner on the purchaser's property as described in the records. This encroachment might be under an unrecorded contract with the purchaser's vendor and not discoverable except by an exact survey. Here again a purchaser may be held to be on notice even though the possession is not prima facie inconsistent with record title.

In effect, then, these conditions create off-record risks for bona fide purchasers of interests in real property. But the cases are not decided in such terms, for it is always held that the purchaser was put on notice by the possession of the conflicting claimant. It is submitted that to apply the doctrine of notice by possession in such cases is unrealistic. A purchaser should be entitled to rely on the public records and, when the physical facts are prima facie consistent with those records, should not be required to go beyond them to ascertain the possible existence of hidden off-record claims.

*Bump v. Dahl*[136] was an encroachment case by an adjoining owner who claimed under an oral contract with the purchaser's vendor, Haley. The supreme court held for the adjoining owner:

> Bump's possession was so open and notorious as to be notice to all the world of the land he claimed. Although the subdivision was new and the lots irregular and contoured, such facts do not lessen the duty to discover actual possession. Nor does the fact the lots were purchased through a real estate agency or that Dahl did not concern himself with the precise boundaries of the lot he was purchasing make the doctrine inapplicable. Apparently the Dahls made no inquiry as to the exact lot line because they were satisfied with this visual observation of what appeared to be the boundaries. The possession of the plaintiff of the triangular piece of land as an encroachment did not impress itself on the mind of Dahl because Dahl did not know or ascertain where the surveyed lot line of lot 39 as plotted was. Dahl paced off the depth of the lot; he noticed the lot line on the plot map did not correspond with what appeared to be the physical lot line, but he made no inquiry of the location of the boundaries of the lot on

134. *See* 6 R. POWELL, *supra* note 94, at 285-86.
135. *Id.* at 287-88.
136. 26 Wis. 2d 607, 133 N.W.2d 295 (1965).

the surface of the earth.[137]

Although the case is a close one, it is submitted that the trial court was correct in consigning Bump to his damages against Haley. The Wisconsin Supreme Court dismisses too readily the facts that the subdivision was new and the physical contours of the land irregular. In addition to the public records, these were facts reasonably relied on by Dahl in ascertaining the boundaries of his purchase. Moreover, Bump was more negligent than Dahl; he had actual knowledge of his oral contract with Haley, but failed for two years to see that the public records were changed to conform to that contract. Although owners of equitable rights in land should be protected whenever possible, the integrity of public land records is a far more critical and momentous concern than the occasional Bump.

*Bell v. Protheroe*[138] involved the owner of a recorded deed who was charged with notice by reason of the possession of a tenant under the owner of a prior unrecorded deed. The court held that the fact that such tenant was also the grantor's tenant could not aid the holder of the recorded deed:

> The testimony of the tenant in the instant case clearly discloses that if defendant [holder of recorded deed] had made inquiry of him she would have been apprised of plaintiff's claim of ownership. The defendant made no such inquiry of the tenant, nor so far as the record shows, of any person. To excuse her failure to inquire she [contends] that a purchaser is not put upon inquiry by the continued possession of a tenant who was in possession prior to the transfer of title by an unrecorded instrument. This exception to the general rule in some cases [has been criticized because] it assumes that the prospective purchaser has notice of the prior state of title. We think it subject to the further criticism that it would require a purchaser under an unrecorded instrument to oust the tenant in possession and create a new tenancy in order that his possession might be notice to the world.[139]

The criticisms of the rule that continued possession by a tenant under a prior grantor affords no notice do not make sense in light of the fact that there is a recording act in effect in Oklahoma.[140] With respect to the first criticism, prospective purchasers are required to have notice of the prior state of record title or purchase at their peril. As to the second, it would seem that the rule requires no more than that a purchaser under an unrecorded instrument record the instrument. In its holding on the notice by possession issue, *Bell v. Protheroe* epitomizes a primary defect

137. *Id.* at 614, 133 N.W.2d at 299.
138. 199 Okla. 562, 188 P.2d 868 (1948).
139. *Id.* at 565, 188 P.2d at 871-72.
140. OKLA. STAT. ANN. tit. 16, § 16 (1953).

not only in the inconsistent possession cases[141] but in the off-record risk cases as a whole: ignorance or lack of understanding of the salutary policies embodied in the recording acts and over-emphasis of "property rights" outside of those acts.

## VIII. Tolled Limitations Periods

Old claims seemingly barred by the statute of limitations but in fact still extant because the limitations period has been tolled due to infancy or insanity not apparent from the public records present another threat to the interest of the bona fide purchaser. Here, as with certain other off-record risks, the courts are engaged in protecting the rights of minors and incompetents, although as usual these underlying considerations are rarely articulated and seldom balanced against the offsetting equities of bona fide purchasers. Indeed, few cases were found where the issue of the purchaser's bona fides is discussed or even referred to, although there are several cases in which subsequent purchasers have been defeated because of tolled limitations periods.

*Lawrence v. Boswell*[142] is one case in which the bona fides of subsequent purchasers were at least mentioned. It involved a limitations period tolled due to insanity. In holding for the heirs of the incompetent as against a bona fide purchaser claiming under a seven-year adverse possession statute the court said:

> Defendant insists that where a party admits that another has been in possession of land openly, notoriously, adversely, and bona fide against the world and under a claim of right for a sufficient length of time in which a title by prescription may ripen, this, as a matter of law, establishes good prescriptive title. As a general rule this contention is sound; but it was agreed to as a fact that Melvina Lawrence was adjudged insane in 1870, sent to the asylum and remained there until the time of her death in March, 1916. If Melvina Lawrence was continuously insane from 1870 until 1916, those years could not be counted as a part of the term of prescription; and though the parties in possession had remained there more than twenty years under open, notorious, adverse claim of title, their possession did not ripen into a good prescriptive title.[143]

*Quare* how the court can justify application of a rule presumably designed to protect incompetents in favor of an incompetent's heirs in light of the facts of this case.

What the cases represent in this area, as in that of off-record family rights, is a rule incorporating the social policy of an earlier,

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141. *See* Jones v. Sharp, 183 Okla. 22, 79 P.2d 585 (1938) (continued possession by tenant under bona fide purchaser's grantor); *cf.* Wise v. Latimer, 200 Okla. 526, 198 P.2d 1001 (1948).

142. 155 Ga. 690, 118 S.E. 45 (1923).

143. *Id.* at 693, 118 S.E. at 47.

more leisurely agrarian culture. The rule has for the most part outlived its usefulness, but some courts continue to adhere strictly to it, thereby obstructing the free transferability of land and progress toward optimum land use in a rapidly changing society. It is suggested that if it is still thought necessary to protect the ancient claims of incompetents and minors[144] by means of tolled limitations periods, then provision should be made for placing the status of the holders of these claims on the title records through guardians, relatives or, since minors and incompetents often come under their jurisdiction, through the courts.

## IX. Prior Holder in Chain of Title Senior in Record but Junior in Time of Actual Notice

A former owner in a bona fide purchaser's chain of title, claiming under an instrument executed after a prior instrument from the same grantor to a different grantee, may have recorded his instrument first, but had actual notice of the instrument first executed. If the actual notice is not reflected in the records, then in a state with a "notice" or "race-notice" recording act, such circumstances may operate as an off-record risk to defeat the interest of a subsequent bona fide purchaser.

*Woods v. Garnett*[145] involved such a situation in a notice state. The Mississippi Supreme Court held for Woods, a subsequent purchaser under the deed senior in time but junior in record, as against Garnett, the holder under the deed junior in time but senior in record whose owner had actual notice. The court rationalized the decision as follows:

> But for the registry law, where one has conveyed his legal title, he has nothing left to convey to another, and that other, with or without notice of the prior conveyance, would get nothing, for his grantor had nothing to convey. Now, the statute comes, and provides that, though a conveyance of the class named in the statute may be made, it shall, as to certain persons, viz. creditors and purchasers without notice, be valid only from a certain time, viz. the time when it is filed for record. In other words, the operation of the unrecorded conveyance is suspended until it shall be recorded, as against creditors and purchasers without notice, and, when recorded, it does not operate by relation as against such persons from the day of its execution, but is effective only from and of the date of its delivery for record. But when filed for record it has full

144. For cases in which subsequent purchasers' rights were held defeasible due, in part at least, to limitations periods tolled by infancy, see Coulter v. Anthony, 228 Ark. 192, 308 S.W.2d 445 (1957); Grogan v. Weatherby, 196 Ark. 705, 119 S.W.2d 552 (1938); Hart v. Wimberly, 173 Ark. 1083, 296 S.W. 39 (1927); *cf.* Breitman v. Jachnal, 99 N.J. Eq. 243, 132 A. 291 (1926), *aff'd*, 100 N.J. Eq. 559, 135 A. 915 (1927).

145. 72 Miss. 78, 16 So. 390 (1894).

> scope and effect against the world. One who buys after that event can find no protection in the statute, for its terms have been complied with by the holder of the adverse title. It is no answer to say that it is inconvenient to the purchaser to examine a long and voluminous record, made after the record of the title of his grantor. To this the sufficient reply is that, but for the registry acts, he would not have even the protection which such records afford, but would deal at his peril with his grantor, and secure only such title as he might assert. If that grantor had good title because a purchaser for value without notice, that is a defense to his vendee; but if such grantor was not such purchaser, then the validity of the title he conveys must depend upon the character of his vendee, and if such vendee is not a bona fide purchaser under the common law or the statute, we cannot perceive from what source a principle can be deduced which will afford him protection. It seems clear to us that one who buys an estate cannot invoke the protection of the registry acts as against a deed under such act at the time of his purchase.[146]

It is pointed out in Professor Philbrick's article on this subject that the reasoning offered for the result in *Woods* requires a title search not recognized by lawyers and abstractors as requisite: "It is judicial theory, remote from practice."[147] In other words, in a names index system a purchaser in the position of Garnett would have to go outside his chain and search the grantor index for the name of every grantor in his chain from the time such grantor acquired title down to the present to see if such grantor had made a prior conveyance recorded after the instrument in his (the purchaser's) chain. Even then, such purchaser would have no way of knowing whether or not the prior holder in his chain had actual notice of the prior conveyance. Of course, the chain of title aspect of the problem would be resolved in a tract index system and it is submitted that the superiority of such indexes over names indexes as manifested in this and other ways compels their adoption in all jurisdictions. The initial cost of converting all past records to a tract index system would be more than offset by the long term benefits and might well be defrayed by a special tax on the beneficiaries of such a conversion, the real property owners. Given the situation as it existed in *Woods* and similar cases,[148] however, the result reached is still unsatisfactory. In the first place, such cases utilize the dubious approach, criticized previously

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146. *Id.* at 82, 16 So. at 397.

147. Philbrick, *Limits of Record Search and Notice*, 93 U. PA. L. REV. 391, 414 (1945).

148. Delay v. Truitt, 182 S.W. 732 (Tex. Civ. App.), *rev'd*, 103 Tex. 144, 124 S.W. 616 (1910) ("notice" state); Clark v. Sawyer, 49 Cal. 133 (1874) ("race-notice" state); Mahoney v. Middleton, 41 Cal. 41 (1871) ("race-notice" state); Goelet v. McManus, 1 Hun 306 (N.Y. 1874) ("race-notice" state). *See also* cases discussed in Philbrick, *supra* note 147, at 414.

in the forgery section, of assessing a subsequent purchaser's bona fides by the merits of his predecessor in title. Secondly, the purchaser in the position of Woods does in a sense have notice of the subsequent conveyance to Garnett's predecessor precisely because it is first recorded; that is, by running down the grantor index for the period that title as reflected by the records, rather than the date of the instruments, was vested in each preceding holder, Woods could have learned of the second conveyance first recorded. The purchaser in Garnett's shoes could not have been put on notice by such means. Even if he found a defective instrument, as in the *Woods* case, he would be entitled to rely on settled legal doctrines declaring its invalidity as to him. Finally, the existence of a recording act invites reliance thereon to the extent of a reasonable title search. Although it is hard for a bona fide purchaser such as Woods to lose his interest, it is in the public interest that instruments conveying title to land be recorded as quickly after execution as possible. A rule in the *Woods v. Garnett* situation favoring Garnett rather than Woods would promote that public interest.

## X. Rights of Prior Transferees under Recording Acts with Grace Periods for Filing

The soundness of a public policy requiring immediate recording of a conveyance is attested to by the evolution of the recording acts in three states where cases were found in which grace periods for filing of instruments for record provided by former recording acts operated as off-record risks. In those three states, Alabama, Mississippi and Virginia, the recording acts now provide no grace period for filing, and deeds and other conveyances are void as against subsequent purchasers until recorded.[149] The threat of this off-record risk in other jurisdictions, however, has not been eliminated. Delaware, for instance, has a recording act with a fifteen day grace period for filing.[150] Moreover, even in those states in which the recording act has been changed, the risk may still exist in the absence of a curative act or statute of limitations bar with respect to those conveyances made under the old recording act with the grace period.

*Betz v. Mullin*[151] offered the most explicit rationale for the defeasance of a bona fide purchaser's interest by a prior conveyance which was recorded after his own but still within the statutory period for filing. The reasoning bears a resemblance to that offered by the court in the *Woods* case[152] discussed above:

149. Ala. Code tit. 47, § 120 (1958); Miss. Code Ann. §§ 867, 868 (1956); Va. Code Ann. tit. 55, § 96 (1954).

150. Del. Code Ann. tit. 25, § 153 (1953). *See* Littletown v. Johnson, 26 Del. 97, 81 A. 47 (1911).

151. 62 Ala. 365 (1878).

152. Woods v. Garnett, 72 Miss. 78, 16 So. 390 (1894).

> It is only by operation of the statute of registration that a junior conveyance can have priority over a senior conveyance of the legal estate. If the senior conveyance is recorded within three months after its date, the statute preserves its priority over a junior conveyance that may be earlier recorded, though the junior grantee may not have notice of it, and it is supported by a valuable consideration.[153]

Statutes with grace periods for filing were perhaps a necessary step in the evolution of recording acts in the days when means of transportation were slower and farmers hitched up their teams to ride into the county seat to transact business only once every few months or so. Today such statutes and cases like *Betz*[154] are inexcusable. The idea inherent in the reasoning of *Betz* and in recording acts with grace periods, that the protection afforded by record title is necessarily limited, is inappropriate in our present complex and impersonal society in which one needs an accessible and reliable reference upon which to base commercial transactions.

## XI. Void Judgments and Court Orders

Judgments and court orders upon which a bona fide purchaser's title is based may be void for lack of service on a necessary party or for want of jurisdiction for other reasons. Under such circumstances, the bona fide purchaser's interest may be defeated by the interest of the party adversely affected by the void judgment or those claiming under him.

These cases are similar to the lack of delivery and mental incapacity cases in that they often confront the bona fide purchaser with an individual who has been divested of his interest solely through the misfeasance of others. Here also the wronged party should normally recover the property at the expense of the bona fide purchaser, who should be relegated to whatever protection he has through title insurance. These situations inhere in the fallibility of men and, presumably, reasonable men recognizing their unavoidability protect themselves through insurance.

On the other hand, in some of these cases the wronged prior owner could have protected himself by the exercise of due care. For instance, in *Scott v. McNeal*[155] the bona fide purchasers were defeated by an absentee, Scott, who returned after an absence of seven years to find that his estate had been probated and sold. The Supreme Court concerned itself mainly with the due process issue, saying with respect to the effect of the probate proceedings on the rights of the absentee:

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153. 62 Ala. at 369 (1894).

154. *See* Clairborne v. Holmes, 51 Miss. 146 (1875); Camp Mfg. Co. v. Carpenter, 112 Va. 79, 70 S.E. 497 (1911) (subsequent grantee held to have notice even if prior instrument were not recorded).

155. 154 U.S. 34 (1894).

> The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void; . . . and a conveyance of property by the administrator passes no title.
>
> The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such prima facie evidence of his death that the probate court may assume him to be dead and appoint an administrator of his estate. . . . But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the *prima facie* evidence of his death, and establishes that the court had no jurisdiction, and the administrator no authority; and he is not bound. . . .[156]

The Court's reasoning is made less compelling by the fact that in a subsequent case it upheld the constitutionality of a Pennsylvania statute permitting the administration of absentees' estates.[157] Such statutes[158] offer a direct solution to the *Scott v. McNeal* problem, but in their absence it is submitted that due process operates not only in favor of the absentee who abandoned the property but also in favor of the bona fide purchaser who acquired rights in the subject property by exchanging value therefor.[159] In this area as in others, however, the courts have been content to rest their decisions on syllogisms such as "what is initially void is ever void and life may not be breathed into it by lapse of time,"[160] without probing too far into facts and equities.[161]

## XII. Subsequently Discovered Will

When a link in the bona fide purchaser's chain of title is an acquisition through inheritance, the subsequent discovery and probate of a will may divest a bona fide purchaser of his interests. The reasoning here is based on the ancient doctrine that title to realty passing under a will relates back to and takes effect as of the time of the testator's death. Thus, in *Reid's Administrator v. Benge*,[162] in which a bona fide purchaser's mortgage was defeated

156. *Id.* at 49-50.

157. *See* Cunniss v. Reading School Dist., 198 U.S. 458 (1905).

158. *See* Uniform Absence as Evidence of Death and Absentees' Property Act, 9 Unif. Laws Ann. §§ 5-12 (1957).

159. *See also* Grogan v. Weatherby, 196 Ark. 705, 119 S.W.2d 552 (1938).

160. Los Angeles v. Morgan, 105 Cal. App. 2d 726, 731, 234 P.2d 319, 322 (1951).

161. For other cases in which subsequent purchasers were defeated because of void court judgments, see Wallace v. Nichols Adm'r, 56 Ala. 321 (1876); Hart v. Wimberly, 173 Ark. 1083, 269 S.W. 39 (1927) (probate court made unauthorized sale of minor's homestead); Whitehead v. Garrett, 199 Okla. 278, 185 P.2d 686 (1947) (void tax sale).

162. 112 Ky. 810, 66 S.W. 997 (1902).

by claimants under a subsequently probated will, the court said:

> By [statutes] in force at the death of T. T. Reid it is provided that the will speaks as of the testator's death, unless a contrary intent appear by the will. . . . It was held as far back as 1827 . . . that the interest of a devisee vested the instant of testator's death and was not lost by destruction of the will before probate. . . . Applying that rule here, it is clear that at the death of T. T. Reid, in 1888, the appellants, devisees under his will, had a vested estate in his lands as the will provided.[163]

Again, a strict application of an ancient common law rule defeats the rights of a bona fide purchaser, for the doctrine of relation back with respect to real property passing under a will undoubtedly grew out of the feudal rule that there could be no abeyance of seizin.[164] This was perhaps a useful doctrine in the Middle Ages with its more literal-minded approach to the law and when property passed down through generations of the same family, but is a poor excuse today for enforcing the claims of those who gratuitously receive property under a will as against bona fide purchasers. If devisees for whatever reason fail to have a will probated within a reasonably short time after the testator's death, then they should not prevail against claims innocently acquired for value during the period of their delay, whether or not that delay was excusable.

Significantly, one state, North Carolina, where two cases[165] similar to *Reid's Administrator* were found, has changed the result therein by a statute providing that wills probated after two years from the death of the testator shall not affect the rights of innocent purchasers for value.[166] It is submitted that if the courts of a given jurisdiction fail, as some of them have with respect to this off-record risk,[167] to adapt to modern circumstances, legislative action similar to that taken in North Carolina is required.[168]

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163. *Id.* at 814, 66 S.W. at 998. This statute is still in force. KY. REV. STAT. §§ 330, 394 (1963).

164. *See* CRIBBET, PRINCIPLES OF THE LAW OF REAL PROPERTY 63 (1952).

165. Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919); Cooley v. Lee, 170 N.C. 18, 86 S.E. 720 (1915).

166. N.C. GEN. STAT. § 31-39 (1966).

167. Most courts, however, have protected the bona fide purchaser against those claiming under the subsequently discovered will. *See, e.g.*, Eckland v. Jankowski, 407 Ill. 263, 95 N.E.2d 342 (1950).

168. Another case where a bona fide purchaser was defeated because of a subsequently discovered will, in a state where the result apparently has not been changed judicially or by legislation, is Cole v. Shetton, 169 Ark. 695, 276 S.W. 993 (1925).

## XIII. Foreclosure Sale Stayed under Soldiers' and Sailors' Civil Relief Act

The Soldiers' and Sailors' Civil Relief Act[169] provides that in actions in any court when there is a default of appearance by any party, the plaintiff shall file an affidavit to the effect that the defendant is not in the military service. If the defendant is in the military service, or that fact cannot be determined, provision is made for protection of the serviceman's rights by appointment of an attorney for him or filing of a bond by plaintiff. The court may also grant other relief to protect the serviceman, including the staying of a mortgage foreclosure action.

In the latter case, however, the mortgagor who took the mortgage as a bona fide purchaser may have been unaware that a servicemean had an interest in the mortgaged property because such interest was not of record; that is, it was an unrecorded equitable interest or an interest held of record by a corporation in which the serviceman owned all the stock. In that situation, rights acquired by a bona fide purchaser who took the mortgage in the subject property may be impaired to the extent that his mortgage foreclosure action is stayed under the Soldiers' and Sailors' Civil Relief Act. In the one known case in which the serviceman whose interest was not of record brought an action under the Act to void a foreclosure sale and subsequent deeds, however, the court held for the bona fide purchasers under the sale.[170]

The policies of the Soldiers' and Sailors' Civil Relief Act were indicated and fairly implemented in *Application of Pickard*[171] where the court said:

> [T]he act is to be construed liberally to accomplish its purposes . . . and the court holds that the benefits of the act should be applied at least where the veteran is and has been the holder of the entire corporate stock. . . . It is sufficiently made out in these papers that the ability of the veteran to meet the obligation has been materially affected by his military service. The question remains as to the nature and extent of the relief granted, under all the circumstances, with due justice to the mortgagee. . . . Under all the circumstances it would seem just if the application be granted to the extent of staying enforcement of the principal obligation of the mortgage until May 1, 1946

169. 50 U.S.C. § 520 (Appendix 1964).

170. Godwin v. Gerling, 362 Mo. 19, 239 S.W.2d 352 (1951). *But see* Morse v. Stober, 233 Mass. 223, 123 N.E. 780 (1919), where it was held in a suit for specific performance of a real estate sales contract, in which the plaintiffs acquired their interest in the premises under a mortgage foreclosure sale which did not comply with the Soldiers' and Sailors' Civil Relief Act, that plaintiffs could not prevail unless they proved that no serviceman owned an interest in the subject property at the time of the sale.

171. 187 Misc. 400, 60 N.Y.S.2d 506 (Sup. Ct. 1946).

> under proper terms relating to amortization, etc., out of surplus income and the maintenance of other payments.[172]

The special facts of *Pickard* (that the serviceman was sole shareholder in a corporation which had recorded its interest) made it a proper case in which to protect the serviceman's rights at the expense of the bona fide purchaser. A stay may also be appropriate in a case like *Twitchell v. Home Owner's Loan Corp.*,[173] in which the serviceman's rights in the subject property were based on an oral contract partly fulfilled by him. In such cases the limited nature of a stay granted at the expense of bona fide purchasers and the equitable policy of protecting the rights of those whose ability to meet their financial obligations is impaired by service to the country argue persuasively for such relief. It is doubtful, however, whether the policy of protecting servicemen with unrecorded interests from mortgage foreclosures is correct as a general rule. To be required to record one's interest is a small burden, and a serviceman like any other citizen should not be immune to the consequences of a deceptive situation he creates. Certainly the statement in *Hoffman v. Charlestown Five Cents Savings Bank*,[174] that "there is nothing in the [Act] which limits its provisions to owners of record or to cases where the mortgagee in fact knew or had reason to know who the owner of the property was,"[175] disregards the fact that Congress enacted the Civil Relief Act for a society in which recording acts play an integral part in ordering and determining the ownership of land.

## XIV. Instrument Given as Security for Usurious Loan

When an instrument has been given as security for a loan bearing a usurious rate of interest, the usury may be held to "infect" the entire transaction so as to void the mortgage or deed of trust and render it ineffectual to pass title. Thus, a bona fide purchaser claiming under the voided instrument is deprived of his property interest even though the evidence of usury is off-record. In *Lankford v. Holton*,[176] for example, the Georgia Supreme Court in discussing a former usury law applicable to the security deed in question said: "Under the former law, the grantee in a security deed tainted with usury could not, as against the grantor, convey a good title, even to one who took bona fide for value, before maturity, and without notice of the usury."[177]

As indicated, Georgia had amended its usury law,[178] so that for transactions after 1916 the only penalty is forfeiture of the inter-

172. *Id.* at 401, 60 N.Y.S.2d at 507-08.
173. 59 Ariz. 22, 122 P.2d 210 (1942).
174. 231 Mass. 324, 121 N.E. 15 (1918).
175. *Id.* at 328, 121 N.E. at 16.
176. 187 Ga. 94, 200 S.E. 243 (1938).
177. *Id.* at 99, 200 S.E. at 248.
178. Ga. Code Ann. § 57-112 (1962).

est on the loan.[179] In other states, such as Illinois, although the defense of usury is good against a bona fide purchaser it has always affected the accounting only and not the validity of the security instrument involved.[180] Presumably this is the case now in Georgia. Nonetheless, the possibility that usury exists as an off-record risk which would totally invalidate a link in a bona fide purchaser's claim has not been eliminated in other jurisdictions.[181] Moreover, even in states like Georgia the risk exists, in the absence of a curative act or statute of limitations bar, with respect to transactions occurring before the effective date of the statute alleviating the usury penalties.

On the other hand, if such an off-record risk were to manifest itself today it would be an anachronism. The risk evolved as the result of a policy designed to prevent socially undesirable conduct, and it no doubt received an added impetus from the early fanatical distaste for usurers. As with the risk of forgery, however, which has in part a similar origin, the effect of such a policy on bona fide purchasers was not appropriate to its purpose. The criminal law is a better instrument by which to control deviant behavior. As was said in *Marks v. Pope*,[182] the threat of usury should not be "a paralyzing restraint upon the modern financing of large hotels, apartments and other properties,"[183] nor, it is submitted, on the financing of single unit dwellings in a mobile society. As *Marks* held, even an entirely pecuniary forfeiture assessed against a bona fide purchaser is subject to this objection.

## XV. Recording Errors

Another off-record risk arises when those charged with the duty of recording instruments fail to do so properly. Thus, a mortgage may be released on a different parcel than that on which it was a lien, or the register of deeds may not promptly record an instrument filed with him. In such cases, subsequent innocent purchasers who acquire rights in the subject property are charged with notice of the improperly recorded instrument even though an examination of the records would not disclose it, and their rights are subject to defeasance by those claiming under that instru-

179. For other pre-1916 Georgia cases in which bona fide purchasers were defeated because of usury laws, see Wacasie v. Radford, 142 Ga. 113, 82 S.E. 442 (1914); Beach v. Lattner, 101 Ga. 357, 28 S.E. 110 (1897); *cf.* Pottle v. Lowe, 99 Ga. 576, 27 S.E. 145 (1896).

180. *See* Hush v. Arnold, 318 Ill. 28, 148 N.E. 882 (1925); Olds v. Cunnings, 311 Ill. 188 (1863). *But see* Marks v. Pope, 370 Ill. 597, 19 N.E.2d 616 (1939).

181. *See, e.g.*, Ark. Stat. Ann. tit. 68, §§ 608, 609 (1964); Hare v. General Contract Purchases Corp., 220 Ark. 601, 249 S.W.2d 973 (1952) (the defense of bona fide purchaser is not available to the holder of a usurious note).

182. 370 Ill. 597, 19 N.E.2d 616 (1939). *See* note 181 *supra*.

183. *Id.* at 600, 19 N.E.2d at 620.

ment. It is said that "the conveyance being operative as a record from its delivery to the judge [register of deeds], no subsequent mistake of his could deprive it of the operation thus given it by law."[184]

The remedies of a bona fide purchaser for this risk probably should lie with the title insurance company. Like the mental incapacity and lack of delivery cases, the cases concerning recording errors usually involve an innocent party, wronged by the misconduct of another, who is claiming against the bona fide purchaser. As noted above, the bona fide purchaser in such cases is placed in a position analogous to that of a receiver of stolen property, albeit an innocent one, and the maxim "first in time, first in right" is properly applied.[185]

Despite these considerations the courts rely even in this area on conclusionary terms to justify their decisions. In *Wilkins v. Fehrenbach*,[186] a case involving the mistaken release by the recorder of plaintiff's mortgage, the court said:

> Assuming that the appellant had no notice that the release of plaintiff's deed of trust was improperly made, we understand the question submitted to us for decision is whether or not an attempted unauthorized release of a recorded deed of trust, attested by the recorder, by one not the owner of the note therein described, is valid as between the holder of the note and a subsequent purchaser in good faith and for value of the property described in the deed of trust. Releases of deeds of trust and mortgages by one not the holder of the note are void. . . . A release made by one not the owner of the note described in the mortgage or deed of trust securing it is void as to subsequent purchasers.[187]

Although the result in *Wilkins v. Fehrenbach* cannot be disputed in view of its facts and the absence of negligence on the part of the plaintiff, the pernicious effects of such sweeping generalizations as those above when they are taken out of the factual context of a case involving two equally innocent parties has already been seen in many of the forgery and fraud cases. In addition, it is contended that even in a recording error case, despite the fact that private citizens should not usually be charged with overseeing that public officials properly perform their duties, a situation may arise where the negligence of the victim of the error is sufficient to warrant a decision for the bona fide purchaser.[188]

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184. Mims v. Mims, 35 Ala. 23, 25-26 (1859).
185. *See* Hellweg v. Bush, 228 Mo. App. 876, 74 S.W.2d 89 (1934).
186. 180 S.W. 22 (Mo. Ct. App. 1915).
187. *Id.* at 24.
188. *See* Mims v. Mims, 35 Ala. 23 (1859); Carlisle & Co. v. King, 103 Tex. 620, 133 S.E. 241 (1910); Throckmorton v. Price, 28 Tex. 606 (1866).

## XVI. Estoppel by Deed

Under the concept of estoppel by deed a grantor who conveys title to property which he does not own and who later acquires title to such property is estopped to disavow the prior conveyance. In some states this estoppel binds not only the grantor but "privies in estate, privies in blood and privies in law."[189] Thus, a bona fide purchaser to whom the grantor conveys after acquiring title will also be estopped to deny the effect of his grantor's prior conveyance.

In addition to privity, a basic rationale for the decisions against bona fide purchasers in these circumstances is that such purchaser has been placed on notice by the recordation of the conveyance to the prior grantee. This rationale is similar to that offered above for the result in *Woods v. Garnett*.[190] It also shares the basic defect of the *Woods* reasoning in that it ignores the chain of title concept relied on by lawyers and abstracters, requires a title search not recognized by them as requisite, and is therefore another instance of judicial theory divorced from practice.

Thus, the court in *Bernardy v. Colonial & U.S. Mortgage Co.*[191] said in reversing a lower court decision for the bona fide purchaser:

> [A] purchaser from one who has acquired the legal title must examine the record, and ascertain whether or not he has previously conveyed the property by a conveyance purporting to convey the fee simple title, as a purchaser is presumed to know the law, and to know that the party in whom the legal title stands may have previously conveyed the property, and that such prior grantee may have acquired such legal title by operation of law under the statute.
>
> Counsel for the respondent have discussed at some length the question as to what extent a party has constructive notice of conveyances not in the line of his chain of title, but in the view we take this question has no application to the case at bar, for, as before stated, both plaintiff and defendant claim under the same party, Wilkes. No question, therefore, is presented as to the notice of any record of conveyances lying outside of the plaintiff's chain of title.[192]

Although the court points out that South Dakota is a tract index state, there would be no way for the subsequent bona fide purchaser examining the records to know if the prior conveyance of his grantor were valid even if he were to discover it in the records. Furthermore, the court's chain of title reasoning is patent

189. Tefft v. Munson, 57 N.Y. 97, 99 (1874).
190. 72 Miss. 78, 16 So. 390 (1894).
191. 17 S.D. 637, 98 N.W. 166 (1904).
192. *Id.* at 638-39, 98 N.W. at 169.

error because a chain of title excludes instruments recorded before acquisition or after a recorded relinquishment[193] and does not necessarily encompass all conveyances from the same grantor. Thus, a bona fide purchaser would be justified in considering the prior conveyance invalid because not in his chain. The estoppel by deed cases[194] are also inconsistent in that they hold the bona fide purchaser to constructive notice of what the records supposedly reveal but do not hold the prior transferee to similar constructive notice; that is, notice that the records showed that title was not in his grantor at the time of the conveyance to him. Finally, the notion of privity used to justify defeasance of the bona fide purchaser's interest in such cases presents another instance of adjudication by legal word-magic rather than a realistic appraisal of the facts and the operation and purposes of the recording acts.

## XVII. Destruction of Records

An off-record risk similar to that posed by recording errors arises when records are destroyed, and the recording of an instrument prior to destruction without rerecording afterwards is held to place a bona fide purchaser on constructive notice. If a bona fide purchaser's grantor has executed a prior instrument which has been destroyed and not rerecorded, the purchaser may be defeated by those holding under the destroyed instrument. Even if provision for rerecording is made, it may be held merely permissive rather than mandatory. Thus, in *Thomas v. Hanson*[195] it was said:

> The fact that the records of Toombs County may have been burned does not destroy their effect as constructive notice, and we cannot hold that . . . it was the intention of the legislature to unseat or annul those records for the purpose of constructive notice thereafter, though it was the legislative intent to allow the recording or rerecording in Stearns County of deeds made prior thereto.[196]

Of course, the bona fide purchaser in *Thomas* should have been on notice of the gap in the records that would have been revealed by a title search. Moreover, the records presumably did not show title in Hanson's grantor, Renville. Even if Hanson were aware that the records had been destroyed, however, there was no way he could learn of Thomas' claim because the land was unoccupied;

193. 6 R. Powell, The Law of Real Property 289 (1965).

194. For other cases in which a bona fide purchaser was defeated because of estoppel by deed see Gray v. Delpho, 97 Misc. 37, 162 N.Y.S. 194 (Sup. Ct. 1916); Tefft v. Munson, 57 N.Y. 97 (1874) (prior deed of record not entitled to recognition because forged); Simonson v. Monson, 22 S.D. 242, 117 N.W. 135 (1908). *See also* Ayer v. Philadelphia & Boston Face Brick Co., 159 Mass. 84, 34 N.E. 177 (1893); Fries v. Clearview Gardens Sixth Corp., 285 App. Div. 568, 139 N.Y.S.2d 573 (1955).

195. 59 Minn. 274, 61 N.W. 135 (1894).

196. *Id.* at 280, 61 N.W. at 136-37.

and Renville, who supposedly retained his patent, possessed prima facie evidence of title. Granted that some protection should be afforded holders of record title for a short period after the records are destroyed, the case is still disturbing because of its restrictive construction of the statute providing for rerecording. The pervasive defect of the off-record risk cases is found again in this case and others like it:[197] the failure to recognize the need for clear land titles and to meet that need through proper implementation of recording acts.

Notably, statutes requiring rerecording of instruments after destruction in order that they may continue to operate as constructive notice to subsequent purchasers have been upheld.[198] Similar provisions should be enacted whenever circumstances so require. Nevertheless, the cases involving destruction of records arose in an era when documents were presumably kept in wooden files. With the advent of steel filing cabinets, the threat of destruction has probably diminished.

## XVIII. Conveyances Void Because of Section 70 of the Bankruptcy Act

Section 70 of the federal Bankruptcy Act[199] provides that all property of the bankrupt located in the United States which is not exempt from execution passes to the bankruptcy trustee on the date of filing of the bankruptcy petition. If the petition is filed in a state other than that in which the property is located and a bona fide purchaser subsequently buys such property from the bankrupt, his interest will be defeated by the prior title of the trustee. Although this particular risk is of record in the sense that the bankruptcy petition has been filed with a federal district court, when the court is in a state far removed from the situs of the land involved the risk is for practical purposes off-record for the bona fide purchaser.

One case was found in which an alleged bona fide purchaser was defeated by this risk. In *Hull v. Burr*[200] the court said:

> The defendants . . . filed separate pleas, seeking to set up the defense of bona fide purchasers. Their rights were all acquired subsequent to the adjudication in bankruptcy. These pleas . . . failed . . . upon the ground that the property they sought to purchase was in *custodia legis*.
>
> The amendment to the Bankruptcy Act of 5 February, 1903, directing the trustee to file a certified copy of the decree of adjudication in the office where conveyances of

197. *See* Fitch v. Boyer, 51 Tex. 349 (1879); *cf.* Stebbins v. Duncan, 108 U.S. 32 (1882).

198. *See* Carlisle & Co. v. King, 103 Tex. 620, 626-27 (1910); *cf.* American Land Co. v. Zeiss, 219 U.S. 47 (1911).

199. 11 U.S.C. § 110(a) (1964).

200. 61 Fla. 625, 55 So. 852 (1911).

> real estate are recorded, in every county where the bankrupt holds real estate not exempted from execution, etc., is directory only and does not affect the principle that the bankrupt's title passes by operation of law to the trustees in bankruptcy as of the date of his adjudication.[201]

As an alternative ground for its decision the court held that the alleged bona fide purchasers had actual notice of the bankruptcy proceedings.

Nevertheless, the operation of section 70 of the Bankruptcy Act does present a substantial and unnecessary risk to bona fide purchasers of real property. This is especially true because the grantor's bankruptcy will normally preclude recovery of even the purchase price by the bona fide purchaser. Of course, whether the policy of orderly administration of debtors' estates is to take precedence over the policy of secure record title to land is a question for the legislatures. Yet, section 21(g) of the Bankruptcy Act[202] provides that in states authorizing such recording, the filing of a petition in bankruptcy shall not be constructive notice to subsequent bona fide purchasers unless first recorded in the land record office for the county in which the land is located. Therefore, there is no reason for the Bankruptcy Act, in this respect at least,[203] to operate in opposition to the recording acts. But apparently only fourteen states have authorized such a recording.[204]

### SUMMARY AND CONCLUSION

The off-record risks considered above may be divided into three broad groups: (1) those which are necessary in some cases to protect innocent parties, but which should be decided on a case by case basis with due regard for the equities of the bona fide purchaser; (2) those arising from social policies which are no longer appropriate and should be subordinated to the policies embodied in the recording acts; and (3) those due to misinterpretation of the recording acts and their objectives, or to imperfect recording acts, which should be eliminated entirely by the courts or legislatures. Of course, some or all of the above grounds may be in part responsible for a given off-record risk, but in this final section an attempt will be made to categorize off-record risks according to the apparently predominant reason for their existence.

The first group, off-record risks necessary in some cases to protect innocent parties, may be classified further into two subgroups based on the nature of the event which gives rise to the need for protection. In the first subgroup are off-record risks aris-

201. *Id.* at 629, 55 So. at 854.
202. 11 U.S.C. § 44(g) (1964).
203. For other ways in which the Bankruptcy Act may operate as an off-record risk see sections 60 and 67 of the Act. 11 U.S.C. §§ 96, 107 (1964).
204. *See* 2 T. PATTON, TITLES 580 (2d ed. 1957).

ing from human error. This category includes risks caused by void judgments and court orders, recording errors, and destruction of records. These off-record risks are almost inevitable in light of man's imperfect state and usually, if the opposing party has not contributed to their existence, warrant a decision against the bona fide purchaser. The dangers they pose can sometimes be reduced, however, as in the case of destruction of records, where a requirement for rerecording within a short time would go far toward limiting that risk.

The second subgroup of off-record risks necessary to protect innocent parties results from a desire to protect such parties from the malfeasance of others or their own lack of understanding. This category includes risk due to forgeries and frauds, mental incapacity, and lack of delivery. It may also include incapacity of an infant in certain cases, but the latter is more the result of an outdated social policy. In any event, it is in this category that the penchant of courts for deciding off-record risk cases through the use of conclusionary terms and phrases is most apparent, because it is here that the need for close examination of the facts and balancing of opposing equities is greatest. In light of modern requirements for secure record title to land, it is submitted that in these cases a presumption should exist in favor of the bona fide purchaser. Moreover, as has been seen, the "innocent" party has often contributed to his own loss, and therefore does not deserve to be protected at the expense of a bona fide purchaser.

The second group of off-record risk cases, those arising from outdated social policies, are the result of incapacity of an infant, lack of acknowledgment, unrecorded family rights, tolled limitations periods, or usury. Lack of acknowledgment is included here because it is usually a vehicle for protection of homestead rights and the rights of spouses. Off-record risks due to forgeries and frauds might have been included in this group, but they are primarily a product of the desire to protect the innocent victim. The off-record risks included here are mainly the products of a land-based society's efforts to provide security to minors, wives, incompetents and other dependents. Moreover, the rights which these risks protect arose prior to the enactment of our present recording acts, and therefore are not generally subject thereto. But society is no longer agrarian in character. Real property is no longer the principal form of wealth or the means by which security for dependents can be best provided. It is, in relative terms, an increasingly limited commodity the utility of which must be maximized from the standpoint of society as a whole rather than from the point of view of a few women, children and lunatics. If it is thought necessary to retain these ancient forms of social security, they should be brought within the scope of the recording acts. But with respect to the risk of usury, which had similar origins in

the mores of an agrarian culture, there is no reason for its continued existence. Penalties for usury are inappropriate outside the criminal law and should not be imposed except on the usurer himself.

The third group, off-record risks arising from misinterpretation of or defects in recording acts, is by far the largest. The risks arising from misinterpretation of recording acts include legal incapacity, prior adverse possession, subsequently discovered wills, holders of instruments senior in record but junior in date who had actual notice of the prior conveyance, the Soldiers' and Sailors' Civil Relief Act, failure to inquire with respect to certain types of possession, and estoppel by deed. The off-record risks which exist because of defects in recording acts, usually failure to provide for recordation, are undisclosed prescriptive and implied easements, grace periods for filing, and section 70 of the Bankruptcy Act. In addition to being the most numerous, the risks in this group are the most unnecessary. Often justified by ancient or artificial doctrines and policies, they represent failures of the courts and legislatures to recognize a modern need: the need engendered by frequent transfers of real estate in a society in which secure record title is a paramount necessity if housing subdivisions, industrial parks, shopping plazas, and similar developments are to be constructed with maximum speed.

It has been said that

> [i]deally, any system of record title should allow the purchaser of land to determine where the title is presently vested and whether any person other than the owner is capable of asserting a potential adverse claim of interest. The system of title examination now employed in the American states allows the purchaser to answer neither of these queries conclusively, and, if it were not endowed with the respectability accorded the status quo, the system might be a matter of some curiosity.[205]

The failure of present recording systems to indicate definitively where title to a given parcel of real estate is vested and whether there are any potentially adverse claims is due in large part to the existence of the off-record risks examined in this paper. Consequently, these off-record risks should be a primary object of reform for those who desire a closer approximation of the ideal in the recordation of real property interests.

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205. Payne, *Increasing Land Marketability Through Uniform Title Standards*, 39 VA. L. REV. 1, 2-3 (1953). *See also* P. BAYSE, CLEARING LAND TITLES 1 & n.1 (1953).

# APPENDICES

## APPENDIX A

Some risks for bona fide purchasers of real property result from the fact that certain adverse claims appear in records which are not accessible and therefore not examined in a normal title search. Listed below are some of those risks and cases in which subsequent purchasers were defeated by claims so recorded.

1. *Lis pendens* in some states operates as constructive notice to purchasers of realty as of the time of filing of the petition, without recordation anywhere other than in the court where the action is pending. *See* OKLA. STAT. tit. 13, § 180 (1961). This seems to have caused some difficulties. *See, e.g.*, United States v. Dwyer, 250 F. Supp. 470 (E.D.N.Y. 1966); Simpson v. Bunis, 365 P.2d 134 (Sup. Ct. Okla. 1961); Hart v. Pharaoh, 359 P.2d 1074 (Sup. Ct. Okla. 1961); Cannon Mills v. Spivey, 208 Tenn. 419, 346 S.W.2d 266 (1961); Wyatt v. Wycough, 232 Ark. 760, 341 S.W.2d 18 (1960); Owens v. El Gato Inv. Co., 332 P.2d 22 (Sup. Ct. Okla. 1958); State v. Keller, 264 P.2d 242 (Sup. Ct. Okla. 1953); Tesar v. Leu, 156 Neb. 528, 56 N.W.2d 803 (1953); Pearson v. Logan, 208 Okla. 234, 255 P.2d 255 (1951); American Bank & Trust Co. v. Continental Inv. Corp., 202 Okla. 351, 213 P.2d 861 (1951); Whitehurst v. Abbot, 225 N.C. 1, 33 S.E.2d 129 (1945); People v. Chicago, 299 Ill. App. 504, 20 N.E.2d 306 (1939).

2. *Eminent domain takings*, through oversight or lack of statutory provision therefor, may not be of record other than in the court which issued the decree authorizing the taking. Here again subsequent purchasers have sometimes learned too late of records of which they were on constructive notice. Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir. 1955); Walsh's Inc. v. County of Oswego, 9 App. Div. 2d 393, 194 N.Y.S.2d 149 (1959); State v. Meeker, 75 Wyo. 210, 294 P.2d 603 (1956); *see* United States v. Ivie, 163 F. Supp. 138 (N.D. Ga. 1957).

3. *Statutory liens* sometimes present a risk for purchasers who are not aware of their existence. *See, e.g.*, Mason v. Cook, 187 Ky. 260, 218 S.W. 740 (1919).

4. *Divorce decrees* often affect title to real estate although they may not be found elsewhere than in the court records. Subsequent purchasers' interests have been defeated by claims arising from such decrees in the following cases: First Federal Sav. & Loan Ass'n v. Fisher, 60 So.2d 496 (Sup. Ct. Fla. 1952); Parduhn v. Rodman, 201 Okla. 242, 204 P.2d 869 (1949).

5. *Changes in county boundaries* may result in claims being recorded in a county other than the one in which real estate is presently located. Nevertheless, subsequent purchasers have been held to be on constructive notice of such claims. *See* Korper v. St. Paul & N. P. Ry., 40 Minn. 132, 41 N.W. 656 (1889).

APPENDIX B

Title defects not appearing of record but insured against by a policy of title insurance to the extent not otherwise indicated by the policy:

1. False personation of the true owner of the land or of his consort.
2. Forged deeds, releases of mortgages and other instruments.
3. Instruments executed under fabricated or expired powers of attorney. (Death or insanity of principal).
4. Deeds apparently valid but actually delivered after death of grantor or grantee, or without consent of grantor.
5. Deeds to or from corporations before incorporation or after surrender or forfeiture of charter.
6. Undisclosed heirs.
7. Misinterpretation of wills, deeds and other instruments.
8. Deeds by persons of unsound mind.
9. Deeds by minors.
10. Deeds by aliens.
11. Deeds by persons apparently single but actually married.
12. Birth or adoption of children after date of will.
13. Children living at date of will but not mentioned therein.
14. Mistakes in recording legal documents. (Incorrect indexing, errors and omissions in transcribing and failure to spread of record or preserve original instruments).
15. Want of jurisdiction of persons in judicial proceedings.
16. Discovery of will of apparent intestate.
17. Discovery of later will after probate of first will.
18. Federal estate and gift tax liens.
19. State inheritance and gift tax liens.
20. Capacity of foreign personal representatives and trustees to act.
21. Failure to include necessary parties in judicial proceedings.
22. Claims of creditors against property conveyed by heirs or devisees within prescribed period after owner's death.
23. Deeds absolute on their faces but which are held to be equitable mortgages.
24. Deeds in lieu of foreclosure set aside as being given under duress.
25. Ultra vires deed given under falsified corporate resolution.
26. Outstanding prescriptive rights not of record and not disclosed by survey.
27. Conveyances and proceedings affecting rights of servicemen protected by Soldiers' and Sailors' Civil Relief Act.
28. Deed of property recited to be separate property of grantor which is in fact community property.
29. Errors in tax records. (For example, listing payment against wrong property.)

30. Deed from bigamous couple—prior existing marriage in another jurisdiction.
31. Deed from convicted felon.
32. Conveyance by heir, devisee or survivor of a joint estate who murdered the decedent.
33. Defective acknowledgment due to lack of authority of notary (acknowledgment taken before commission or after expiration of commission).
34. Federal condemnation without filing of notice. (Federal law does not require filing of notice of taking in local recording office.)
35. Rights under financing statements filed under Uniform Commercial Code in the name of the debtor who may not be the owner of the property.
36. Record easement, but erroneous ancient location of pipe or sewer line which does not follow route of granted easement.
37. Demolition liens where city demolishes building under statutory authority which are not recorded or are not recorded against the true owner.
38. Descriptions apparently but not actually adequate.
39. Fraudulent changes in existing records by persons other than recording officials. Changes in record by recording official without authority upon oral request or upon being presented with instrument changed after execution and recordation.
40. Ineffective waiver of tax liens by tax or other governing authorities repudiated later by successors.
41. Corporation franchise taxes as lien on all corporate assets, notice of which does not have to be recorded in the local recording office.
42. Wills revoked by marriage after execution when marriage not contemplated by terms of will.
43. Special assessments where they become liens upon passage of resolution and before recordation or commencement of improvements for which assessed.
44. Interests arising by deeds to fictitious characters to conceal illegal activities on the premises.
45. Erroneous reports furnished by tax officials, but not binding on municipality.
46. Administration of estates and probate of wills of persons absent but not deceased.
47. Undisclosed divorce of spouse who conveys as sole heir of deceased consort.
48. Marital rights of spouse, purportedly but not legally divorced.
49. Tax homestead exemptions set aside as fraudulently claimed.
50. Break in chain of title beyond period of examination of public records where running of adverse possession statute has been suspended. (True owner is incompetent, absent or incarcerated or title is held by the sovereign.)

51. Deed from trustees of purported business trust which is in fact a partnership or joint stock association.
52. Deed of executor under non-intervention will when order of solvency has been fraudulently procured or entered.
53. Deed from record owner of land where he has sold property to another purchaser on unrecorded land contract and the purchaser has taken possession of premises.
54. Void conveyances in violation of public policy: (Payment of gambling debt, payment for contract to commit crime or conveyance made in restraint of trade).
55. Duress in execution of instruments.

Letter from Martin C. Bowling, Jr., Associate Counsel for Lawyers Title Insurance Corporation, to Ralph L. Straw, Jr., April 7, 1967.

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