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## **NORTH CAROLINA'S REAL ESTATE RECORDING LAWS: THE GHOST OF 1885**

CHARLES SZYPSZAK\*

### **I. INTRODUCTION**

Private real estate ownership depends on reliable public records. Conveyance laws provide those who acquire real estate interests with a way to record their rights to protect themselves against competing conveyances of the same interests. Purchasers and lenders rely on these records to assess the likelihood that those with whom they are dealing own real estate free of competing claims.

North Carolina is one of the very few states clinging to a "pure race" recording system, which is characterized simply as "first to record, first in right." Unlike the recording statutes common elsewhere, North Carolina's laws are intended to limit the inquiry of real estate interests to the public record, by eliminating the need to consider other information that may be available about a competing claim. This intended purity has proved to be an illusion. The real estate records give an incomplete picture of property rights. Courts have used their equitable powers to reorder the priority of rights that the records depict. Lawmakers have created liens that can apply without having to appear in the real estate records. Courts have denied the recording benefits to instruments deemed to have been prepared improperly. In a fairly recent development, the records have been used as a tool for harming rather than protecting property interests. These realities make the recording laws far less simple than they may appear, and raise questions about whether the statutes could be a more comprehensive and coherent statement of the rules.

This article discusses the nature of the race recording statute and the major conceptual and practical issues that have arisen in its application. Part II discusses the statute and the extent to which it truly results in a pure record as originally envisioned. It also considers how the statute could be amended to reflect the law as it is actually applied. Part III describes undue risks to legitimate conveyances posed by requiring strict compliance with recording rules, and examines possible refinements to the laws to address these risks. Part IV describes

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abuse of the recording system and possible legislative responses to the problem.

## II. THE MISLEADING NOTION OF PURE REAL ESTATE RECORDS

In the United States, real estate conveyances are governed by state law. All states have recording offices for real estate instruments and laws that govern the effect of recording, including how disputes are resolved if there is a conflict between the sequence of conveyances and the order in which instruments are recorded. Most of the states' laws share the same essential features, which take into account both the order of recording and any notice a claimant may have had about a prior, competing conveyance. North Carolina still retains a statute that seems to make no exception to the recording requirements based on such prior notice. The statute's express language can be misleading, however, because the courts and the legislature have recognized or created many important exceptions to priorities shown on the public record.

### A. *Recording Laws*

Real estate recording laws have two main goals. The first goal is to give those who acquire interests legitimately a means of protecting against otherwise undetectable competing claims. The laws do this by giving priority to interests that are first recorded publicly. The second goal is to provide those interested in acquiring interests in real estate, either by purchase or as security for a loan, a way to assess the validity of the rights claimed by those with whom they are dealing.<sup>1</sup> The laws do this by requiring real estate instruments to be recorded. To accomplish both of these goals, the recording laws must resolve conflicting claims predictably and fairly.

Without a recording statute, if two grantees are conveyed the same real estate, the first conveyance will be acknowledged as effective because the grantor had nothing left to give when the second conveyance was made. Only application of an overarching equitable principle will alter this outcome. The recording laws can change the result based on either or both of two factors: the sequence in which the instruments of conveyance were recorded, and notice obtained by means other than the records about a prior conflicting claim, usually from actual knowledge about an unrecorded instrument.

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1. See *Bd. of Selectmen of Hanson v. Lindsay*, 829 N.E.2d 1105, 1109-10 (Mass. 2005) (discussing the "two interconnected" purposes of real estate recording of protecting purchasers from undisclosed claims and giving them a means of detecting such claims).

Recording laws take three forms: notice, race-notice, and race. Of the three, the notice rules depend the least on the public records. A typical notice statute provides that no instrument conveying real estate will "be effectual to hold such lands against any person but the grantor and his heirs, unless the deed or conveyance is acknowledged and recorded."<sup>2</sup> This means that if an instrument of conveyance is recorded, everyone else is deemed to have constructive notice of the conveyance and to be bound by it. As with all recording systems, an unrecorded instrument will not bind a subsequent purchaser or creditor who does not otherwise know about it.<sup>3</sup>

Many states have "race-notice" recording laws. A common version provides that real estate instruments become enforceable when recorded "as to all creditors and subsequent purchasers in good faith without notice," but instruments are "void as to all creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments are recorded prior to such instruments."<sup>4</sup> This type of statute denies priority to a second grantee with actual notice about an unrecorded prior conveyance, but requires that the second grantee record the instrument to be entitled to the statute's benefits.

North Carolina is one of the very few states with a "pure" race recording statute. North Carolina's statute provides that no deed or other instrument of conveyance "shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies."<sup>5</sup> Notice plays no role in this statute, only *registration*, which refers to the status of being properly recorded (the word "recorded" is used in this article to refer to an instrument's presence in the records, which may or may not be deemed to be registration under the law).<sup>6</sup> A familiar refrain in North

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2. VT. STAT. ANN. tit. 27, § 342 (1989).

3. See *Hemingway v. Shatney*, 568 A.2d 394, 396 (Vt. 1989) (describing Vermont's notice statute).

4. NEB. REV. STAT. § 76-238 (2003).

5. N.C. GEN. STAT. § 47-18(a) (2005). The same language is used in different statutes for deeds, *id.*, security instruments, § 47-20, and easements, § 47-27. Louisiana, with its unique legal system, is the other state with what is still described as a pure race recording statute. LA. CIV. CODE ANN. § 3338 (West Supp. 2006).

6. North Carolina has a Torrens Act by which title to real estate can be confirmed by a court decree and then ownership (not just the instrument) can be registered. N.C. GEN. STAT. §§ 43-1 to -64 (2005). The Torrens system was adopted by a number of states in the early twentieth century but was unsuccessful. It was used mostly by holders of large tracts that wanted and could afford to obtain title assurances from the government greater than the ordinary recording system could provide. It never received widespread acceptance and has been displaced by title insurance. See Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663 (2003) (comparing the recording and Torrens systems and the private alternatives that evolved); Frederick B. McCall, *The Torrens System—After Thirty-Five Years*, 10 N.C.L. REV. 329, 335 (1932) (stating in 1932 that "[t]he

Carolina is that “no notice to the purchaser, . . . however full and formal, will supply the place of registration.”<sup>7</sup> Ostensibly this means that those who record first will have title even if they knew someone else was already conveyed the same property. With notice and race-notice laws, the second grantee’s actual knowledge of the prior conveyance could result in subordination even though the second grantee records first.

Many of the states’ original recording laws were race-type statutes but were later modified to take notice into account.<sup>8</sup> A number of states have race-type statutes for mortgages but not for deeds.<sup>9</sup>

### B. *Registration Required*

North Carolina’s first laws required that deeds go before a court before being recorded with the county register of deeds.<sup>10</sup> This record could then be used as evidence of ownership,<sup>11</sup> but the statutes did not set rules about resolving competing claims based on actual notice of an unregistered deed. Prior to 1885, an unregistered deed was considered to be a legal conveyance and courts looked to the situational equities to determine whether someone who knew of a prior competing conveyance should be denied ownership despite being the first to record.<sup>12</sup> Actual notice was, therefore, as important as recording. The North Carolina Supreme Court stated that when a purchaser knew someone else had a deed to the same real estate, “he is affected with notice of every part of its contents.”<sup>13</sup> The court reasoned that “an incomplete legal title” existed when the deed was delivered, which could ripen into “a perfect legal title” upon registration retroactive to the deed’s delivery.<sup>14</sup> The equitable merits of the first grantee’s situation could be shown by parol evidence.<sup>15</sup>

In 1829, North Carolina began to strictly require a security instrument, such as a deed of trust, to be registered first in order to have priority as a lien on the real estate.<sup>16</sup> Without a registration require-

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Torrens law is practically a dead letter so far as this state is concerned”). The continued existence of the Torrens law should be reconsidered in view of the burdens it continues to place on registers despite its very limited utility, but that is a subject beyond the scope of this article.

7. *Quinnerly v. Quinnerly*, 19 S.E. 99, 99 (1894) (quoting *Robinson v. Willoughby*, 70 N.C. 358, 364 (1874)).

8. 14 Powell on Real Property § 82.02[1][c][i] (Michael Allan Wolf ed. 2005).

9. *E.g.*, ARK. CODE ANN. § 18-40-102 (2003).

10. 1715 N.C. Sess. Laws 38 § 5.

11. 1756 N.C. Sess. Laws 6 § 3.

12. *See Ray v. Wilcoxon*, 12 S.E. 443, 447 (N.C. 1890) (remanding title dispute “for an equitable adjustment of the rights of the parties”).

13. *Walker v. Coltraine*, 41 N.C. 79, 82 (1849).

14. *Phifer v. Barnhart*, 88 N.C. 333, 338 (1883).

15. *Robinson v. Willoughby*, 70 N.C. 358, 363 (1874).

16. Act effective 1829, ch. 20, 1829 N.C. Sess. Laws 23.

ment, creditors could withhold their instruments from public view. This enabled debtors to obtain credit from other lenders who were unaware of the prior credit. When the first lenders later registered their mortgages, they would still take priority over the innocent second lenders.<sup>17</sup> The 1829 law provided that “[n]o deed of trust or mortgage . . . shall be valid at law to pass any property as against creditors or purchasers, for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth . . . .”<sup>18</sup> The North Carolina Supreme Court stated that this requirement “was intended to uproot all secret liens, trusts, unregistered mortgages, etc., and under its force it has been held that no notice, however full and formal, will supply the place of registration.”<sup>19</sup>

In 1885, the same rule was applied to deeds by a statute providing that no deed “shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies.”<sup>20</sup> This law was known as Connor’s Act, named for the state senator and judiciary committee chair, Henry Groves Connor, who sponsored it. That same year, Connor became a superior court judge. Later he was speaker of the house, an associate justice for the state supreme court for which he wrote important decisions interpreting the statute, and a federal judge.<sup>21</sup> Justice Connor

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17. *Leggett v. Bullock*, 44 N.C. 283, 286 (1853).

18. Act effective 1829, ch. 20, 1829 N.C. Sess. Laws 23 (codified at Code of N.C. ch. 27, § 1254 (1883) (current version at N.C. GEN. STAT. § 47-20 (2005))).

19. *Hooker v. Nichols*, 21 S.E. 207, 208 (N.C. 1895).

20. Connor’s Act, ch. 147, sec. 5, 1885 N.C. Sess. Laws, 234 (codified at N.C. GEN. STAT. § 47-18(a) (2005)). In 1943, the same race recording language was added to a statute specifically applying to easements. Act effective 1943, ch. 750, 1943 N.C. Sess. Laws (codified at N.C. GEN. STAT. § 47-27 (2005)).

21. Connor’s Act was part of a political climate that sometimes employed the law as a tool of exclusion, a goal that all legislators should now agree is illegitimate. Henry Groves Connor was among the leading Southern Democrats who became known for advocating racial segregation in the late 1800s and early 1900s. While speaker of the house in North Carolina he was a supporter of the infamous “Grandfather’s Clause” amendment to the state’s constitution. Editorial Notes, *Henry Groves Connor*, 2 N.C.L. REV. 228, 229 (1924) (“Judge Connor was a real leader in the famous legislature of 1899, which restored ‘white supremacy’ by the passage of the constitutional amendment requiring an educational qualification for voting.”). The 1900 amendment limited voting rights to those who could read and write the state’s constitution, except for those who were able to vote in 1867 or their descendants, which was when only white people could vote. Act Effective 1899, N.C. Sess. Laws 218; Act of 1900, N.C. Sess. Laws 2 (enacted at N.C. CONST. of 1868, art. VI, § 4 amended by N.C. CONST. art. VI (1971)). The Republican Party platform opposing the Democrats in 1900 said that “the Democratic leaders have determined to wage the coming campaign upon the race issue alone, and they go before the people with a scheme of disfranchisement which is the most impudent assault upon the Constitution of the United States, and the most shocking act of perfidy ever attempted by men who recognize the obligation of an oath or the sanctity of a public pledge.” Republican Party Platform 1900, reprinted in HUGH T. LEFLER, NORTH CAROLINA HISTORY AS TOLD BY CONTEMPORARIES 405,

said that when the law was enacted, the state was “an inviting field for the investment of capital in the development of its resources in mines, lumber, water-power and agriculture,”<sup>22</sup> but suffered from “the laxity of our registration laws,” by which the holder of an unrecorded deed could obtain priority rights upon registration retroactive to the date of the delivery of the deed.<sup>23</sup> He noted that “frequent efforts were made to place deeds in respect to registration as affecting purchasers and creditors on the same footing with mortgages and deeds in trust,” and in 1885 the efforts succeeded.<sup>24</sup>

Formal deed recording requirements must have encouraged real estate investments, but they could not have been intended to promote widespread real estate ownership by those who already occupied the land. In 1885 there were many landholders who were unsuited to comply with rigorous instrument preparation and recording requirements. They included former slaves, of whom there were more than 350,000 in North Carolina after the Civil War.<sup>25</sup> A small, but not insignificant, percentage of freed persons occupied land they believed they owned. However, they encountered difficulties when arranging for credit and meeting other demands of ownership, and they were frequent victims of fraud.<sup>26</sup> Another large group of vulnerable landholders were sharecroppers, tenants, and small farmers. Tenant farmers operated more than one-third of North Carolina’s farms.<sup>27</sup> Connor’s Act was obviously not intended to protect these groups who were not likely to be familiar with methods of formalizing ownership, and were also unlikely to have access to lawyers for assistance.<sup>28</sup>

The plight of disadvantaged landholders was not mentioned in the public record when the need for the 1885 law was described, but Justice Connor did acknowledge that a strict registration requirement was a “radical . . . change and departure from the law and policy which

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405-06 (Hugh T. Lefler, ed., U.N.C. Press 1956). Although the state’s recording law cannot fairly be attributed primarily to white supremacy, the continued desirability of any law should be examined with some consideration of the context in which it was enacted.

22. *Laton v. Crowell*, 48 S.E. 767, 767 (1904).

23. *Id.*

24. *Id.*

25. MILTON READY, *THE TAR HEEL STATE: A HISTORY OF NORTH CAROLINA* 250 (U.S.C. Press 2005).

26. See SHARON ANN HOLT, *MAKING FREEDOM PAY: FREED PEOPLE WORKING FOR THEMSELVES, 1865 – 1900*, 60 J.S. HIST. 229, 259 (1994) (“sometimes fraud in the drawing up or filing of land deeds necessitated paying twice or thrice over for the same form”).

27. HUGH TALMAGE LEFLER & ALBERT RAY NEWSOME, *THE HISTORY OF A SOUTHERN STATE: NORTH CAROLINA* 522 (3d ed. 1973).

28. See generally, *Avent v. Arrington*, 10 S.E. 991, 996 (1890) (stating most landholders would understand that a deed is important but few would appreciate the subtleties of preparing and recording the deed including the rules for a proper acknowledgment of the signature, the court saying that “only one educated in the law could be expected to understand that a seal was necessary to make it, in reality, a deed, and vest the estate in the grantee”).

had prevailed for more than a century.”<sup>29</sup> To spread the word about the new requirements, the legislation required the secretary of state, court clerks, and registers to publish notice about them.<sup>30</sup> The legislation allowed a grace period for registering deeds, and an exception for unregistered deeds executed prior to the statute’s effective date if the claimant or claimant’s tenants had possession when the conflicting deed was executed, or if the grantee of the conflicting deed had actual or constructive notice of the prior, unregistered deed.<sup>31</sup> Notice was therefore relevant only to conveyances prior to 1885.<sup>32</sup>

For conveyances after 1885, application of the statute could have harsh results, as illustrated by *Grimes v. Guion*,<sup>33</sup> in which a woman defended a claim of ownership based on possession and improvement of the property. She alleged that the owner was facing foreclosure and asked her to pay the taxes and make a loan. The defendant said the owner invited her to take possession, to cultivate the land, and to improve the structures. Further, the defendant said the owner promised that if she did not repay to the defendant all amounts expended before the owner died, the defendant would own the property. The defendant made investments as agreed but was not repaid. The owner’s heirs gave a recorded deed to someone whom the defendant said was fully aware of her investment and claim. The defendant’s counsel described his client as “an ignorant colored woman, without education.”<sup>34</sup> The court was not moved by her situation and said:

Though the defense attempted to be set up by defendant portrays her as the victim of a grievous wrong, which engenders indignation and invokes sympathy, it states no cause of action against plaintiff. There is no averment that he has either assumed, or broken any obligation to her. Rather, the averments indicate that he has acted within the registration laws as written.<sup>35</sup>

Strict application of the registration law can also enable a purchaser to invalidate interests that should have been obvious when the property was acquired. In *Rowe v. Walker*,<sup>36</sup> owners of land situated across two counties challenged a farm road easement. The owners acquired their land by a single deed describing the property in both counties. But the deed that created the easement was recorded in only one of the counties when the easement beneficiaries purchased their prop-

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29. *Laton*, 48 S.E. at 768.

30. Connor’s Act ch. 147, sec. 5, 1885 N.C. Sess. Laws, 234.

31. *Id.* at sec. 1, 233.

32. *See Laton*, 48 S.E. at 768.

33. 18 S.E.2d 170 (N.C. 1942).

34. *Id.* at 171.

35. *Id.* at 173.

36. 441 S.E.2d 156 (N.C. Ct. App. 1994), *aff’d*, 455 S.E.2d 160 (N.C. 1995).



erty.<sup>37</sup> A title search should have been done in both counties when the land was purchased, and the easement instrument and its effect on land in both counties should have been noticed. But the easement recording statute states that no “easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies.”<sup>38</sup> A majority of the court of appeals said this meant that registration in one county does not bind others with respect to real estate in another county.<sup>39</sup> The appellate court rejected the trial court’s ruling that the law “require[s] a purchaser for valuable consideration to be an ‘innocent purchaser.’”<sup>40</sup> A dissenting judge found this to be an unacceptable result.<sup>41</sup> Relying on terminology loosely employed in two state supreme court cases,<sup>42</sup> the dissent said that the statute’s qualification that registration applies to a “purchaser for a valuable consideration” required that the party seeking the statute’s benefits must have been acting in good faith, which included acting without knowledge of the contested right.<sup>43</sup> But a good faith requirement is not part of the statutory language; its absence is a distinguishing feature of a pure race recording statute. The dissent’s statutory interpretation may have been creative but the motivation to arrive at an equitable result was understandable.

### C. Statutory Impurity

Contrary to the announced goals of a pure race recording statute, there are many potential claims to real estate that are not shown by the public records. Purchasers, title examiners, and title insurers must investigate other records and other circumstances to be sure a real estate title is what the owner represents it to be.

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37. *Id.* at 157.

38. N.C. GEN. STAT. § 47-27 (2005).

39. *Rowe*, 441 S.E.2d at 158.

40. *Id.*

41. *Id.* at 159 (John, J., dissenting).

42. For the good faith requirement the dissent gave the following authority: “*Hill v. Pine-lawn Memorial Park*, 304 N.C. 159, 165, 282 S.E.2d 779, 783 (1981) (N.C. recording statutes ‘do[ ] not protect all purchasers, but only *innocent* purchasers for value’) (emphasis added) (citations omitted); see also *Green v. Miller*, 161 N.C. 24, 31, 76 S.E. 505, 508 (1912) (purchaser *without notice* of right or interest of third party, who pays full and fair price at time of purchase or before notice, takes property free from right of third party ‘because he is regarded as an innocent purchaser . . . . It is a perfectly just rule, and it would be strange if the law were otherwise’) (emphasis added).” *Id.* In *Hill*, the court recognized an exception to the registration requirement for actual knowledge of pending litigation. 282 S.E.2d at 783. In *Green*, the court considered whether a landowner was estopped from denying the public dedication of roads shown on the subdivision plan. 76 S.E. at 506-09. These exceptions to the registration requirement are discussed *infra* in the text accompanying notes 62 and 65 to 68.

43. *Rowe*, 441 S.E.2d at 160-61.

The recording laws apply to third parties.<sup>44</sup> Failure to record is not a defense against a grantee's enforcement of an instrument against its grantor.<sup>45</sup> Also, a deed obtained fraudulently,<sup>46</sup> or without valuable consideration, does not enjoy the statute's protection.<sup>47</sup> These exceptions follow from the statutes' identification of "creditors or purchasers for a valuable consideration" as those who are protected.<sup>48</sup>

The courts have made a number of important exceptions to recording priority that are not reflected in any statute's text. An owner will be held subject to rights described in an unrecorded instrument if the unrecorded instrument is incorporated by reference into the owner's deed or another recorded instrument in the chain of title. For example, the North Carolina Supreme Court held that an owner was bound by an agreement to recognize unrecorded leases because the agreement was mentioned in the owner's deed.<sup>49</sup> The court has reasoned that someone acquiring title with such a reservation is either estopped from denying its effect,<sup>50</sup> or that the grantee takes the property in trust subject to the conveyance to which reference was made.<sup>51</sup>

Parties' relative rights have been realigned based on other equitable theories as well. For example, in *Hice v. Hi-Mil, Inc.*,<sup>52</sup> a deed included more property than the parties intended. One of two grantees re-conveyed his interest to the other. The grantee with the entire interest then transferred the property to a corporation the two had formed.<sup>53</sup> The corporation thereby acquired title to the erroneously included land with no competing claim on the record. Based solely on the recording laws, the corporation would have uncontested ownership. But the North Carolina Supreme Court went beyond the stat-

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44. See, e.g., *Bowden v. Bowden*, 141 S.E.2d 621, 627 (N.C. 1965) ("The registration of deeds is primarily for the protection of purchasers for value and creditors; an unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties.").

45. *Patterson v. Bryant*, 5 S.E.2d 849, 851 (N.C. 1939).

46. *Twitty v. Cochran*, 199 S.E. 29, 30 (N.C. 1938) (explaining that the statute did not give priority to recorded deed over unrecorded deed when the former was "a voluntary one made for a fraudulent purpose").

47. *Paterson v. Bryant*, 5 S.E.2d at 851 (holding that the first to record prevails "in the absence of fraud or matters creating an estoppel").

48. N.C. GEN. STAT. §§ 47-18(a), -20, -27 (2005).

49. *State Trust Co. v. Braznell* 41 S.E.2d 744 (N.C. 1947).

50. *Hardy v. Abdallah*, 133 S.E. 195 (N.C. 1926) (subordinating mortgage to subsequently recorded mortgage mentioned as an exception to the warranty against encumbrances).

51. See *Terry v. Brothers Inv. Co.*, 334 S.E.2d 469 (N.C. Ct. App. 1985) (subjecting deed to lease identified in prior deed in chain of title); *Bourne v. Lay & Co.*, 140 S.E.2d 769 (N.C. 1965) (holding that rule did not apply to a reference to a prior lease with a disclaimer of any warranty regarding its effect); *Hardy v. Fryer*, 139 S.E. 833 (N.C. 1927) (subordinating mortgage to subsequently recorded mortgage mentioned as an exception to the warranty against encumbrances in a prior deed in the chain of title).

52. *Hice v. Hi-Mil, Inc.*, 273 S.E.2d 268 (N.C. 1981).

53. *Id.* at 269-70.

utes to avoid an inequitable result, ordering that the deed be reformed because the individuals' knowledge was imputed to the corporation and the corporation therefore was not "an innocent bona fide purchaser for value" without notice.<sup>54</sup> The recording law, however, says nothing about a purchaser having to be innocent.

The courts also have avoided the law's potential for inequity by wielding the sometimes omnipotent constructive trust concept. In *Arnette v. Morgan*,<sup>55</sup> for example, the court used a constructive trust to address conflicts arising from a recorded deed that had omitted part of the land intended to be conveyed. After the conveyance, a judgment creditor recorded a lien against the grantor, who still had title to the omitted land according to the public record. The court of appeals held that the grantor held the property in a constructive trust for the intended grantee's benefit, which made the recording law inapplicable to consideration of the relative rights of the creditor and the intended grantee. The court then insisted that the creditor must be "bona fide purchaser for value without notice or someone occupying similar status" to prevail, and because the creditor did not prove it was so qualified, the deed was reformed to convey the property to the grantee free of the creditor's lien.<sup>56</sup>

There are also circumstances in which third parties can acquire rights in real estate without first recording an instrument. For example, ownership rights to real estate can be acquired without a deed by adverse possession based on open and continuous occupation to the exclusion of others, without permission, for at least twenty years.<sup>57</sup> North Carolina shortens the required possession period to only seven years when someone occupies the property under color of title,<sup>58</sup> which can be based on a written instrument purporting to convey land but failing to comply with formal requirements.<sup>59</sup> The color of title doctrine evolved to protect settlers who worked land relying on in-

54. *Id.* at 272.

55. *Arnette v. Morgan*, 363 S.E.2d 678 (N.C. Ct. App. 1988).

56. *Id.* at 680.

57. N.C. GEN. STAT. § 1-40 (2005); *Locklear v. Savage*, 74 S.E. 347, 348 (N.C. 1912); see generally PATRICK A. HETRICK & JAMES P. McLAUGHLIN, JR., *WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA*, ch. 14 (5th ed. 1999) (discussing adverse possession in North Carolina). For an excellent example of how adverse possession can overcome a registration problem, see *McClure v. Crow*, 146 S.E. 713 (N.C. 1929), in which the North Carolina Supreme Court remanded a case for a new trial on the question of rights by possible adverse possession after determining that a deed's registration was invalid because it lacked a required witness acknowledgment.

58. N.C. GEN. STAT. § 1-38 (2005); *Price v. Tomrich Corp.*, 167 S.E.2d 766, 770 (N.C. 1969); see generally Monica Kivel Kalo, *The Doctrine of Color of Title in North Carolina*, 13 N.C. CENT. L.J. 123 (1982) (discussing the doctrine of color of title).

59. See *Price v. Tomrich Corp.*, 167 S.E. 2d 766, 770 (N.C. 1969) ("Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance.").

struments they mistakenly believed to have conveyed good title to them,<sup>60</sup> and survived adoption of the current recording statute.<sup>61</sup>

Another exception to the recording requirement is the enforceability of easement rights based on a development plan. The North Carolina Supreme Court has held that "a purchaser is bound to take notice of an apparent easement, servitude, or dedication for a street or other way [shown on a plan to which a deed refers or that is physically apparent]; and if he fails to do so, he buys at his peril and takes his title subject thereto."<sup>62</sup> This rule is applied when a subdivision plan shows access roads for use of the lots within the subdivision, but the deeds for the lots neglect to state expressly that these rights to the roads were included. The courts do not allow the absence of a recorded instrument to prevent purchasers from having access to the development's clearly intended benefits.

A number of exceptions to the recording requirement have also been created legislatively. One often contentious exception applies to pending litigation. In some states, the only way for a litigant to acquire rights in real estate in connection with litigation is to obtain a court-ordered attachment and record the order in the real estate records.<sup>63</sup> Consequently, even in a race-notice jurisdiction, a prospective purchaser or creditor can rely safely on the register's records for information about litigation liens. In North Carolina, and in some other states, such liens need not be recorded with the register. North Carolina's pending litigation, or *lis pendens* lien, is indexed in the superior court records, which binds later purchasers and creditors to the outcome of the pending proceeding.<sup>64</sup>

The possible effects of litigation on real estate titles extend even beyond rights that can be determined based on the superior court records. In *Lawing v. Jaynes*,<sup>65</sup> the North Carolina Supreme Court held that purchasers and creditors acquiring real estate interests are subject to judgments arising from litigation of which they had actual knowledge.<sup>66</sup> The court spoke of a purchaser's obligation "to show that he is a purchaser for a valuable consideration and, when an action is pending which affects the title to the property, that he had no actual

60. See Kalo, *supra* note 58, at 131-132 (discussing the origins of the color of title doctrine).

61. See *Collins v. Davis*, 43 S.E. 579, 581 (N.C. 1903) (discussing continued viability of the color of title doctrine after adoption of the recording statute in 1885).

62. *Green v. Miller*, 76 S.E. 505, 509 (N.C. 1912) (but holding that there was insufficient evidence of knowledge of the road dedication).

63. E.g., N.H. REV. STAT. ANN. § 511:3 (1997); see *Manchester Fed. Sav. & Loan Ass'n v. Letendre*, 164 A.2d 568, 572-73 (N.H. 1960) (discussing New Hampshire's attachment lien procedure).

64. N.C. GEN. STAT. § 1-118 (2005).

65. *Lawing v. Jaynes*, 206 S.E.2d 162 (N.C. 1974).

66. *Id.* at 171.

notice of such action.”<sup>67</sup> Again, the state’s recording laws were intended to make actual notice irrelevant. But the state’s supreme court said that “[w]here a purchaser claims protection under our registration laws, he has the burden of proving by a preponderance of the evidence that he is an innocent purchaser for value, *i.e.*, that he paid valuable consideration and that he had no actual notice, or constructive notice by reason of *lis pendens*, of pending litigation affecting title to the property.”<sup>68</sup>

There are many other interests that can affect real estate that are not required to be recorded with the register of deeds. A judgment affecting real estate docketed in superior court will have priority over any subsequently acquired security interest in the real estate.<sup>69</sup> North Carolina statutes grant those who provide labor or materials for improvement of real estate a lien on the property, effective from the date the labor or materials are first provided, which can be perfected with an action in superior court until four months after the labor or materials were last provided.<sup>70</sup> A lien for municipal and county real estate taxes attaches when the property is listed for taxes annually and has priority over other liens.<sup>71</sup> Federal environmental liens can be created with a filing in the federal district court.<sup>72</sup> Consequently, to protect themselves, purchasers and creditors must examine court records, tax records, and make inquiries about recent construction for information not required to be recorded at the register of deeds.

A final example of how recording gives an incomplete picture of real estate rights is the passage of title by will or intestate succession. Competing claims based on inheritance are determined based on the governing estate planning instruments and laws of succession.<sup>73</sup> Justice Connor, the sponsor of North Carolina’s recording law, instructed that the recording law “applies only to deeds, contracts to convey, and leases of land. The statute is directed to the protection of creditors and purchasers for value. The evil which [the statute] was intended to remedy was the uncertainty of title to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records. This evil could not exist in regard to wills, as the devisee [is] not a purchaser for value, but [takes] as donee or volunteer.”<sup>74</sup> Consequently, those who examine real estate titles

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67. *Id.*

68. *Hill v. Pinelawn Memorial Park, Inc.*, 282 S.E.2d 779, 783 (N.C. 1981).

69. N.C. GEN. STAT. § 1-234 (2005); *Moore v. Jones*, 36 S.E.2d 920, 922 (N.C. 1946).

70. N.C. GEN. STAT. §§ 44A-8, -10, -12.

71. N.C. GEN. STAT. §§ 105-355, -356.

72. 42 U.S.C. § 9607(l) (2000).

73. *Bowden v. Bowden*, 141 S.E.2d 621, 627 (N.C. 1965).

74. *Bell v. Crouch*, 43 S.E. 911, 912 (N.C. 1903).

often must look beyond the register's records to the probate records or elsewhere.

This summary demonstrates that the state of the law on real estate recording is not as simple as promised. In 1942, after half a century of experience with the state's race recording rule, the North Carolina Supreme Court described the law in these glowing terms: "Its wisdom has clearly demonstrated itself in the certainty and security of titles in this State which the public has enjoyed since its enactment. It is necessary in the progress of society, under modern conditions, that there be one place where purchasers may look and find the status of title to land."<sup>75</sup> After another sixty years, those who rely on the records know there is not "one place where purchasers may look" to make such a discovery. Instead, there are other public offices, and other circumstances, that must be examined and considered. It has become an experts' system, and purchasers and creditors must rely on experienced title examiners and modern title assurance mechanisms for protection against adverse liens and claims.

#### D. *Statutory Clarity*

Several years after North Carolina's race recording statute was enacted in 1885, Justice Clark described the law named after Justice Conner as "[o]ne of the most beneficial laws enacted of late years."<sup>76</sup> By making the public records a more reliable indication of ownership rights, the law unquestionably improved the marketability of North Carolina real estate in general. The goal of making the public records a reliable determinant of real estate interests continues to have merit, and may actually be more achievable today than it was in 1885. Real estate conveyances and mortgage financing are much different in nature and scale than they were a few decades ago. Real estate transfers occur within a well-developed market, which involves professionals and industries that are very familiar with real estate instruments, recording requirements, and risks of mistakes. Modern secured mortgage financing, which did not begin in earnest until the 1930s, now usually involves standardized instruments and practices. Those whose rights depend on the public real estate records are therefore now more likely to be protected under the recording rules and to have access to professionals who are facile with the process. This includes the vast majority of residential property purchasers, who obtain mortgage financing through lenders who use title companies and attorneys to protect their interests.

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75. *Turner v. Glenn*, 18 S.E.2d 197, 200-01 (N.C. 1942).

76. *Cowen v. Withrow*, 17 S.E. 575, 576 (N.C. 1893) (Clark, J., dissenting).

The information contained in the records is also becoming much more accessible. Most registers of deeds now make at least part of their records available to the public on the Internet, and recording electronically with registers is becoming more prevalent. These developments mean that reliance on public records is less likely to displace large groups of disadvantaged claimants as was the case when the race recording laws were first enacted.

North Carolina's state motto is *esse quam videri*<sup>77</sup> which means "to be, rather than to seem." The state's recording laws are not what they seem. If the race recording approach is to be retained, all who rely on the statutes would benefit if the statutes are clarified to more accurately reflect how rights in real estate are determined. For example, the statutes could be amended to make explicit all exceptions to the recording requirement.<sup>78</sup> This would include mention of liens obtained by *lis pendens*, tax and judgment liens, and liens for amounts owed for materials and labor applied to the property, as well as rights acquired by adverse possession. The resulting statutes may not be as simple as they now appear, but they would be a more realistic depiction of the law as it really is.

### III. RECORDING, REGISTERING, AND REALITY

The rules for any real estate recording system must function to protect those who convey and acquire real estate interests in good faith. In a race recording system, good faith purchasers and creditors must rely on the rights accorded to them as a result of recording their instruments. North Carolina's historic process of subjecting instruments to official review before they could be accepted for recording became incompatible with modern transactional realities. At the same time, the law can still be interpreted to deny the benefits of registration to instruments that have not been properly processed before recording or that contain apparent improprieties in the notary's acknowledgment. These potential complications create significant risks for good faith purchasers and creditors who rely on the laws to protect their interests.

#### A. *The Magic of Registration*

North Carolina's recording laws protect only instruments that are properly "registered." As interpreted by the courts, being recorded in the register of deeds office does not by itself constitute registration

77. N.C. GEN. STAT. § 144-2 (2005).

78. For an example of such a straightforward acknowledgment of off-record interests, see IOWA CODE ANN. § 558.41(2) (Supp. 2005) (noting that nothing in the statutory priority is intended to abrogate the collection of property taxes).

sufficient to enjoy priority based on the statute. If the document is not something that is permitted to be registered, its recordation has no effect on subsequent purchasers and creditors. The North Carolina Supreme Court once stated that an instrument “does not constitute constructive notice, if it is not of a class which is authorized or required by law to be recorded.”<sup>79</sup> A document permitted to be registered also can be denied the benefits of the statute if it has not been registered *properly*.

In North Carolina, as in other jurisdictions, the execution of deeds, deeds of trust, and most other real estate instruments must be acknowledged before a notary public or other authorized official before the instruments can be recorded.<sup>80</sup> This acknowledgment requirement prevents fraud by requiring instrument signatories to establish their identities through the act of signing before public officials who make a record of the event.

In most states, registers have little responsibility for reviewing documents submitted to them for recording. Typically, the law only requires that registers review documents presented for recording for basic indexing information and reproduction quality—not for legal sufficiency or for compliance with acknowledgment form requirements.<sup>81</sup> North Carolina is different. Until recently, officials reviewed the content of instruments before they could be recorded. For example, a register would not accept a deed with a notarial certificate in which the notary's signature did not exactly match the notary's name on the seal, or if the certificate was recited in the form of an oath when no oath was required.

The North Carolina process is a remnant of eighteenth century law, when those who wished to register their real estate ownership were required to have their deeds “probated” by the clerk of the superior court who was to determine whether the instruments had been “duly acknowledged.”<sup>82</sup> When the instruments were adjudged to have been duly acknowledged and the certificates to be in due form, the instruments were ordered by the court to be recorded by the register. In

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79. *Chandler v. Cameron*, 47 S.E.2d 528, 531 (N.C. 1948) (recorded personal contract did not give constructive notice) (citing 66 AM. JUR. 2D, *Records and Recording Laws* § 107 (2005)).

80. N.C. GEN. STAT. § 47-17 (2005) (deeds, contracts, and leases). Strictly speaking, an instrument presented for recording may either be “acknowledged” or “proved.” *Id.* An “acknowledgment” occurs when the signatory signs or acknowledges having signed before a notary or other authorized official. N.C. GEN. STAT. § 10B-3(1). A “proof” or “verification” occurs when a witness to someone else's signature acknowledges the signature. *Id.* § 10B-3(28). Either involves a notary or other authorized official and a certificate recording the act.

81. *E.g.*, N.H. REV. STAT. ANN. § 478:4-a (1989) (amended in 2001) (register empowered to insure suitable, permanent recording of documents submitted to them).

82. N.C. GEN. STAT. § 47-14 (1943) (amended by 1967 N.C. Sess. Laws 639, § 1).



1967, the burden of “probating” was shifted to the registers of deeds,<sup>83</sup> and remained with them until 2005. Registers were statutorily directed to register an instrument only after determining that all statutory and locally adopted prerequisites for recording have been met. In addition, until 2005 they were obliged to “pass on” the acknowledgment that appeared on the instrument by determining whether it was in “due form” and “duly proved or acknowledged,” and, if so, they placed a certification to that effect on the instrument and recorded it.<sup>84</sup> If the instrument was defective it was returned without being recorded.

North Carolina registers’ responsibilities also included an unusually active role in handling records of real estate finance. In most states, after a deed of trust or mortgage has been satisfied, the lender’s representative prepares a simple document and mails it to the register, who records it. Until 2005, North Carolina registers were required by statute to examine satisfactions and their acknowledgments for completeness, accuracy, and form compliance, and in many cases to make entries on the recorded document about the satisfaction.<sup>85</sup>

Legislation that became effective on October 1, 2005,<sup>86</sup> narrowed the registers’ obligation to review documents that are presented to them for recording. They are no longer required to certify that an instrument has been “duly” acknowledged or that the acknowledgment is in “due form.” Instead, registers review an instrument to see if it “appears to have been proved or acknowledged before an officer with the apparent authority to take proofs or acknowledgements, and the said proof or acknowledgement includes the officer’s signature, commission expiration date, and official seal, if required.”<sup>87</sup> The 2005 legislation also simplified the process for mortgage lenders to make a record of satisfaction of a deed of trust or mortgage. They can use simple instruments prepared and signed by the trustee or secured creditor and acknowledged, subject to the register’s review only for the presence of a signature and the basic acknowledgment elements.<sup>88</sup>

These changes eliminated a safeguard on which many practitioners relied in the recording process. The result is a system similar to other states, in which the parties and their counsel are solely responsible for the legal sufficiency of the instruments they record and make their own determinations about the sufficiency of other recorded instru-

83. 1967 N.C. Sess. Laws 639, § 1, codified at N.C. GEN. STAT. § 47-14(a) (2003) (amended by 2005 N.C. Sess. Laws 123, § 2).

84. N.C. GEN. STAT. § 47-14(a) (2003) (amended by 2005 N.C. Sess. Laws 123, § 2).

85. *Id.* § 45-37 (amended by 2005 N.C. Sess. Laws 123, § 1).

86. 2005 N.C. Sess. Laws 123, § 1.

87. N.C. GEN. STAT. § 47-14(a) (2005).

88. *Id.* §§ 45-36.10(b)(2), -36.20(e)(2).

ments. But as the process is being changed to make it easier to record without scrutiny, it becomes more likely that an instrument will be recorded with a technical defect.

The limitation of the register's review occurred while form requirements for completing real estate instruments were made more complex, which causes concern for those who rely on the records. There is now a greater chance that a technically defective instrument will be recorded. In 2005, the General Assembly repealed the existing notary laws and enacted a new notary act.<sup>89</sup> The new notary laws are based on the National Notary Association's model, which is intended to promote notaries as a safeguard against fraud, and which emphasizes rigorous attention to detail in the notarial process and completion of certificates.<sup>90</sup> By enacting these laws, North Carolina elected not to adopt a simpler Uniform Law on Notary Acts proposed by the National Conference of Commissioners on Uniform States Laws, now in effect in twelve jurisdictions. The uniform law provides simple forms and emphasizes the basic elements of an acknowledgment without insisting on compliance with many details.<sup>91</sup> As a result of the 2005 legislation, the laws now require a notary's name to be typed or printed legibly near the notary's signature; the notary seal must be within the delineated dimensions and contain only specified information without any of the graphics common in existing seals; and the seal must be affixed to the same page as the notary's signature.<sup>92</sup> Each added requirement raises another possible ground to challenge the legal effect of an instrument without regard to the conveyance's legitimacy, and official scrutiny will no longer protect purchasers or creditors from failures to comply with the requirements.

Purchaser and creditors recording in other states need not be so concerned about technical defects in the form of recorded instruments. Other recording statutes do not deny recognition of recording status based on such defects—recorded instruments that depict the essence of the conveyance will at least be deemed to have given notice of what they describe, which matters in notice and race-notice jurisdictions. Those who represent purchasers and lenders therefore are accustomed to protecting their clients' rights by ensuring that instruments are recorded even if they have minor defects. As a practical matter, any public record of an interest is likely to protect it, be-

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89. 2005 N.C. Sess. Laws 391.

90. See Model Notary Act (National Notary Association 2002), at [http://www.nationalnotary.org/UserImages/Model\\_Notary\\_Act.pdf](http://www.nationalnotary.org/UserImages/Model_Notary_Act.pdf); Letter from Elaine F. Marshall, North Carolina Secretary of State, to the North Carolina General Assembly (Mar. 16, 2005) (on file with author) (describing proposed changes to the notary laws and the need for regulatory clarification).

91. Uniform Law on Notarial Acts (1982), 14 U.L.A. 201 (2005).

92. N.C. GEN. STAT. §§ 10B-20(b)(2), -36(b), -37 (2005).

cause good faith purchasers and creditors alerted to a possible adverse claim will not proceed with an investment without first seeing that the claim is resolved or making accommodations for the risks it poses. As a result, the modern mantra in the national real estate community is "just get it on the record." In North Carolina, the statutes and case law continue to cause concern that an unintentional defect in form could result in rejection of the instrument upon presentation for recording or, even worse, denial of registration status sometime after the instrument was recorded.

### B. *Recorded but Void*

The requirements for recorded instruments have important implications for the reliability of the records as a depiction of legitimate interests in real estate. North Carolina's recording laws state that instruments are entitled to protected priority status "from the time of registration thereof."<sup>93</sup> This does not suggest that something more than recording is required. But the North Carolina Supreme Court has consistently held that completion of the recording process is not enough; an instrument is denied the benefits of the statute if it lacks all required components of a *proper* registration. The following rule, as stated by the supreme court, causes much concern among those relying on the records:

Taking the acknowledgment or proof of a deed or admitting it to probate is a judicial or quasi judicial act, and, if the acknowledgment or proof or probate is defective on its face, the registration of the instrument imparts no constructive notice and the deed will be treated as if unregistered.<sup>94</sup>

The question of whether a recorded instrument is entitled to the benefits of the recording act is not unique to North Carolina. As one commentator said in 1944 about the state of the law nationally, "[h]undreds of cases could undoubtedly be cited containing statements that 'invalid' or 'improperly' recorded instruments, without distinction between substantive and formal invalidity as records, are 'nullities.'"<sup>95</sup> The principal justification for this rule has been that an invalidly or improperly recorded instrument would not be allowed as evidence by a court and therefore should not be entitled to be treated as a valid instrument under the recording acts.<sup>96</sup>

93. *Id.* §§ 47-18(a), -20(a), -27.

94. *McClure v. Crow*, 146 S.E. 713, 714-15 (N.C. 1929); *see also* *County Sav. Bank v. Tolbert*, 133 S.E. 558, 560 (N.C. 1926) ("a registration upon a defective probate is invalid and of no effect as to creditors or subsequent purchasers for value").

95. Francis S. Philbrick, *Limits of Record Search and Therefore of Notice, Part II*, 93 U. PA. L. REV. 259, 288 (1944) (emphasis omitted).

96. *Id.* at 295-96.

The notion that runs contrary to this view has been best described as the obligation of “inquiry notice,” by which someone who sees an instrument is held to be obligated to make a reasonable inquiry into any legitimate rights it describes.<sup>97</sup> Such notice is likely to matter in all but a pure race jurisdiction. The North Carolina courts have held, however, that “no notice however full and formal as to the existence of a prior deed can take the place of registration.”<sup>98</sup>

The potential litigation outcome that causes concern about the recording laws is exemplified in *Barber v. Brunson*.<sup>99</sup> In *Barber*, a deed of trust’s registration was held to be void because, the court said, it was “registered on a defective probate.”<sup>100</sup> The deed of trust was to have been executed by three individuals. The notary’s certificate was in a form for spouses and was left with blank lines for their names and for identification of the county in which the notary was commissioned and in which the acknowledgment was taken.<sup>101</sup> The court held the recording to be invalid without explaining the significance of the omitted information, or whose rights may have been affected by this defect in form. Without this background, *Barber* is hard to reconcile with cases such as *Banks v. Shaw*,<sup>102</sup> in which the court refused to invalidate a deed of trust that had an acknowledgment form for only a wife when the instrument was signed by a husband and wife. In that case the court stated: “It appears that the deed of trust was properly executed and acknowledged. Hence the omission in the notary’s certificate was a matter of proof. The certificate could be amended subsequently to speak the truth, no rights of creditors or third parties being invoked.”<sup>103</sup> Notwithstanding this logical explanation, the outcome of *Barber* causes concern as to whether an instrument will be denied the effects of registration because it contains a format irregularity.

There are reasons to believe that *Barber* was an anomaly. A consistent theme in other cases in which an instrument’s registration was invalidated are issues with the instrument’s legitimacy—not simply with the form of acknowledgment or probate. For example, *Allen v. Burch*<sup>104</sup> involved a statute that enabled the plaintiff to record a deed executed by a deceased person based on an affidavit that the “affiant believes such deed to be a bona fide deed and executed by the grantor

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97. See, e.g., *id.* at 259-73 (discussing inquiry notice).

98. *McClure v. Crow*, 146 S.E. 713, 714 (N.C. 1929).

99. *Barber v. Brunson*, 161 S.E. 549 (N.C. 1931).

100. *Id.* at 550.

101. *Id.* at 549.

102. *Banks v. Shaw*, 41 S.E.2d 281 (N.C. 1947).

103. *Id.* at 281.

104. *Allen v. Burch*, 55 S.E. 354 (N.C. 1906).

therein named.”<sup>105</sup> The affidavit merely stated that the grantor and witnesses were dead and that the affiant could not give proof of the handwriting. Justice Connor, writing for the court, said the required attestation of the deed’s legitimacy was “the substance of the affidavit” and its absence could not be overlooked.<sup>106</sup>

In a number of cases, the court held that deeds acknowledged or probated before unauthorized officials were not entitled to protection under the recording laws. In each, the instrument’s legitimacy was suspect. The circumstances have involved, for example, a deed probated by the grantee’s heir and relative,<sup>107</sup> a conveyance for a corporation executed by an individual for whom there was no evidence of corporate authority,<sup>108</sup> acknowledgment by a notarial officer who was a preferred creditor of the signatory,<sup>109</sup> and a clerk who probated his own certificate.<sup>110</sup>

A careful examination of the reported cases should dispel a conviction that a court will invalidate an instrument’s registration merely because it contains a mistake in the form of a probate or acknowledgment. The North Carolina Supreme Court once quoted the following from a legal encyclopedia: “‘courts uniformly give to certificates of acknowledgement a liberal construction, in order to sustain them if the substance be found, and the statute has been substantially observed and followed. It is accordingly a rule of universal application that a literal compliance with the statute is not to be required of a certificate of acknowledgement, and that, if it substantially conforms to the statutory provisions as to the material facts to be embodied therein, it is sufficient.’”<sup>111</sup> The cases show that the courts’ real concern has been with instruments whose legitimacy is in doubt—not with errors in the form of certificates describing the events. As the North Carolina Supreme Court once asked, “Are the instruments to be adjudged void merely because probates are deficient in matters of form and not of substance?” The court then answered that the proper concern was about substance.<sup>112</sup>

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105. *Id.* at 355 (quoting Acts 1905, ch. 277, sec. 1981, 1905 Public Laws 323).

106. *Id.*

107. *Scranton and N.C. Land & Lumber Co. v. Jennett*, 37 S.E. 954 (N.C. 1901).

108. *Bernhardt v. Brown*, 29 S.E. 884 (N.C. 1898).

109. *Long v. Crews*, 18 S.E. 499 (N.C. 1893).

110. *White v. Connelly*, 11 S.E. 177 (N.C. 1890); *see also* *Norman v. Ausbon*, 138 S.E. 162 (N.C. 1927) (clerk could not probate instrument to which he was a party); *Woodlief v. Woodlief*, 135 S.E. 612 (N.C. 1926) (recorded deed that was not probated was not admissible as evidence); *Buchanan v. Hedden*, 85 S.E. 417 (N.C. 1915) (invalidating deed that was signed by a power of attorney that was not probated and that lacked a proper signature).

111. *Freeman v. Morrison*, 199 S.E. 12, 14 (N.C. 1938) (quoting 1 C.J. Acknowledgment, Sec. 183, p. 841).

112. *Bailey v. Hassell*, 115 S.E. 166, 169 (N.C. 1922)

The courts' inclination to look beyond inconsequential matters of form was made early on in *Quinnerly v. Quinnerly*,<sup>113</sup> in which the court refused to invalidate a mortgage just because an adjudication of the acknowledgment was not in proper form. The court distinguished between a situation in which "the probate was in fact insufficient," in which case "the registration was invalid and of no effect," and a shortcoming in the manner in which the probate was depicted on the instrument.<sup>114</sup> The court stated "[t]he presumption is that it was properly taken," and "[a]s the validity of the registration may be thus impeached, so it may be supported by the same kind of evidence."<sup>115</sup> In a number of other cases the North Carolina Supreme Court similarly has looked beyond form to the substance of the alleged impropriety.<sup>116</sup>

The courts have also refused to allow a challenge to registration based on alleged errors in formality not obvious on the face of the instrument unless the party claiming the benefit of the defective acknowledgment was aware of the disqualifying circumstance.<sup>117</sup> For example, an acknowledgment by a South Carolina notary was taken in North Carolina, where the notary had no authority, but the instrument indicated that the acknowledgment occurred in South Carolina. The court would not invalidate the instrument's registration unless the party challenging it could prove that the grantee was aware of the defect.<sup>118</sup> This rule makes sense; those who rely on recorded instruments should have no obligation to investigate beyond the records to

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113. 19 S.E. 99 (N.C. 1894).

114. *Id.* at 99.

115. *Id.*

116. See *Consolidated Realty Corp. v. Henderson*, 197 S.E. 144 (N.C. 1938) (obvious transcription mistake in notarial certificate that indicated notary was from West Virginia rather than North Carolina held not to invalidate the instrument); *Roberts v. Saunders*, 134 S.E. 451, 453 (N.C. 1926) ("[T]he mere fact that no seal appeared upon the records in the office of the register of deeds is not conclusive as to whether or not a seal was actually affixed to said deed"); *County Sav. Bank v. Tolbert*, 133 S.E. 558 (N.C. 1926) (finding certificate said it was completed in South Carolina when it was actually in North Carolina; the court held the error was not patent and therefore did not invalidate the registration); *Mfrs. Fin. Co. v. Amazon Cotton Mills Co.*, 109 S.E. 67 (N.C. 1921) (holding that an instrument which was "subscribed and sworn to before" a notary public was equivalent to its being acknowledged); *Smith v. Ayden Lumber Co.*, 56 S.E. 555 (N.C. 1907) (holding omission of signatures by register's transcription did not invalidate registration); *Hatcher v. Hatcher*, 37 S.E. 207 (N.C. 1900) (holding proper execution and acknowledgment of a grantor's signature, in the absence of any acknowledgment on the instrument, could be proved by testimony of the justice of the peace who performed the acknowledgment); *Matter of Hess*, 407 S.E.2d 594, 595 (N.C. Ct. App. 1991) (rejecting a contention that an instrument was defective because its acknowledgment did not state that the affiant personally and voluntarily acknowledged making it; the court said: "There is no requirement that the acknowledgment itself contain any magical language to show that it was executed personally and voluntarily by the affiant.").

117. *Blanton v. Bostic*, 35 S.E. 1035 (N.C. 1900).

118. *Id.* at 1036.

determine whether something went awry in the instrument's preparation for recording. But allowing challenges to proceed if the error is obvious invites opportunism. Someone who notices an invalidating defect could acquire a competing interest expecting to be given priority because the already recorded instrument will be denied registration status. Such an unacceptable outcome could be avoided only if the courts look beyond the recording statute and employ a constructive trust or other equitable theory. This potential is yet another example of how adherence to an oversimplified rule can have an untoward result.

### C. *Statutory Rationality*

Although continued emphasis on public records as the source of title information has merit, especially as the records and their use become more accessible, continuation of a rule in which a conveyance can be subordinated based on a technical recording defect undercuts the system's intended reliability. The recording laws are intended to remove obstacles to marketability, not introduce new ones.

The possibility of technical invalidity unduly diverts attention away from the substance of the transaction toward immaterial details. The notary seal requirements enacted into law in 2005 are an excellent example. On the day the law took effect, most notary seals in use contained such things as small circles or dots that are prohibited under a strict interpretation of the new requirements to the effect that they allow only prescribed components on the seal image. Registers, who must verify the presence of an "official seal" on deeds and deeds of trust before accepting them for recording, were unsure about whether they could accept instruments if they had such seals. A potential debacle was averted when the North Carolina Department of the Secretary of State, which regulates notaries, issued an e-mail stating that the new seal requirements did not apply to seals obtained by notaries before the legislation's effective date.<sup>119</sup> Important real estate conveyances and finance were momentarily put in doubt by an unintended effect of notary regulations.

The potential for recording invalidation based on technical flaws is a remnant of a regime in which form was allowed to prevail over substance. In 1853, for example, the North Carolina Supreme Court rejected an attorney's argument that a recorded deed could not be ignored because it "was spread upon the record, and for all useful purposes had the same notoriety as if duly acknowledged or proven,

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119. E-mail from Gayle Holder, Director Notary Public Section, North Carolina Department of the Secretary of State, to NCARD Mailing List (December 1, 2005, 12:21 EST) (on file with author).

so that the objection is technical.”<sup>120</sup> The court was not persuaded, holding that “where a thing is not done in due form, it is not done at all in contemplation of the law.”<sup>121</sup> Since then, the courts wisely have not been so formalistic.

As discussed above,<sup>122</sup> realistically courts are unlikely to invalidate registration based on “technical or unsubstantial objections,” but instruments remain subject to challenge due to the manner in which the courts have sometimes described the statutes and the absence of any legislative clarification. The possibility of invalidation due to a defect in form is a serious impediment to the reliability that the race recording law was intended to achieve. Over the years the General Assembly has addressed technical objections only in piecemeal fashion. The North Carolina statutes contain a number of curative provisions that validate instruments with certain kinds of defects or that were prepared during defined periods, many of which address the kinds of discrepancies that have been held by the courts not to invalidate instruments.<sup>123</sup> For example, the statutes validate instruments missing a register’s certificate before October 1, 2004,<sup>124</sup> and validate acknowledgments missing seals, names, and signatures prior to January 1, 1991.<sup>125</sup> The General Assembly’s inclination to waive defects when asked raises doubt about justification for leaving other instruments with the same kinds of defects subject to challenge merely from lack of similar attention. Technical noncompliance cannot be very important if the legislature so willingly forgives it.

In *Weston v. J.L. Roper Lumber Co.*,<sup>126</sup> the North Carolina Supreme Court noted the illogic of a rule that would invalidate a registration “where no substantial departure from legal requirements appeared, but merely an irregularity which could be cured without injury to the rights of others.”<sup>127</sup> The court also quoted from a United States Supreme Court opinion that observed that some courts, “by unnecessary strictness in their construction of the statutes, added to the insecurity of titles, in a country where too many have acted on the supposition that every one who can write is fit for a conveyancer. The great evils likely to arise from a strict construction applied to the bona fide conveyances of an age so careless of form have compelled Legislatures to quiet titles by confirmatory acts, in order to prevent the

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120. *DeCourcy v. Barr*, 45 N.C. 181, 185 (1853).

121. *Id.*

122. *See supra* text accompanying notes 111-16.

123. N.C. GEN. STAT. §§ 47-47 to -108.26 (2005).

124. *Id.* § 47-50.1.

125. *Id.* § 47-53, -54.

126. 75 S.E. 800 (1912).

127. *Id.* at 801.



most gross injustice.”<sup>128</sup> The concerns to which the Court referred persist as shown by the continued appearance of curative acts.

Almost forty years ago, Professor James A. Webster, Jr.,<sup>129</sup> a leading authority on North Carolina real estate law, argued for more sweeping legislation to cure technical defects in acknowledgments. He observed that “[a] rule that dictates that a perfectly executed, perfectly recorded instrument is incapable of giving either constructive or actual notice under the recordation statutes, or which bars the admissibility of such instrument as evidence in a lawsuit, has little to commend it.”<sup>130</sup> He noted that “at the present time many defects of record caused by faulty acknowledgments, probates, and recordations are simply clogging the marketability of land.”<sup>131</sup> To cure acknowledgment defects, he proposed a statutory provision declaring that duly signed and recorded instruments are “valid and effective in law as if each instrument has been correctly acknowledged” “notwithstanding the instruments have not been acknowledged before an officer authorised by the laws of North Carolina to take acknowledgments or which have not been otherwise properly acknowledged, or the acknowledgments of which have not been taken and certified in conformity with the laws of this State in force at the time each such instrument was executed.”<sup>132</sup> Professor’s Webster’s conclusions remain valid and his recommendation still deserves consideration.

Some other states’ laws overcome technical invalidity in different ways, all of which are viable alternatives for North Carolina. For example, an Arkansas statute lists a number of irregularities that will not affect an instrument’s recording status, including specified missing or incorrect acknowledgment certificate components.<sup>133</sup> Virginia limits the time in which a document’s legitimacy can be challenged, declaring that all recorded instruments “shall be conclusively presumed to be in proper form for recording after having been recorded for a period of three years, except in cases of fraud.”<sup>134</sup> This gives affected parties a limited time to challenge an instrument. Still, the fairness of subjecting instruments to challenge on matters of form, even for a limited time, is questionable in a modern transactional environment.

A more comprehensive approach to avoiding some of the potential irrational results from application of the recording laws would be to

128. *Id.* at 802 (quoting *Webb v. Den*, 58 U.S. 576, 577 (1854)).

129. Professor Webster was the original author of North Carolina’s treatise on real estate law, *Webster’s Real Estate Law in North Carolina*, *supra* note 57.

130. James A. Webster, Jr., *Toward Greater Marketability of Land Titles—Remedying the Defective Acknowledgment Syndrome*, 46 N.C.L. REV. 56, 70 (1967).

131. *Id.* at 68.

132. *Id.* at 69-70.

133. ARK. CODE ANN. § 18-12-208 (2003).

134. VA. CODE ANN. § 55-106.2 (Michie 2003).

redefine the kind of notice for which a purchaser or creditor will be held accountable. North Carolina could join the many other states that have adopted a race-notice recording statute, the form of which is described above.<sup>135</sup> The choice would be the same as it was in 1885: whether to emphasize registration with the hope of making the records more reliable, or to emphasize protecting good faith purchasers and creditors against those with actual notice of competing claims. The answer may be different today than it was in 1885. A statute that expressly acknowledges that purchasers and creditors will not be allowed to ignore actual notice of another's claim would be a more accurate depiction of the law than the statute currently provides, given the numerous exceptions to the registration requirement and the courts' willingness to consider actual notice when the equities demand.

Other states have chosen a race-notice statute based on similar experiences with race statutes.<sup>136</sup> It is also the type of statute endorsed in the Uniform Simplification of Land Transfers Act, the only modern significant effort to unify state laws governing real estate instrument recording.<sup>137</sup> The uniform law was not adopted by any state and was withdrawn by the National Conference on Uniform State Laws that had drafted it. It was not withdrawn because of any substantive objections to the proposed recording rule approach, but for a number of other reasons, including, according to some, opposition by real estate attorneys to change, especially if it would diminish reliance on their services.<sup>138</sup> Such concerns should not impede legislation that would result in more coherent laws for those who depend on them.

A more limited approach would be for North Carolina to modify the race recording statutes only to address the knowledge deemed to be given by recording. The race recording laws are silent about notice. They say only, in relevant part, that no conveyance is "valid to pass any property interest as against lien creditors or purchasers for a valuable consideration but from the time of registration thereof in the county where the land lies."<sup>139</sup> The courts early on construed the statute to deny any notice effect to an instrument deemed not to be prop-

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135. See *supra* text accompanying note 4.

136. Powell, *supra* note 8, § 82.02[1][c][i].

137. Uniform Simplification of Land Transfers Act §§ 3-201 to -205 (1976).

138. Ronald Benton Brown, *Whatever Happened to the Uniform Land Transactions Act?*, 20 NOVA L. REV. 1017 (1996).

139. N.C. GEN. STAT. §§ 47-18(a), -20, -27 (2005) (respectively applying to: conveyances, contracts, options, and leases; deeds of trust and other security interests; and easements). The statutes also provide that to be validly registered a deed of trust or mortgage of real property or a lease must be registered "in each county where any portion of the land lies in order to be effective as to the land in that county." *Id.* §§ 47-20.1, -20.4. The notice issue discussed above would not relieve a secured creditor from this obligation nor should it.

erly registered,<sup>140</sup> an interpretation that the General Assembly could address with legislation that reflects decades of experience with the statute and the changes that have taken place in the transactional environment.

Some states address the notice question by specifically defining the notice effect of recording. For example, Illinois has a statute that provides that instruments “shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law; but the same shall not be read as evidence, unless their execution be proved in a manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgement or proof.”<sup>141</sup> Although the statute appropriately acknowledges the notice that recorded defective instruments impart, the blanket declaration that any recorded instrument gives notice to all cannot be given its plain meaning. Constructive or record notice is based on the assumption that someone should be able to find the instruments that apply to particular real estate. By necessity a search of the records must focus on conveyances to and from an owner during ownership; examiners cannot reasonably be expected to search for every possible conveyance or encumbrance recorded at any time involving every owner in the chain of title.<sup>142</sup> For example, a searcher cannot fairly be held accountable for failing to find an easement deed given by someone owning multiple parcels over time if the easement was not recorded until decades after the owner who gave the deed conveyed the subject property away. The courts and commentators have recognized that “nothing is notice unless reasonable inquiry must lead from it to the fact, apparent to a reasonable purchaser, that there exists a hostile title earlier and presumably superior to that which his vendor offers.”<sup>143</sup> The North Carolina Supreme Court has acknowledged the need for this qualification, holding that an instrument binds a purchaser only “if enough is disclosed by the index to put a careful and prudent examiner upon inquiry, and if upon such inquiry the instrument would be found.”<sup>144</sup> Any statutory declaration that recording constitutes notice and binds subsequent purchasers and creditors therefore should be

140. See *supra* text accompanying notes 94-102.

141. 765 ILL. COMP. STAT. 5/31 (2001). For examples of similar ways to describe the notice given by recording, see, e.g., KANS. STAT. ANN. § 58-2222 (1994); OHIO REV. CODE ANN. § 5301.01(B)(1)(b) (Anderson 2004).

142. Francis S. Philbrick, *Limits of Record Search and Therefore of Notice, Part III*, 93 U. PA. L. REV. 391, 415 (1944) (“Search is only made against each name, from the day before the date of the deed into him, to the day after the record of the deed out of him.”).

143. *Id.* at 396 (emphasis omitted).

144. *Dorman v. Goodman*, 196 S.E. 352, 355 (N.C. 1938).

limited to apply only to instruments that a reasonable searcher would find.<sup>145</sup>

Another approach to being explicit about notice of a recorded instrument would be to amend the statute to provide as follows, which borrows some of Professor Webster's suggested curative language but takes the next step:

Any party acquiring or conveying an interest in real property shall be deemed to have record knowledge of any instrument on record at the time of acquisition at the register of deeds in the county in which any portion of such real property is situated, if reasonable inquiry would lead to discovery of such instrument. Such record knowledge shall be deemed to have been acquired notwithstanding that the registration of any instrument, or form of acknowledgment or proof appearing thereon, did not comply with the laws of this state for the registration of real property instruments. Record knowledge shall be the same as constructive knowledge as is deemed given by valid registration.

This would equate recording with constructive notice notwithstanding problems of form that have no bearing on the instruments' legitimacy or the equities of those affected. The result would be a recording law that continues to require recording but that deems notice to have been given by an instrument's appearance in the chain of title in the public record.

#### IV. THE FRAUDULENT OR FRIVOLOUS LIEN PROBLEM

For decades, the records were protected by subjecting presented instruments to an official review before they could be recorded. That kind of review became impossible in the modern transactional and financing environment, as the volume and rapidity of real estate conveyances and financing dramatically increased, and legal instruments took on more complex forms, often generated in others states or countries. The modern environment demands that instruments be more readily recordable.

The increased availability of information in modern society presents an opportunity for those who wish to harm others through fraud, false claims, and annoyance. The threat to the real estate records is a serious part of this development, because the potential impact of a fraudulent or frivolous real estate filing can interfere with a transaction involving substantial investments, or impair someone's capacity to obtain credit. For example, some wrongdoers file instruments that claim a "nonconsensual lien" against a targeted public official, which is de-

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145. Wisconsin law addresses the chain of title issue by declaring that purchasers are not bound by an instrument outside the chain of title unless a conveyance within the chain refers to the instrument. Chain of title is then defined to include matters discoverable by a reasonable search of the records and indexes. WIS. STAT. ANN. §§ 706.09(1)(b), 706.09(4) (West 2001).

picted as a claim to the official's property unless the public official responded within a limited time. Although the frivolous nature of these instruments is readily apparent, the instruments can nonetheless cause harm to the target by holding up a transaction or impairing credit while the instrument is investigated.

Since 2001, a North Carolina statute directs superior court clerks not to accept claims of a lien on real property unless the claim is authorized by statute.<sup>146</sup> The statute provides that an attempt to file such a document is considered a misdemeanor offense.<sup>147</sup> The statute applies only to superior court records. The statutes do not require or authorize registers to refuse to accept instruments even if they seem intended for no purpose other than to harass. Registers cannot reasonably be put in the position of having to scrutinize the validity of complex instruments prepared by sophisticated legal counsel. Registers are elected officials with heavy responsibilities and limited resources. The risk of loss to the parties from erroneous rejection of an instrument, and the potential liability of the registers, are too great to warrant putting registers in that gate-keeping role.

Those harmed by abuse of the recording system must therefore look to civil or criminal laws for remedies. Current law is inadequate and provides little deterrence against abuse. North Carolina recognizes a cause of action for slander of title. Recovery for slander of title requires proof of false statements about the title to property, malice, and damages.<sup>148</sup> Such actions are rare in North Carolina.<sup>149</sup> The cause of action typically is raised in connection with challenges to the merits of litigation of which notice has been given.<sup>150</sup> Proving the elements for slander of title, especially malice, is difficult.<sup>151</sup>

Some states recently have enacted legislation to address the problem of frivolous or false liens or claims against real estate. Wyoming law has the most comprehensive statute. It addresses a number of the ramifications of frivolous filings by authorizing a damages award, attorneys' fees reimbursement, injunctive relief for a groundless or false lien or claim, and by providing for an expedited hearing process. The

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146. N.C. GEN. STAT. § 44A-12.1(a) (2005).

147. *See id.* § 44A-12.1(b).

148. *Allen v. Duvall*, 304 S.E.2d 789, 791 (N.C. Ct. App. 1983).

149. *Id.*

150. *See id.* (finding only three cases in which slander of title was addressed prior to 1989: *Texas Co. v. Holton*, 27 S.E.2d 293 (N.C. 1943) (holding comments about lease insufficient to sustain cause of action); *Cardon v. McConnell*, 27 S.E. 109 (N.C. 1897) (cause of action rejected because statement was truthful); *McElwee v. Blackwell*, 94 N.C. 261 (1886) (recognizing cause of action exists for statements about trademark)).

151. For cases noting the proof of malice requirement, *see Chatham Estates v. American Nat'l Bank*, 88 S.E. 783 (N.C. 1916); *Quinn v. Quinn*, 433 S.E.2d 807 (N.C. Ct. App. 1993); *Allen v. Duvall*, 304 S.E.2d 789 (N.C. Ct. App. 1983).

hearing provides a mechanism to invalidate any claim of lien against government officials and employee based on their duties. The law also makes use of such liens a criminal misdemeanor.<sup>152</sup> Other states consider it a felony to file a forged, groundless, or false claim intentionally;<sup>153</sup> provide for a damages remedy and award of attorneys' fees for filing a frivolous or false lien or claim;<sup>154</sup> authorize multiple damages;<sup>155</sup> or provide for different remedies based on whether the defendant caused the instrument to be recorded or was merely named in it.<sup>156</sup> Some statutes simply declare claims of nonconsensual common law liens to be invalid.<sup>157</sup>

The currently available common law remedies offer little protection against the potential harm that can be caused by fraudulent or frivolous claims filed in the public records. The time and money it takes to remove a wrongful lien cannot realistically be recovered adequately with available common law remedies. An expedited hearing process, enhanced damages, and criminal sanctions are all sensible tools for preserving the system's integrity and for discouraging its abuse.

## V. CONCLUSION

In 1885, North Carolina's legislative leaders said they wanted recording laws that made real estate more marketable by making the public records a reliable single source of information about titles. Since then, transactional realities and legislative initiative have disproved the notion that the public record alone determines rights to real estate. Lawmakers are justifiably cautious about changing well-established legal rules on which important rights depend. If North Carolina's race recording statute as applied were as pure as it was envisioned, changing it could unsettle expectations and affect perceived vested rights. However, the reality is different from the textual simplicity. The North Carolina Supreme Court once said it would focus its review of real estate instruments "so that the essence of what was done should not be sacrificed to the form of doing it."<sup>158</sup> The state's recording statutes are due for re-examination to ensure that they coherently and clearly focus on this essence.

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152. WYO. STAT. ANN. § 29-1-311 (2005). The summary review process allows the court *ex parte* to order a hearing to occur as soon as fifteen days after a petition is filed by someone challenging a lien, and the court may declare the lien invalid, and award damages, if the person claiming the lien fails to appear. *See id.* § 29-1-311(b).

153. KY. REV. STAT. ANN. § 434.155 (1999).

154. COLO. REV. STAT. § 38-35-109(3) (2004); IDAHO CODE § 45-1705 (Michie 2003).

155. ARIZ. REV. STAT. § 33-420 (2000); UTAH CODE ANN. § 38-9-4 (2005).

156. ARIZ. REV. STAT. § 33-420 (2000); N.M. STAT. ANN. § 48-1A-9 (Michie Supp. 2003).

157. N.M. STAT. ANN. § 48-1A-5 (Michie Supp. 2003).

158. *Weston v. J.L. Lumber Co.*, 75 S.E. 800, 801 (N.C. 1912).