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Vendor and Purchaser - Records - Effect of Error by Recording Officer

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similar to the Federal practice. Minnesota provides for the granting or refusal of requests before argument and allows counsel to read the approved requests to the jury in their argument.[32] The charge then comes at the conclusion of the argument. The purpose of this provision is to enable litigants to have the applicable principles of law discussed by counsel in their final argument.[33] The benefit to litigants of having such applicable principles of law discussed by counsel in final argument is not to be underestimated.[34] Florida has a statute similar in effect to Minnesota.[35] Statutes in Ohio and Wyoming require the giving of requested instructions before argument and the general charge after.[36] It has there been held that such requested instructions must be given before argument and the defect cannot be cured by giving them in the general charge after argument.[37]

It would seem that there is considerable to be said for the argument that counsel has a right either to have the instructions given before argument or to know what the instructions will be when given. The argument that the last voice the jury is to hear before retiring should be that of the judge calmly restoring them to the main elements of the controversy and the law which they are to use as a guide to their verdict, is likewise of great force. While these two statements seem beyond reconciliation it is to be noted that it is not impossible to combine much of the better arguments on either side into a single, workable rule.

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VENDOR AND PURCHASER — RECORDS — EFFECT OF ERROR BY RECORDING OFFICER. — One of the most difficult problems faced by the law arises when one of two innocent parties must bear a loss occasioned by the act of a third party. This situation is presented to a court when a party acquiring an interest in property presents his instrument of title to a recording officer and receives it back believing in good faith that it has been recorded in compliance with the law only to discover later that as the result of an error by the recording officer another party has acquired an interest in the same property without having been able reasonably to discover the inter-

32. Minn. Stat. § 546.14 (1945).
33. Lataurelle v. Horan, 212 Minn. 520, 4 N.W.2d 343 (1942).
34. Zickrick v. Strathern, 211 Minn. 329, 1 N.W.2d 134 (1941).
35. Fla. Stat. § 918.10 (1951).
36. Ohio Gen. Code § 11447 (Page's, 1926); Wyo. Comp. Stat. § 3-2408 (1945).
37. Industrial Comm. v. Austin, 51 Ohio App. 469, 1 N.E.2d 649 (1935).

est of the first party. Due to the financial status of many recording officers, the amount of their surety bonds and the applicable statutes of limitation, which matters will be discussed subsequently, legal action between the two innocent parties often results.[1]

For purposes of simplification the types of error encountered will be classified in two general groups: errors in enrolling instruments at length upon the record books and errors of indexing.

Errors of Enrollment

The recording statutes generally change the common law rule that a conveyance prior in time is prior in right and make conveyances void as to subsequent purchasers in good faith for valuable consideration and without notice unless the conveyance has been recorded in compliance with the terms of the applicable statute,[2] and the record is made constructive notice of the conveyance recorded.[3]

In a large number of the reported cases courts have based their decisions on interpretations of certain individual sections of their recording acts,[4] but variations in wording or detail of mechanics in statutes intended to bring about the same basic results seem to be tenuous grounds at best for the variations of opinion which have arisen. It would seem better to determine the legislative intent by viewing the recording acts as a *whole* and then to reach a decision which implements that intention.[5]

Theories of law, both connected with and apart from sectional statutory interpretation, have been developed by the courts that have considered recording errors. In *Frost v. Beekman*,[6] the earliest reported American case, the New York cout felt that the mortgagee was under a duty to see that the records contained the proper information as to his interests. This idea, necessarily implied in all cases favoring a subsequent party, has been expressly mentioned in a number of later cases.[7] The opposite view, equally implied in all cases favoring the party presenting an instrument for recording,

1. The application of the Torrens System of title registration to this situation will not be discussed.

2. 1 Jones on Mortgages § 570 (8th Ed. 1928).

3. 1 Jones, *op. cit. supra* note 2, § 570.

4. *In re Labb*, 42 F. Supp. 542 (W.D.N.Y. 1941); General Motors Acceptance Motors Acceptance Corp. v. Brackett & Shaw Co., 84 N.H. 348, 150 Atl. 739 (1930) (vendor's lien on personal property); Ritchie v. Griffiths, 1 Wash. 429. 24 Pac. 341 (1890).

5. Barney v. McCarty, 15 Iowa 510 (1864) (instrument not indexed).

6. 1 Johns Ch. 288 (N.Y. 1814) ($3,000 mortgage recorded as $300).

7. *E.g.*, Barney v. McCarty, 15 Iowa 510 (1864) (failure to index mortgage); General Motors Acceptance Corp. v. Brackett v. Shaw Co., 84 N.H. 348, 150 Atl. 739 (1930) (vendor's lien on personal property); Ritchie v. Griffiths, 1 Wash. 429, 24 Pac. 341 (1890).

that a party who has filed an instrument with the proper officer[8] for recording has done his full duty and is entitled to the protection of the recording act, has also found favor.[9] Closely allied to the question of duty is the theory of agency. It has been mentioned that the grantee presenting an instrument for recording does not make the clerk his agent[10] but other courts have brought out the point that as between the grantee and the innocent purchaser the position of the former is more like that of a principal.[11] It is he who has had the nearest contact with the recorder and paid him for his services.

The contention that a defective record does not give the notice contemplated by the statutes has been mentioned in almost every case and discussed in a large number of them.[12] The Supreme Court of Pennsylvania has said "The prime purpose of the law, in providing for the recording of deeds and mortgages, is to give notice to intending purchasers, or to others who may be interested, that the conveyance or incumbrance stands in the line of title to the property which it describes. The object of the recording acts is to give notice to the world of that which is spread upon the record."[13] From this might be gleaned an additional purpose, that of providing a source where the prospective purchaser can find reliable evidence concerning the state of a given title.[14]

Most of the recording acts contain sections providing for the time from which constructive notice will effect others or when the instrument will be deemed to have been recorded. A good example of this is Section 47-1908 of the North Dakota Revised Code of 1943:

"An instrument is deemed to be recorded when, being duly

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8. For discussions on proper officers see Jones v. Federal Land Bank of Columbia, 189 Ga. 419, 6 S.E.2d 52 (1939) (recording officer may employ others); Cook v. Hall, 1 Gilm. 575 (Ill. 1844) (person not appointed by recorder but asked to act for him).

9. *In re* Labb, 42 F.Supp. 542 (W.D.N.Y. 1941) (seller and buyer confused in index); Cook v. Hall, 1 Gilm. 575 (Ill. 1844) (original deed still in recorder's office); Guaranty State Bank of Fort Worth v. La Hay, 98 Okla. 29, 224 Pac. 189 (1924).

10. Mangold v. Barlow, 61 Miss 593 (1884) (grantee had done his duty).

11. Terrel v. Andrew County, 44 Mo. 309 (1896) (county that hired recorder was a party to the action); Frost v. Beekmon, 1 Johns, Ch. 288 (N.Y. 1814); Jenning v. Wood, 20 Ohio 261, 267 (1851) ". . . the misfortune must . . . rest on the person in whose business and under whose control it happened;" Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 241 (1890).

12. Hadfield v. Hadfield, 126 N.J.Eq. 510, 17 A.2d 169 (1941) (mortgage recorded in book of deeds not notice); Prouty v. Marshall, 225 Pa. 570, 74 Atl. 550 (1909) (mortgage of L.J.M. enrolled and indexed as that of S.J.M. not constructive notice); Sanger v. Craigue, 10 Vt. 555 (1838) (error in description of property).

13. Prouty v. Marshall, 225 Pa. 570, 74 Atl. 550, 551 (1909).

14. Chamberlain v. Bell, 7 Cal. 293 (1875); Pope v. United States Fidelity & Guaranty Co., 200 Ga. 69, 35 S.E.2d 899 (1945) (error in execution of docket kept by superior court clerk); Cilchrist v. Gough, 63 Ind. 576 (1878) ($5,000 mortgage recorded as $500); Hill v. McNichol, 76 Me. 314 (1884) ($2,000 mortgage recorded as $200).

acknowledged or proved and certified, it is deposited in the register's office with the proper officer for record."

Statutes of this type have received two interpretations. One group of courts hold that constructive notice starts from the time the instrument is filed regardless of the acts or omissions of the recording officer.[15] In *Thomas v. Hudson*[16] this point of view was carried to its logical conclusion. There the court, faced with two statutes, one providing for notice from the time of filing and another declaring that an erroneously recorded instrument would not be notice as to bona fide subsequent parties, decided the two sections were in irreconcilable conflict and, adopting the rule that the most recent enactment prevails, held that a mortgage on realty recorded in the chattel-mortgage book imparted constructive notice. Other courts have read into statutes of this type the proviso that an instrument will carry constructive notice from the time of filing providing the rest of the recording statutes are complied with.[17] While individual cases have given other reasoning[18] the foregoing theories are the ones most often considered.

The following states have held statutes providing for notice from time of filing to be conclusive against the rights of a subsequent purchaser of mortgagee, the party presenting an instrument for record having done his duty when he leaves it with the recording officer: Alabama,[19] Arkansas,[20] Colorado,[21] Connecticut,[22] Georgia,[23] Illinois,[24] Kansas,[25] Kentucky,[26] Massachusetts,[27] Mis-

15. Rowland v. Griffin, 179 Ark. 421, 16 S.W.2d 457 (1929) (recorder inserted word "royalty" in mineral deed); Throckmorton v. Price, 28 Tex. 606 (1866); Bank of Marlinton v. McLaughlin, 123 W.Va. 608, 17 S.E.2d 213 (1941) (citing prior West Virgina cases).

16. 190 Ga. 622, 10 S.E.2d 396 (1940).

17. *E.g.*, Miller v. Bradford, 12 Iowa 14 (1861); Terrel v. Andrew County, 44 Mo. 309 (1896) (lien of $400 recorded as $200).

18. Terrel v. Scott, 129 Okla. 78, 262 Pac. 1071 (1927) (as between equal equities the prior in time should prevail); Atlas Lumber Co. v. Canadian-American Mortgage & Trust Co., 36 N.D. 39, 161 N.W. 604 (1917) (where an error occurs in the records the loss should fall on the party the recording acts were designed to protect).

19. Mims v. Mims, 35 Ala. 23 (1859) ($622 mortgage recorded as $122); Dubose v. Young, 10 Ala. 365 (1846) (deed of trust to slave filed but not recorded within statutory time); *cf.* Fouche v. Swain, 80 Ala. 151 (1855) (mortgage placed on record two weeks after filing).

20. Rowland v. Griffin, 179 Ark. 421, 16 S.W.2d 457 (1929) (recorder inserted word "royalty" in grant of ⅛ undivided mineral interest).

21. *See* People v. Ginn, 160 Colo. 417, 106 P.2d 479, 484 (1940) (action against recording officer).

22. Butchers' Ice & Supply Co. v. Bascom, 109 Conn. 433, 146 Atl. 843 (1929) (failure to record filed attachment) (citing early Connecticut cases).

23. Willie v. Hines-Yelton Lumber Co., 167 Ga. 883, 146 S.E. 901 (1929) (five year timber lease executed in 1922 recorded as executed in 1912); Thomas v. Hudson, 190 Go. 622, 10 S.E.2d 396 (1940). *But cf.* Pope v. United States Fidelity & Guaranty Co., 200 Ga. 96, 35 S.E.2d 899 (1945) (court quoted with apparent approval a statement that parties may rely on what appears in the records where error was in execution docket kept by the clerk of court).

24. Merrick v. Wallace, 19 Ill. 486 (1858); Cook v. Hall, 1 Gilm. 575 (Ill. 1844) (deed filed but never recorded).

sissippi,[28] Nebraska,[29] Oklahoma,[30] Oregon,[31] Rhode Island,[32] South Dakota,[33] Texas,[34] Virginia,[35] West Virginia. [36] Since many of the statutes dealing with personal property interests are "filing" laws rather than "recording" laws, i. e.: the original instrument remains on file rather than being returned to the filing party, decisions concerning personal property might be considered more as indicative of a tendency than as precedent. A large number of states have construed the records to be notice only of what they contain. These states are California,[37] Indiana,[38] Iowa,[39] Maine,[40] Maryland,[41]

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25. Lee v. Bermingham, 30 Kan. 312, 1 Pac. 73 (1883) (deed filed but never recorded); Poplin v. Mundell, 27 Kan. 138 (1882) (instrument remained on file though not enrolled).

26. Seat v. Louisville & Jefferson County Land Co., 219 Ky. 418, 293 S.W. 986 (1927) (instrument not indexed); Cain v. Gray, 146 Ky. 438, 142 S.W. 715 (1912) (acknowledgment not enrolled); Buckner v. Davis, 19 Ky. L. 1349, 43 S.W. 445 (1897) (mortgage recorded several years after filing); Bank of Kentucky v. Haggin, 8 Ky. 306 (1818).

27. *See* Gillespie v. Rodgers, 146 Mass. 610, 16 N.E. 711, 714 (1888) (citing many Massachusetts cases).

28. Mangold v. Barlow, 61 Miss. 593 (1884) (recorder not agent of grantee who files deed).

29. Perkins v. Strong, 22 Neb. 725, 36 N.W. 292 (1888) (deed listed on tract index but not enrolled or indexed further). *See* Deming v. Miles, 35 Neb. 739, 53 N.W. 665 666 (1892).

30. Terrell v. Scott, 129 Okla. 78, 262 Pac. 1071 (1927) (contains reasoning that as between equal equities the prior in time should prevail); Guaranty State Bank of Fort Worth v. La Hay, 98 Okla. 29, 224 Pac. 189 (1924) (statute made mortgage void as to subsequent purchasers unless filed with the recorder); Hodges v. Simpson, 89 Okla. 80, 213 Pac. 737 (1922) (lease for $50 per annum recorded as $250); Covington v. Fisher, 22 Okla. 207, 97 Pac. 615 (1908) (mortgage on N.W.¼ indexed properly but enrolled as upon S.W.¼).

31. *See* Board of Commissioners v. Babcock, 5 Ore. 472 (1875) (held that index not part of the records and reasoned that grantee had done his duty). Recording errors are now provided for by statute in Oregon; Ore. Rev. Stat. §94.335 (1953).

32. Nichols v. Reynolds, 1 R. I. 30 (1840).

33. Shelby v. Bowden, 16 S. D. 531, 94 N.W. 416 (1903); Parrish v. Mahany, 10 S. D. 276, 73 N.W. 97 (1897) (failure to enroll). *But see* Citizens Bank of Parker v. Shaw, 14 S. D. 197, 202, 84 N.W. 779, 781 (1900) "unless a party is actually misled by an error in recording the instrument, no rights are affected by the mistake."

34. Throckmorton v. Price, 28 Tex. 605 (1866).

35. Beverley v. Ellis, 1 Rand. 102 (Va. 1822).

36. Bank of Marlinton v. McLaughlin, 123 W. Va. 608, 17 S.E.2d 213 (1941) (citing West Virginia cases).

37. Chamberlain v. Bell, 7 Cal. 293 (1857) (purchaser can rely on what the record shows); Cady v. Purser, 131 Cal. 522, 63 Pac. 844 (1901) (intrument must be enrolled and indexed); *cf.* Rice v. Taylor, 220 Cal. 629, 32 P.2d 381 (1934) (California enacted Political Code §4135 after Cady v. Purser to make proper indexing alone sufficient for constructive notice).

38. Baugher v. Woollen, 147 Ind. 308, 45 N.E. 94 (1896) (notice by publication against Baugher under name "Banger" is sufficient where true spelling did not appear in records); Gilchrist v. Gough, 63 Ind. 576 (1887) (mortgage of $5,000 enrolled as $500 and indexed as $5,000 in constructive notice of $500 mortgage since statute did not require such information in the index).

39. Parry v. Reinerton, 208 Iowa 739, 224 N.W. 489 (1929) (incorrect index); James v. Newman, 147 Iowa 574, 126 N.W. 781 (1910) (failure to index); Barney v. McCarty, 15 Iowa 510 (1864) (failure to index); Miller v. Bradford, 12 Iowa 14 (1861).

40. Hill v. McNichol, 76 Me. 314 (1884) ($2,000 mortgage recorded as $200); Stedman v. Perkins, 42 Me. 130 (1856) (wrong date transcribed).

41. Brydon v. Campbell, 40 Md. 331 (1874) (deed to 4-10 of an equitable interest enrolled as 1-14).

Missouri,[42] Michigan,[43] Minnesota,[44] New Hampshire,[45] New Jersey,[46] New York,[47] North Carolina,[48] Ohio,[49] Pennsylvania,[50] South Carolina,[51] Tennessee,[52] Vermont,[53] Washington,[54] Wisconsin.[55]

Errors of Indexing

In those jurisdictions that do not allow errors of enrollment to impair notice the rule is the same as to errors of indexing but in those states holding to the opposite view the additional problem of whether the index is a part of the record is presented. This question might be more properly stated "Is proper indexing essential to the record?" The following courts have answered this question

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42. White v. Himmelberger-Harrison Lumber Co., 240 Mo. 13, 139 S.W. 553 (1911); Terrell v. Andrew County, 44 Mo. 309 (1869) (county employing recorder filed the lien).

43. Barnard v. Campau, 29 Mich, 162 (1874) (record of notice of levy omitted part of premises levied upon); *cf.* Sinclair v. Slawson, 44 Mich. 123, 6 N.W. 207 (1880) (mortgagee's name in entry book but not in instrument as enrolled held sufficient for constructive notice).

44. Bank of Ada v. Gullikson, 64 Minn. 91, 66 N.W. 331 (1896) (misdescribed land); Thorp v. Merril, 21 Minn. 336 (1875) (error in land description); *cf.* Latourell v. Hobart, 135 Minn. 109, 160 N.W. 259 (1916) (correct description in reception book but error of enrollment held sufficient for constructive notice).

45. Pittsburgh Plate Glass Co. v. American Crystal, Inc., 91 N.H. 102, 13 A.2d 721 (1940) (failure to record special attachment); General Motors Acceptance Corp. v. Brackett & Shaw Co., 84 N. H. 348, 150 Atl. 739 (1930) (vendor under duty where statute provided reserved lien must be "caused" by vendor to be "recorded").

46. Hadfield v. Hadfield, 126 N. J. Eq. 510, 17 A.2d 169 (1941) (mortgage enrolled in book of deeds).

47. Frost v. Beekman, 1 Johns. Ch. 288 (N. Y. 1844); *cf.* Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N.E. 712 (1888) (failure by recorder to enroll limited partnership agreement did not make them general partners as to creditors). *But cf. In re* Labb, 42 F.Supp. 642 (W.D. N. Y. 1941) (error of indexing); Dodds v. O'Brien, 166 N. Y.Supp. 1065 (1917) (grantee has done his duty where recorder failed to index chattel mortgage).

48. Dorman v. Goodman, 213 N. C. 406, 196 S.E. 352 (1938) (by implication in index error case); S. R. Fowle & Son v. O'Ham, 176 N. C. 12, 96 S.E. 639 (1918). *Contra*: Eureka Lumber So. v. Satchwell, 148 N. C. 316, 62 S.E. 310 (1908) (overruled by O'Ham case above).

49. Jennings v. Wood, 20 Ohio 261 (1851) (agency theory discussed); *cf.* Tousley v. Tousley, 5 Ohio 78 (1855) (judgment creditor not in the position of a subsequent purchaser).

50. Prouty v. Marshall, 225 Pa. 570, 74 Atl. 550 (1909) (discussing prior Pennsylvania law); *cf.* Gulf Refining Co. v. Camp Curtin Trust Co., 323 Pa. 431, 187 Atl. 437 (1936) (erroneous information not required in index has no bearing on notice).

51. O'Niell v. Cooper River Corp., 109 S. C. 35, 95 S.E. 124 (1918) (timber deed extension of 10 years enrolled as 3 years).

52. Southern Building and Loan Assoc. v. Rodgers, 104 Tenn. 439, 58 S.W. 234 (1900) (record with defective description not notice after mortgage withdrawn). *Cf.* Wilkins v. Reed, 156 Tenn. 321, 300 S.W. 588 (1927) (error must be of a type that could not reasonably be discovered).

53. Sawyer v. Adams, 8 Vt. 172 (1863) (deed enrolled on fly leaf of old record book and not indexed); Sanger v. Craigue, 10 Vt. 555 (1838) (deed to one lot enrolled as to another).

54. Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341 (1890) (failure to index).

55. Pringle v. Dunn, 37 Wis. 449 (1875) (error affecting recordability destroys constructive notice if information not supplied elsewhere in records). *Cf.* Shove v. Larson, 22 Wis. (1867) (error of enrollment with correct information furnished in index sufficient for notice).

in the affirmative: California,[56] Iowa,[57] North Carolina,[58] Pennsylvania,[59] and Washington.[60] The view taken by other courts is that their statutes, generally similar to those of the previously mentioned states, do not make the index a part of the record but just an aid to the searcher.[61]

The North Dakota decisions on the point of who shall suffer for the recording officer's error appear to favor the party filing for record. The earliest case found is that of *Red River Lumber Co. v. Children of Israel.*[62] The court held that the failure of the clerk to perform his duties under the statutes relating to mechanic's liens would not defeat the lien of a party who had submitted the lien for recording. However there was no bona fide subsequent purchaser or incumbrancer as a party to that case. If there had been Chief Justice Corliss said "It might be that the plaintiff would be estopped from setting up the lien as against such purchaser or incumbrancer."[63] In a later case [64] action was brought by a subsequent purchaser against the register of deeds for failure to put a mortgage on the tract index. The mortgagor had prevailed in the lower court on foreclosure but it does not appear that the foreclosure proceedings were ever appealed from so it is impossible to tell just what the facts in that case were. At any event doubt has been expressed that information in the tract index will give constructive notice.[65] The most important North Dakota case is that of *Atlas Lumber Co. v. Canadian-American Mortgage & Trust Co.*[66] In that case the plaintiff had filed a mechanics lien against the N.W.¼ of a certain section. Later, discovering a mistake, they filed

56. Cady v. Purser, 131 Cal. 552, 63 Pac. 844 (1901) (both correct enrollment and indexing necessary). *Cf.* Rice v. Taylor, 220 Cal. 629, 32 P.2d 381 (1934) (Section 4135 of Cal. Pol. Code enacted to make proper indexing alone constructive notice).

57. Parry v. Reinertson, 208 Iowa 739, 224 N.W. 489 (1929) (failure to properly index a mortgage); Barney v. McCarty, 15 Iowa 510 (1864) (contains discussion of practical considerations).

58. Dorman v. Goodman, 213 N. C. 406, 196 S.E. 352 (1938) (index must contain sufficient information to put a prudent searcher on his guard); S. R. Fowle & Son v. O'Ham, 176 N. C. 12, 96 S.E. 639 (1918); Dewey v. Sugg, 109 N. C. 328, 13 S.E. 923 (1891) (proper index essential to creation of judgment lien). *Contra*: Eureka Lumber Co. v. Satchwell, 148 N. C. 316, 62 S.E. 310 (1908) (overruled by O'Ham case above).

59. *See* Speer v. Evans, 47 Pa. St. 141, 144 (1864). *Cf.* Gulf Refining Co. v. Camp Curtin Trust Co., 223 Pa. 431, 187 Atl. 437 (1936) (erroneous information not required by statute has no bearing on notice).

60. Ritchie v. Griffiths, 1 Wash. 429, 25 Pac. 341 (1890) (thorough discussion).

61. *E.g.*, Mutual Life Insurance of New York v. Drake, 87 N. Y. 257 (1881); Green v. Garrington, 16 Ohio St. 549, (1866) (the index points to the record); Armstrong v. Austin, 45 S. C. 69, 22 S.E. 763 (1895); Curtis v. Lyman, 24 Vt. 337 (1852).

62. 7 N. D. 46, 73 N.W. 203 (1897).

63. Red River Lumber Co. v. Children of Israel, 7 N. D. 46, 50, 73 N.W. 203, 204 (1897).

64. Rising v. Dickinson, 18 N. D. 478, 121 N.W. 616 (1909).

65. Maxwell, *The Tract Index and Notice in North Dakota*, 25 N. D. Bar Briefs 176 (1949).

66. 36 N. D. 39, 161 N.W. 604 (1917).

a new lien against the S.½ of the S.W.¼ and the S.½ of the S.E.¼, at the same time filing a satisfaction of the former lien. The clerk of court erroneously noted this satisfaction in the margin of the corrected lien as if it were satisfied. In the action between the plaintiff so filing and subsequent lien holders the court found for the plaintiff on two grounds; (1) "The consequences of the failure of a recording officer to perform his statutory duties with precision and accuracy should be visited rather on those in whose interests the statutes are enacted than upon those who have in all ways complied with the statutes requiring the filing of instruments for record."[67] (2) "Had the subsequent encumbrancers in the case before us examined the contents of the satisfaction filed with the clerk of the district court they could have been in no way misled by the entry on the record."[68] The second ground seems more likely to have been the true basis for the decision and is well supported by decisions in other jurisdictions. The best examples of the proposition that a mistake must be of such a nature that a prudent searcher would be unable to discover the true state of title if the party filing the instrument is to bear the burden of it are two cases decided by the Supreme Court of Iowa at the same term of court.[69] In *Barney v. McCarty* the mortgage was never indexed and the court found that the record did not give notice. In *Barney v. Little* the index gave the wrong page reference to a mortgage but since the page number of the mortgage in question was out of sequence with the rest of the page numbers in that section of the index and the searcher, on looking for the mortgage on the page given, would have found a different instrument, the court ruled that the error was of a type that could have reasonably been discovered and so was not the type to prevent the giving of notice. This reasoning was obviously followed by the North Dakota court in the *Atlas* case.

In *McHugh v. Haley*[70] the question of the clerk's failure to note an easement on the tract index was briefed by counsel but the case was decided on other grounds. However a discussion of the point in that case by Justice Birdzell, who also wrote the opinion in the *Atlas* case, indicates that the court did not feel the question of who should suffer for a recorder's error generally had been settled by

67. Atlas Lumber Co. v. Canadan-American Mortgage & Trust Co., 36 N. D. 39, 42-43, 161 N.W. 604, 605 (1917).
68. *Id. at* 43, 161 N.W. at 605.
69. Barney v. Little, 15 Iowa 527 (1864); Barney v. McCarty, 15 Iowa 510 (1864).
70. 61 N. D. 359, 237 N.W. 835 (1931).

the previous case.[71] A future presentation of the general problem might possibly be decided either way as the discussion for the first ground for the decision in the *Atlas* case could conceivably be considered dicta. Insofar as mortgages of personal property are concerned there can be little question of the effect of a recorder's error in North Dakota. Section 35-0413 of the North Dakota Revised Code of 1943 provides in part as follows: "The negligence of the officer with whom the mortgage is filed shall not prejudice the rights of the mortgagee."

LIABILITY OF RECORDING OFFICER

"The register of deeds is a ministerial officer, and as such is answerable in damages for nonfeasance, misfeasance or malfeasance."[72] It is plain that the identity of the party to whom the recorder is liable in damages depends upon the rule of the jurisdiction as to which of two innocent parties must bear the loss. The cases have been so decided without express reference to such rules. The recorder need not, at his peril, rule upon the validity of an instrument presented to him as he is a ministerial officer and cannot arbitrarily refuse to record an instrument in proper form eligible for record.[73]

The main point of disagreement among the various courts lies in their interpretations of the applicable statutes of limitations, the question being, "When does the statute begin to run?" North Dakota has decided that the statute begins to run when the faulty entry is made.[74] In *Rising v. Dickinson*,[75] where the plaintiff had purchased property from a party who had already mortgaged the same property under an erroneously recorded instrument, the recording officer prevailed due to the plaintiff's failure to show that his grantee could not pay on her warranty. The position that the statute of limitations begins to run when the injury occurs has, however, been ably defended in other jurisdictions.[76]

Registers of deeds are not generally more affluent than other public servants so North Dakota is fortunate in that the legislature has required them to be bonded in an amount more realistic than is provided in most other states. The North Dakota statutes provide for either $10,000 or $15,000 surety bonds depending on the size of the county served.[77] ROBERT N. OPLAND.

71. McHugh v. Haley, 61 N. D. 359, 372-373, 237 N.W. 835, 840 (1931).
72. Rising v. Dickinson, 18 N. D. 478, 481, 121 N.W. 616, 617 (1909).
73. Weyrauch v. Johnson, 201 Iowa 1197, 208 N.W. 706 (1926).
74. Farmer's Bank of Garrison v. Raugust, 42 N. D. 503, 173 N.W. 793 (1919).
75. Rising v. Dickinson, 18 N. D. 478, 121 N.W. 616 (1909).
76. *See* Betts v. Norris, 21 Me. 314, 324 (1842) (dissenting opinion).
77. N. D. Rev. Code §11-1006 (1943).