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The Scope of Title Examinations in West Virginia Revisited

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THE SCOPE OF TITLE EXAMINATIONS IN WEST VIRGINIA REVISITED

John W. Fisher, II*  

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I. INTRODUCTION

It has been over a decade since the West Virginia Law Review published companion articles1 that discussed the law relevant to real estate title examinations. These articles were intended to give practitioners guidance as to the law

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relevant to title examinations in West Virginia in hopes that it would assist the attorneys in deciding how to use their time most effectively and efficiently and still fully protect the interests of their clients.

As I noted in the introduction to one of the earlier articles, information collected as part of the law school's reaccreditation process established that over 50% of the respondents listed real estate as an area in which they practice. In preparation for the regular reaccreditation visit during the 2008-09 academic year, the law school again surveyed its graduates, and again the results indicate that a significant number of our graduates include real estate as a part of their practice. As long as providing legal service to those involved in the sale and purchase of real estate is considered the practice of law and those not licensed for the practice of law are excluded from providing such services, there will continue to be a significant number of attorneys who maintain some portion of their practice in the real estate area.

As a beginning point, as noted in the earlier article, "the perimeters of a title examination are established by what 'knowledge' the law imputes to the purchaser of real property. Therefore, the title attorney's task is to search the records to discover all information that 'the law' deems the purchaser to possess and to also make certain that the client understands and appreciates that the law charges the purchaser with certain information or knowledge which is not found in 'the records' in the courthouse."

Therefore, the task of the title examiner is to search the relevant records for the appropriate periods of time and to recognize the legal significance of the information he or she discovers. As noted above, since under the recording acts not all legally recognized rights must be recorded, sufficient steps must be taken to determine if there are legally protected interests not discoverable by an examination of the "records" in the courthouse.

In recognition that the body of law relevant to the rights and responsibilities of those with ownership interest in real property is continuously evolving as a result of legislative actions and court decisions, these updates are intended to supplement and build on the discussions of the articles published in Volume 98 of the West Virginia Law Review.

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2 Of the 473 respondents, 45.1% indicated that their practice involves real estate, with 20.9% reporting that a high concentration of their practice involved real estate. Real estate was fourth behind trial (68.8%), criminal law (55%), and insurance (53%) as areas listed as a percentage of practice.


4 Fisher, supra note 1, at 452.

5 See, e.g., infra Part II.
II. THE RECORDING ACTS

A. The Recording Acts: Do They Apply?

While this article is intended to stand alone or be "self-contained," it also builds on the discussion and background provided in the earlier articles. With that in mind, a brief summary of the history and evolution of recording acts will be helpful, if not necessary, for the discussion that follows.

As Professor Raleigh Colston Minor, in his treatises on the early laws of Virginia, explained:

The common law does not require any deed or writing in order to pass the title to lands, and of course, therefore, knows nothing of the doctrine of registry. The only notoriety which it demanded in such transactions, and the only one compatible with the illiteracy of ancient Anglo-Norman society, is livery of seizin for estates of freehold, and entry for estates for years.6

Professor Richard Powell observed: "The ancient common-law non-statutory rule with respect to successive conveyances of the same legal interest in land was simple: the first in time was superior in right."7

While England did enact its very restricted Statute of Enrollment, which was applicable only to conveyance by bargain and sale, it never developed any general system of recordation.8 As to the Statute of Enrollment, Professor Minor notes it was "an appendage" to the Statute of Uses and was enacted by Parliament at the same session and required that conveyances by bargain and sale would not pass a freehold estate unless the same were by "writing indented, sealed and enrolled" within six months after the date of the writing.9 As to the success of the Statute of Enrollment, Minor said, "The policy thus hesitatingly and imperfectly inaugurated was almost immediately frustrated by the ingenious adaptation of the lease and release to the purpose of conveying the title to lands, whereby conveyances might be as secret as could be desired."10 Thus, the recording acts were not part of the common law or the received law of England when the first colonists arrived in the "new world." The earliest "recording act" was the one adopted in the Massachusetts Bay Colony in 1634, which was followed in 1640 by a statute that resembles modern recording acts.11 According

8 Id. at 1045.
9 Minor, supra note 6, § 1294, at 1746.
10 Id. at 1747.
11 Powell, supra note 7, ¶ 912, at 1046.
to Professor Minor, a general registration system began developing in Virginia about 1639 or 1640.\(^\text{12}\)

Therefore, by their very nature, recording acts are the result of legislative enactments, which means that

\[
\text{[i]nstruments not within the scope of the jurisdiction's recording statute are governed as to priority by common-law rules. Equities, such as the right to enforce a resulting trust, or the right to reform, or to set aside a conveyance, do not rest generally on an instrument which can be recorded. Hence their assertion against a subsequent purchaser is unaffected by the law of recordation.}^{13}
\]

Several examples will help to illustrate this point. An oral lease for one (1) year is valid under the Statute of Frauds and would take priority over a subsequent bona fide purchaser without notice under the recording acts. Under the Statute of Frauds\(^\text{14}\) only leases for "more than one year" need to be in writing, and under the recording acts\(^\text{15}\) only terms "of more than five years" (assuming no part of the corpus may be taken, destroyed, or consumed, except for domestic purposes) need to be recorded. Therefore, such an oral lease, if first in time, prevails over a subsequent bona fide purchaser without knowledge of its existence. Similarly, a written and signed lease, or memorandum thereof, for four (4) years satisfies the requirements of the Statute of Frauds,\(^\text{16}\) but it is not subject to the recording act\(^\text{17}\) since it is not more than five years (assuming no corpus is to be taken). Again, such a prior written lease takes priority over a subsequent purchaser without knowledge because it was first in time.\(^\text{18}\) Similarly, rights that arise by the operation of law are not "covered" by the recording acts. For example, before dower was abolished by statute in 1992,\(^\text{19}\) the dower rights of a surviving spouse were created by the operation of the law to a set of facts and prevailed even against a subsequent purchaser without notice. Similarly the rights of adverse possession and prescriptive easements are the results of the application of principles of law to a particular set of facts. These rights are not

\(^{12}\) MINOR, supra note 6, § 1294, at 1747.

\(^{13}\) POWELL, supra note 7, ¶ 914 at 1051.

\(^{14}\) W. VA. CODE § 36-1-3 (1931).

\(^{15}\) Id. § 40-1-8 (1993).

\(^{16}\) Since it is for more than 1 year, it must be in writing and signed by the party to be charged. Id. § 36-1-3.

\(^{17}\) Id. § 40-1-8.

\(^{18}\) If any part of the corpus is to be taken, destroyed, or consumed, except for domestic use, then West Virginia Code § 36-1-1 requires the agreement be by deed or will, and § 40-1-8 requires the instrument to be recorded to be protected by the recording acts. Id. § 36-1-1 (1931); id. § 40-1-8.

\(^{19}\) W. VA. CODE § 43-1-1 (1992).
based on recordable instruments and are, therefore, not subject to the recording acts. Therefore, the common law principle of first in time prevails.

B. The West Virginia Statutes

As noted above, the statutory cornerstones of "conveyancing" are the relevant portions of the Statute of Frauds and the recording acts. The statute of frauds sets forth what agreements must be in writing and signed by the party to be charged to be enforceable, and if a writing is necessary, the type of writing or degree of formality required.

The basic tenets of the Statute of Frauds were reaffirmed by the Supreme Court of Appeals in the per curiam decision of Conley v. Johnson. In Conley, one of the vendors (Mrs. Johnson) had prepared a simple memorandum or agreement for the sale and purchase of real estate. The memorandum was signed by both Billy and Martha Johnson, the vendors, but was not signed by the Conleys, the vendees. The original plat of the subdivision had laid out seven (7) lots, with lot 7 containing 4.69 acres. The Johnsons had not only constructed a new house on lot 7 as shown on the original plat, but had also resubdivided the original lot 7 and designated the subdivided area as lots 7, 8, and 9. Litigation ensued when the Johnsons proposed to transfer resubdivided lots 7, 8, and 9 to the Conleys in satisfaction of the agreement. The Conleys claimed they were entitled to the original lot 7 and the adjoining lot 6.

The Johnsons moved for summary judgment, and the circuit court granted their motion stating: "The Court finds the following facts that the purported written alleged [sic] to be a contract was prepared by Martha Johnson, a

20 Id. §§ 36-1-1, -3.
21 Id. §§40-1-8 to -9 (1963).
22 Id. § 36-1-3.
23 See id. § 36-1-1.
24 580 S.E.2d 865 (W. Va. 2003). In Walker v. Doe, 558 S.E.2d 290 (W. Va. 2001), the West Virginia Supreme Court of Appeals specifically addressed the role and precedential value of per curiam opinions in its syllabus as follows:

2. This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution.

3. Per curiam opinions have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a per curiam opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases.

4. A per curiam opinion may be cited as support for a legal argument.

25 "I Billy J. Johnson & Martha R. Johnson agree to sell Patricia & Mark Conley New House & two lots for One Hundred and twenty-five thousand dollars ($125,000.00) at Lilly's Branch on Saw Mill Rd." Conley, 580 S.E.2d at 867.
26 Id. at 867.
lay person, herein and executed only by the Defendants, the Plaintiffs not hav-
ing executed the same . . . ."27 On appeal the court said, "In so stating, the court
inferred that since the Conleys had not signed the memorandum, they did not
have an enforceable contract and they were not entitled to . . . relief . . . ."28 In
reversing, the Supreme Court of Appeals explained that the agreement satisfied
the requirements of § 36-1-3 inasmuch as it was "in writing" and "signed by the
party to be charged thereby." Citing precedent,29 the court correctly noted the
statute does not require both parties to sign "but only by the party being charged
or being sued."30 The court did note there was a question as to whether the par-
ties came to a "meeting of the minds" sufficient to have a contractual relation-
ship which made the granting of a summary judgment error and, therefore, the
case was remanded for future development.31

While the Conley case demonstrates the importance of the basic prin-
ciples of the Statute of Frauds in resolving disputes concerning real estate, a more
fertile area for litigation is the judicially created exception to the Statute of
Frauds of part performance.32 The principle of part performance was involved
in the cases of Holbrook v. Holbrook33 and Messer v. Runion.34 Both cases in-
volve the enforcement of an alleged oral contract for the sale of real estate and
in both the defense of the Statute of Frauds was raised. In Holbrook, the trial
court granted the defendants' (vendors') motion to dismiss pursuant to Rule
12(b)(6) of the West Virginia Rules of Civil Procedure,35 and in Messer the trial
court granted the defendants' (vendors') motion for summary judgment.36 In
both, the Supreme Court of Appeals quoted the Statute of Frauds as set forth in
West Virginia Code § 36-1-3.37 In both Holbrook and Messer, the court recog-
nized the general principle that payment of the purchase money, in whole or in
part, along with possession of the property or the placing of valuable improve-
ments thereon by the purchaser is necessary for the doctrine of part performance

27 Id.
28 Id.
29 Id. at 868 (citing Monongah Coal & Coke Co. v. Fleming, 26 S.E. 201 (W.Va. 1896)).
30 Id. at 868.
31 Id. at 869.
32 See generally Fisher, supra note 1, at 456-57.
34 556 S.E.2d 69 (W.Va. 2001).
35 474 S.E.2d at 903.
36 556 S.E.2d at 71.
37 Holbrook, 474 S.E.2d at 903; Messer, 556 S.E.2d at 71. Also, in both the court quoted Syl-
labus Point 3 of Timberlake v. Hefflin, 379 S.E.2d 149 (W.Va. 1989). Holbrook, 474 S.E.2d at
904; Messer, 556 S.E.2d at 72. Syllabus Point 3 of Timberlake reads: "The statute of frauds, as
applicable to contracts for the sale or lease of land, is a procedural bar to prevent enforcement
of oral contracts unless the conditions expressed in W.Va. Code, 36-1-3, are met. The operation
of the statute of frauds goes only to the remedy; it does not render the contract void." 379 S.E.2d
149.
to be applied as an exception to the Statute of Frauds. On similar facts, in Holbrook the court reversed the circuit court’s grant of dismissal under Rule of Civil Procedure 12(b)(6) in favor of the vendor, and in Messer affirmed the circuit court’s granting of summary judgment in favor of the vendor.

Given the similarity in the facts of the two cases, the difference in the results is reflective of the procedural status of the cases. The Holbrook case was before the Supreme Court of Appeals following the grant of a motion to dismiss under Rule 12(b)(6). In setting forth the standard of review, the court explained:

“The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief . . . .” [O]nly matters contained in the pleading may be considered on a motion to dismiss under W. Va. R. Civ. P. 12(b) . . . .

In applying the standard to the facts before it, the court said:

38 See generally Holbrook, 474 S.E.2d at 904; Messer, 556 S.E.2d at 72.
39 In Holbrook, the defendants (appellees) purchased a tract of 3.978 acres and in the same month conveyed one acre of that parcel to their son. Eight months later, their son married plaintiff (appellant). Plaintiff alleges that after the conveyance of the one acre to their son, but prior to their marriage, defendants orally agreed to convey the remaining 2.978 acres to the son and plaintiff for $10,000 plus interest payable in 120 payments of $132.16 each. Plaintiff alleges she and son made payments jointly from July 1985 through March 1992 and that following her separation from the son in March 1992, she continued to make payments from April 1992 through September 1992 but that defendants refused to cash or negotiate the checks after March 1992. As part of the divorce settlement, son purchased the appellant’s interest in the one acre which they had occupied during their marriage as their marital home. Neither the divorce decree nor the property settlement incorporated therein mentioned the 2.978 acres. Plaintiff’s suit sought to compel the Defendants to convey an undivided \( \frac{1}{2} \) interest in the 2.978 acres upon her payment of any unpaid sums. Holbrook, 474 S.E.2d at 902-03.

In Messer, the plaintiffs entered into an installment land contract on August 1, 1997 with defendants to purchase for $55,000 payable over 68 months, a house and 4.23 acres. On October 20, 1997, the parties entered into a second agreement which would enable the plaintiffs to purchase the property for a single cash payment of $27,000 if they could obtain a loan by November 4, 1997. Plaintiffs were successful in obtaining the loan, and between receiving the commitment for the loan and the closing, the parties entered into a third agreement on November 14, 1997 which gave the vendors the right to dig up and move fruit trees, shrubbery, flowers and strawberries from the property being sold. All three agreements were signed by Mr. and Mrs. Runion and Mr. and Mrs. Messer. After the closing, the Messers claimed that the Runions had agreed to also give them a deed for a one acre parcel that adjoined the 4.23 acre tract and that the one acre was included as part of the purchase price of $27,000. The court on appeal noted: “This case only relates to the adjoining one-acre tract of land, and we find no evidence in the record that the Messers have either taken possession of that property or made improvements thereon . . . . Therefore, the doctrine of part performance is not applicable . . . .” Messer, 556 S.E.2d at 72.

40 474 S.E.2d at 905-06.
41 556 S.E.2d at 72.
42 474 S.E.2d at 903 (internal citations omitted).
In summary, although it may be later determined that the one acre conveyance to the appellees’ son was unrelated to the alleged oral agreement concerning the 2.978 acres, the complaint’s merging of the two transactions, coupled with the allegations of payment of purchase money for the 2.978 acres, render the complaint sufficient to withstand dismissal under W. Va. R. Civ. P. 12(b)(6). As this Court acknowledged in John W. Lodge Distributing Co., supra, 161 S.E.2d at 159 . . . : “The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff’s burden in resisting a motion to dismiss is a relatively light one.”43

In contrast, in Messer, the case was before the West Virginia Supreme Court of Appeals following the grant of summary judgment in favor of the vendors. After discussing the provision of the statute of frauds and the elements of part performance, the court said:

As noted above, the Messers contend that part performance has occurred in this case because they paid the Runions $27,000 and took possession of the 4.23 acres of land. However, the 4.23 acres of land are not at issue in this case. This case only relates to the adjoining one-acre tract of land, and we find no evidence in the record that the Messers have either taken possession of that property or made improvements thereon. Moreover, there is no evidence to support the Messers’ contention that the $27,000 purchase price included payment for the one-acre tract. Therefore, the doctrine of part performance is not applicable, and consequently, the alleged oral contract for the sale of the one-acre tract of land is not enforceable pursuant to the statute of frauds.

Having found that the statute of frauds applies in this case, we further find that no genuine issues of material fact exist to preclude summary judgment.44

III. NOTICE

In resolving questions of priority of titles, the threshold question is: Do the recording acts apply? If they do not, the general principle of the common law of “first in time, first in right” applies.45 If the recording acts apply, then the

43 Id. at 905-06.
44 556 S.E.2d at 72.
45 See Fisher, supra note 1, at 453.
answer will come from the application of their provisions to the facts. In West Virginia, our statutes are classified as "notice" as to purchasers (mortgagees are considered purchasers in West Virginia) and a "race" jurisdiction as to creditors.

Under the recording acts in West Virginia, in order for purchasers to benefit from their protection, they must (1) be subsequent in time, (2) give consideration, and (3) be without notice. Therefore, what constitutes "notice" is an important question.

A. Actual Notice

The role of actual notice is well illustrated by the case of Holleran v. Cole. The facts were simple and were not in dispute. Mrs. Cole, a 79-year-old widow, sold a two-story building to St. Clair. The building had a tavern on the first floor and apartments on the second floor, including a six-room apartment occupied by Mrs. Cole. As part of the consideration for the sale transaction, St. Clair agreed, in writing, that Mrs. Cole could continue to live in the apartment for the remainder of her life, or until she vacated the apartment, whichever should occur first. Five years later, St. Clair sold the property to Hamon and Moore, and approximately five months later, Hamon and Moore sold the property to Holleran, the plaintiff below and appellant on appeal. None of the deeds

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46 See id. at 454-56 (defining the three basic types of recording statutes).
48 See Fisher, supra note 1, at 459-69.
49 See id. at 472-74.
50 See id. at 469-72.
51 See generally id. at 493-513.
52 488 S.E.2d 49 (W. Va. 1997).
53 The agreement provided:

First Party [the appellee] shall have the right to continue to occupy rent free the six (6) room apartment wherein First Party now resides, which is located on the second story of the structure known as The White Horse Club, in Valley District, Preston County, West Virginia, such right of rent free occupancy by First Party to continue for the remainder of First Party's natural life or until First Party should vacate said apartment, whichever should first occur. The right of First Party to occupy the six (6) room apartment is personal to First Party and cannot be assigned or sublet by First Party to any other person or persons.

In addition, the agreement stated that the appellee would be provided with heat and water, without charge, for the apartment and that the appellee had the right to use the garage located upon the premises. As the record reflects, the appellee continued to reside in the apartment following the making of the agreement. However, the agreement was not recorded until sometime after the appellant acquired title to the property.

Holleran, 488 S.E.2d at 50-51.
made any reference to the agreement with Mrs. Cole to live in the apartment, and Mrs. Cole continued to occupy the property throughout the entire period. On appeal, the court held the appellant, Holleran, knew of the agreement and, therefore, "the appellant was not an innocent purchaser of the property in question and, instead, acquired the property subject to the separate written agreement executed by the appellee and the St. Clairs."  

B. Constructive Notice

The case of Belcher v. Powers involved a dispute over the size of a family cemetery which had been reserved when Lucy Copen Belcher subdivided her sixty-nine acres in 1959 among members of her family. The reservation of the cemetery and a right-of-way to the cemetery were reserved in the deeds to lots five (5) and six (6) with the location of the cemetery and the right of way indicated on a map subdividing the sixty-nine acres into the seven lots. This map was attached to the deed for lot five (5). The deed to lot six (6) contained the same language relevant to the reservation of the cemetery and right-of-way as was contained in the deed for lot five (5) and made reference to the map attached to the deed for lot five (5). At the time of the conveyance in 1959, the cemetery was fenced and was smaller in size than the cemetery as reserved on the map. Subsequent to the subdivision of the sixty-nine acres in 1959 and prior to the filing of the law suit, there were several conveyances of property within the 9.9 acres designated on the subdivision map as lot six (6).

When the Belcher brothers (plaintiffs) became aware that the current owners of the portion of lot six (6) that contained the existing fenced cemetery, and a part of what had been designated on the map as included in the cemetery were making changes, which they alleged were affecting the family cemetery, they filed suit seeking injunctive relief. On appeal, the court reversed the circuit court’s decision that had limited the size of the cemetery to the fenced area, i.e., the portion that had been used for burials. In reversing the circuit court, the Supreme Court of Appeals noted, "[o]ur well-established case law likewise recognizes that when confronted with construing a deed, `the intention of the grantor controls’ which requires that `the whole instrument, not merely and sep-

54 The court noted, “[T]he Circuit Court did not specifically define the agreement between appellee and the St. Clairs as either a life estate or a lease,” Holleran, 488 S.E.2d at 53, and similarly, the court on appeal did not classify the nature of the agreement in resolving the case.
55 “Importantly, however, the record is undisputed that, at the time of his purchase of the property, the appellant had actual knowledge of both the agreement between the appellee[, Cole,] and the St. Clairs and the appellee’s occupancy of the apartment.” Id. at 51.
56 Id. at 53.
57 573 S.E.2d 12 (W. Va. 2002).
58 See id. at 14-15.
59 Id. at 16.
60 Id. at 17.
arately disjointed parts, is to be considered.”

In holding that the cemetery included land outside of the fenced area, the court rejected the defendant’s claim that the map attached to the 1959 conveyance of lot five (5) was outside the title chain to lot six (6). The court, in effect held, the map attached to the deed to lot five (5) in 1959, and referenced in the deed to lot six (6), was constructive notice in the chain of title to lot six (6). The court, having rejected the claim that the map was outside the chain of title, said:

This Court has held that “[a] party is not entitled to protection as a bona fide purchaser, without notice, unless he looks to every part of the title he is purchasing, neglecting no source of information respecting it which common prudence suggests.” Syl. Pt. 2, Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co., 63 W. Va. 685, 60 S.E. 890 (1908). We defined notice in Pocahontas Tanning as “[w]hatever is sufficient to direct the attention of a purchaser to prior rights and equities of third parties, so as to put him on inquiry into ascertaining their nature ...” Id., Syl. Pt. 1. The language in the initial 1959 deed to lot six adequately informs a reader of a reservation from the conveyance, the existence of a map describing lot six in relation to the other lots in the subdivision and the location of the map. We deem these facts to be sufficient to place a prudent person on notice and alert such person of the need to attempt to locate and

61 Id. at 18. As part of this discussion, the court explained:

The importance of giving deference to the intent of the parties when construing a deed was perhaps best summarized in syllabus point one of Maddy v. Maddy, 87 W. Va. 581, 105 S.E. 808 (1921), when this Court said:

In construing a deed, will or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principal of law inconsistent therewith.

Accordingly, we have found that it is only in cases where the intent of the parties to a deed is unclear and no other rule of construction can resolve the ambiguity that doubt is resolved in favor of the grantee. Syl. Pt. 6, White Flame Coal Co. v. Burgess, 86 W. Va. 16, 102 S.E. 690 (1920).

Belcher, 573 S.E.2d at 18.

62 Belcher, 573 S.E.2d at 19.

63 The deed to lot six (6) described the conveyance as containing 9.99 acres and being Lot Number Six (6) as shown on a map of the division of [a] 69 acre tract belonging to Lucy Copen Belcher, the party of the first part, and a copy of the map of the division of the said 69 acres is filed and recorded with the deed to Leeroy Belcher and Mary A. Belcher from Lucy Copen Belcher, to which map and deed reference may be had.

Id. at 15.
examine the map as a source of information respecting the title to the property.\(^4\)

In *Subcarrier Communications, Inc. v. Nield*,\(^5\) the grantors were held to have constructive or record notice, depriving them the status of “bona fide purchaser” as used in West Virginia Code § 11A-3-6(a).\(^6\) In the *Subcarrier Communications* case, the Sheriff of Mineral County purchased a tax lien on property in Preston County. The court held that under West Virginia Code § 11A-3-6(a), the sheriff is prohibited from purchasing at any tax sales in any counties, not just tax sales in Mineral County. Following the sheriff’s tax sale in Preston County and immediately before the tax deed was issued on April 12, 2001, the sheriff assigned his tax lien to himself, his son, and John B. Lusk, and they were named as grantees in the tax deed. The sheriff, his son, and John B. Lusk then conveyed the subject property to LN & N Investments, LLC, with the three grantors being the sole principals of the LN & N Investments. The court in rejecting the argument that LN & N Investments was a bona fide purchaser under West Virginia Code § 11A-3-6(a) said:

In the instant case, we are presented with the unusual circumstance of a person who, by virtue of his position as sheriff, is prohibited by law from purchasing tax liens or receiving tax deeds. The question we must answer is whether a corporation may hold such a deed as a bona fide purchaser when the sheriff is a principal of the corporation. Given the foregoing definitions of a bona fide purchaser, we find that such a corporation may not enjoy bona fide purchaser status. It would defy logic and justice to allow a sheriff to own, as the principal of a corporation, that which he is prohibited by law from owning. Moreover, this Court has recognized that one who purchases real estate from a tax-purchaser can never be a bona fide purchaser. In *Simpson v. Edminston*, the Court explained

A tax sale is the culmination of proceedings which are matters of record; and it is a reasonable presumption of law, where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether any-

\(^{4}\) *Id.* at 19.

\(^{5}\) 624 S.E.2d 729 (W. Va. 2005).

\(^{6}\) West Virginia Code § 11A-3-6(a) (1994) reads as follows:

The sale of any tax lien on any real estate, or the conveyance of such real estate by tax deed, to one of the officers named in this section shall be voidable, at the instance of any person having the right to redeem, *until such real estate reaches the hands of a bona fide purchaser*.

*Id.* (emphasis added).
thing shown thereby would diminish the value of such rights, or tend in any contingency to defeat them. A tax-purchaser, consequently, cannot be in any strict technical sense a *bona fide* purchaser, as that term is understood in the law. *And for the same reason his vendee cannot be such purchaser; because a bona fide* purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it; but *the tax-purchaser and his vendees are always deemed to have such notice when the record shows defects. They cannot shut their eyes to what has been recorded for the information of all concerned, and relying implicitly on the action of the officers, assume what they have done is legal because they did it.\(^{67}\)

It should be noted that the prohibition set forth in West Virginia Code § 11A-3-6 includes not only the sheriff. The language of the Code reads:

 § 11A-3-6. Purchase by sheriff and clerk of county commission prohibited; co-owner free to purchase at tax sale.

(a) No sheriff, clerk of the county commission or circuit court, assessor, nor deputy of any of them, shall directly or indirectly become the purchaser, or be interested in the purchase, of any tax lien on any real estate at the tax sale or receive any tax deed conveying such real estate. Any such officer so purchasing shall forfeit one thousand dollars for each offense. The sale of any tax lien on any real estate, or the conveyance of such real estate by tax deed, to one of the officers named in this section shall be voidable, at the instance of any person having the right to redeem, until such real estate reaches the hands of a *bona fide* purchaser.

(b) Any co-owner, except a coparcener, in the absence of satisfactory proof of a fiduciary relationship, shall be entitled to acquire by tax purchase for his own account the tax lien on the interest of any, or all, of his co-owners in any real estate, and to receive a tax deed conveying such interest without being required to hold such tax lien or interest or interests under any constructive trust. There shall be a prima facie presumption against the existence of any such constructive trust. (1994, c. 87.)\(^{68}\)

\(^{67}\) *Subcarrier Comm.,* 624 S.E.2d at 737-38.

\(^{68}\) *W. VA. CODE* § 11A-3-6.
IV. HAS DICTA BECOME LAW?

In 1968, the West Virginia Supreme Court of Appeals decided the prescriptive easement case of *Fanti v. Welsh*. Mr. Fanti, the plaintiff, owned a house on West Fairview Street in Piedmont, West Virginia. He was born in this house and succeeded his father as its owner. In 1934, the plaintiff, as a child, helped his father construct a sewer line from their house, across the B&O railroad property to a city sewer line. It is the sewer that crossed the B&O’s property which is the subject matter of this litigation. The testimony in support of the plaintiff was that the construction took approximately ten (10) days; that work continued around the clock; that the sewer crossed a street and, therefore, interfered with the free flow of traffic; that during construction, including across the railroad’s property, employees of the railroad were present on the property performing their regular duties; that Mr. Fanti did not have permission to construct the sewer line across the railroad’s property; and that the sewer line had been in continuous and exclusive use by the Fantis since it was installed. The defendant, Welsh, purchased the property from the B&O in 1963 and testified he first learned of the sewer line across the property when the lawsuit was filed.

The circuit judge referred the issue to a commissioner who, based on the evidence presented, concluded:

> Your commissioner therefore finds that an easement by prescription for the maintenance of a private sewer line across the defendants’ land has not been proved by the plaintiffs, due to the plaintiffs’ failure to establish by a preponderance of the evidence the requirements that the use be visible, under claim of right, and with the knowledge and acquiescence of the owner.

After concluding the Fantis had not established a prescriptive easement, the commissioner added:

> [S]ince it is stipulated that the existence of this sewer line could not be discovered by visual inspection of this property, and since there is no evidence that the defendants had actual or constructive notice of the existence of this sewer line, the easement, if one had even been established, would have been extinguished by the transfer of the servient estate from the Baltimore and

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70 *Id.* at 502-03.
71 *Id.* at 504.
Ohio Railroad Company to the defendants. 6 M. J., Easements, Section 22.\textsuperscript{72}

The circuit court, which did not follow the recommendation of the commissioner, ruled that the plaintiff had established a prescriptive easement.\textsuperscript{73} On appeal, the Supreme Court of Appeals, in reversing the circuit court, agreed with the commissioner, stating:

By way of summary, we are of the opinion that the commissioner correctly held that the plaintiffs failed to prove by a preponderance of the evidence that, for a period of ten years, the plaintiffs' use of the railroad property for maintenance of a sewer line for their benefit was visible, open and notorious under a claim of right and with the knowledge and acquiescence of the owner of the land . . . \textsuperscript{74}

And in dicta added:

[T]he commissioner also correctly held that James A. Welsh was a purchaser for value without actual or constructive notice and that, therefore, even if a prescriptive right to an easement had been acquired by the plaintiffs as against the railroad company as owner of the land, such right was extinguished and that Welsh, as a purchaser for value without notice, took the land free and clear of any such easement right.\textsuperscript{75}

The statement is clearly dicta inasmuch as the court had concluded that the Fantis had not proved by a preponderance of the evidence all of the elements necessary to acquire a prescriptive easement.\textsuperscript{76}

The dicta in \textit{Fanti v. Welsh}\textsuperscript{77} that a bona fide purchaser for value without notice takes free of a prescriptive easement is quoted with approval in \textit{Clain-Stefanelli v. Thompson}.\textsuperscript{78} In the \textit{Clain-Stefanelli} case, the circuit court found that a prescriptive easement had been established, and its finding was affirmed on appeal. In response to the appellee's argument that she was a purchaser without notice, the court held that where the use and existence of the prescriptive easement is open and visible "so that a reasonably careful inspection of the

\textsuperscript{72} Id. at 504-05.
\textsuperscript{73} Id. at 504.
\textsuperscript{74} Id. at 506.
\textsuperscript{75} Id. at 506.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} 486 S.E.2d 330 (W. Va. 1997).
servient estate would disclose the existence of the right-of-way, the purchaser has constructive notice.”79 The court on appeal noted,

Ample evidence was presented at trial that the right-of-way was clearly open and visible in 1993 when the appellee purchased the property so as to put her on notice of its existence. Several witnesses testified that the existence of the right-of-way was obvious. Further, photo evidence was introduced which clearly shows a right-of-way across the appellee’s property consisting of two tracks having a stone base.80

Since the existence of the right-of-way was evident by a visual inspection of the property, the purchaser was not “without notice.” For our present purpose Syllabus 2 by the court summarizes the relevance of the case:

When a servient estate is sold, a prescriptive right-of-way over that estate is extinguished unless the purchaser of the servient estate has either actual or constructive notice of its existence. Where the prescriptive right-of-way is open and visible so that a reasonably careful inspection of the servient estate would disclose the existence of the right-of-way, the purchaser has constructive notice.81

The dicta of the Fanti case became germane to the resolution of the issues presented in Wolfe v. Alpizar.82 In Wolfe, the plaintiffs (Wolfe and Ellison) had an easement by grant through property acquired by Ms. Alpizar from Mrs. Brown. At the time Ms. Alpizar acquired the property, there was a bridge on the property that was being used by the plaintiffs. This bridge was north of the easement which had been granted to the plaintiffs. Before Ms. Alpizar purchased the property, she inquired of Mrs. Brown as to whether the bridge was within the easement and was told it was not. When the bridge fell into disrepair, Ms. Alpizar tore it down, and the plaintiffs filed suit, asserting that Ms. Alpizar had no right to tear it down, and petitioned the court to require her to rebuild it.83 The circuit court’s grant of summary judgment in favor of Ms. Alpizar was affirmed on appeal but on grounds different from those of the circuit court.84

79 Id. at 334.
80 Id.
82 637 S.E.2d 623 (W. Va. 2006).
83 Id. at 625.
84 In footnote 4, the court explains its decision as follows:

The circuit court’s ruling decided that the alleged express easement failed for lack of compliance with the statute of frauds, and further found that the prerequisites to establish a prescriptive easement were not met. Our analysis of
The court, in effect, said it was not necessary to resolve the question of whether there was an enforceable expressed easement and/or a prescriptive easement for the use of the bridge in order to decide the case.\textsuperscript{85}

The court explained the "focus" of its opinion in footnote 5, as follows:

As will be explained, our review reveals that Ms. Alpizar is a bona fide purchaser; thus, any analysis of the existence of an express or prescriptive easement as between the appellants and the previous owner is unwarranted. That is not to say, however, that a prescriptive easement cannot exist as against a bona fide purchaser. We will assume for the sake of argument that a prescriptive easement existed. With respect to imposing a prescriptive easement against a bona fide purchaser, we have stated the following:

"It is a well-established principle governing the purchase of servient tene-
ments that an easement therein is extinguished unless the purchaser has either actual notice of the existence of the easement, or constructive notice from the recordation of the express grant or reservation creating it, or from the fact that its use and enjoyment is open and visible . . . . The law imputes to a purchaser such knowledge as he would have acquired by the exercise of ordinary dili-
gence . . . . The grantee is bound where a reasonably careful inspection of the premises would disclose the existence of the easement, or where the grantee has knowledge of facts sufficient to put a prudent buyer on inquiry. It is not necessary that the easement be in constant and uninterrupted use." \textit{Fanti v. Welsh}, 152 W. Va. 233, 239-240, 161 S.E.2d 501, 505 (1968) (Citations omitted).

\textit{Clain-Stefanelli v. Thompson}, 199 W. Va. 590, 594, 486 S.E.2d 330, 334 (1997). Thus, as was held previously by this court,

When a servient estate is sold, a prescriptive right-of-way over that estate is extinguished unless the purchaser of the servient estate has either actual or constructive notice of its existence. Where the prescriptive right-of-way is open and visible so that a reasonably careful inspection of the servient estate would disclose the existence of the right-of-way, the purchaser has constructive notice.

\textbf{Syl. pt. 2, Thompson, id.} As will be explained, Ms. Alpizar had neither actual nor constructive notice of the existence of any prescriptive easement. Thus, our analysis will focus on the relevant relationship between the appellants and Ms. Alpizar.

\textit{Wolfe}, 637 S.E.2d at 626 n.5.
Having explained that its analysis of the case was different than that of the circuit court, the Supreme Court of Appeals continues:

We begin by noting that W. Va. Code § 40-1-9 (1963) (Repl.Vol.2004), provides:

Every such contract, every deed conveying any such estate or term, and every deed of gift, or trust deed or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract, deed, trust deed or mortgage may be.86

The court, in its Syllabus, then proceeds to quote from West Virginia cases in which the court describes the purpose of the recording acts as to protect against rights created in documents or instruments.

2. "When a prospective buyer of an interest in real estate has reasonable grounds to believe that property may have been conveyed in an instrument not of record, he is obliged to use reasonable diligence to determine whether such previous conveyance exists." Syllabus point 1, Eagle Gas Co. v. Doran & Associates, Inc., 182 W. Va. 194, 387 S.E.2d 99 (1989).

3. "A grantee in a conveyance of land, to be protected against a prior unrecorded deed for the same property, and to a different person, must be a complete purchaser, without notice of the prior deed, and have paid in full the purchase price for the land purchased by him; but he will be protected to the extent of any purchase money paid therefor before such prior deed is recorded." Syllabus, Alexander v. Andrews, 135 W. Va. 403, 64 S.E.2d 487 (1951).

4. "A bona fide purchaser is one who actually purchases in good faith." Syllabus point 1, Kyger v. Depue, 6 W. Va. 288 (1873).87

The court concludes its application of these principles of law to the facts of this case as follows:

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86 Wolfe, 637 S.E.2d at 627 (emphasis added).
87 Id. at 624.
In the case before us, Ms. Alpizar searched the title of the property and was aware of the thirty-foot deeded right-of-way easement in favor of Mr. Ellison and Mr. Wolfe. Nowhere in the recorded documents was there any mention of any interest in title to the bridge. During purchase negotiations, Ms. Alpizar specifically asked Mrs. Brown about the bridge located on the property. Mrs. Brown indicated that the bridge came with the purchase of the land and that Ms. Alpizar would be the sole owner. At that point in time, Ms. Alpizar became a *bona fide* purchaser for value without notice. Ms. Alpizar, in essence, was an innocent purchaser and Mr. Wolfe's and Mr. Ellison's claims, even if valid, were extinguished by an innocent purchaser's, *i.e.* Ms. Alpizar's, acquisition of the land. The appellants have asserted no documentation of which Ms. Alpizar could have or should have been aware that would have alerted her to the appellants' claims to the bridge. All parties agree that the easement recorded in the deed transferring property title is not the location of the bridge, as the bridge is far north of the actual easement. Furthermore, all parties concede that the alleged easement at the bridge location was not recorded. Thus, there is no documentation that would have alerted Ms. Alpizar to the appellants' claims to the bridge.\(^{88}\)

While the only place in the decision that the *Fanti* and *Clain-Stefanelli* decisions are cited or discussed is in the court's footnote 5,\(^{89}\) there can be little doubt that these cases provide the genesis of the court's holding. Therefore, the important question is not whether the dicta in the *Fanti* case has become law, but whether the dicta from *Fanti* is fundamentally sound.

The court in the *Fanti* case quoted from the commissioner's report as follows:

\[\text{[S]ince there is no evidence that the defendants had actual or constructive notice of the existence of this sewer line, the easement, if one had been established, would have been extinguished by the transfer of the servient estate from the Baltimore and Ohio Railroad Company to the defendants. 6 M.J., Easements, Section 22.}\(^{90}\)

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\(^{88}\) *Id.* at 628.

\(^{89}\) *See supra* note 85.

\(^{90}\) *Fanti,* 161 S.E2d at 505.
In the next paragraph, the court quotes the entire first paragraph of that section of *Michie's Jurisprudence* and following that quote adds, "To the same effect see *Shaver v. Edgell*, 48 W. Va. 502, 37 S.E. 664; *Patton v. Quarrier, Trustee*, 18 W. Va. 447; *Ricks v. Scott*, 117 Va. 370, 84 S.E. 676; *Bowman v. Holland*, 116 Va. 805, 83 S.E. 393; *Deacons v. Doyle*, 75 Va. 258; *Scott v. Beutel*, 23 Grat. 1; *1 Minor on Real Property* (2d Ed., Ribble), Section 113; 28 C.J.S. Easements §§ 47-50; 9 R.C.L., Easements, Section 61."  

The first paragraph of the *Michie's Jurisprudence* quote is virtually identical to § 113 of 1 RALEIGH COLSTON MINOR, THE LAW OF REAL PROPERTY (Minor). Four of the cases cited by the court are also cited by Minor as authority (i.e., *Ricks v. Scott; Deacon v. Doyle; Scott v. Beutel; and Shaver v. Edgell*).

A review of cases cited by the court in *Fanti* in support of the statement that a bona fide purchaser without notice takes free of the prescriptive easement reveals they do not support the statement. In *Shaver v. Edgell*, the court held there was no easement created. While the court in *Shaver* does discuss "notice" in the context of *Patton v. Quarrier* (discussed below), the discussion's focus is that if there is no easement, there is nothing to have "notice of." In *Patton v. Quarrier, Trustee*, the court held that there was no easement for an alley across the lots in question. The court in *Patton* does quote the Virginia case of *Deacon v. Doyle* with approval and the *Deacon* case discusses "notice" in the context of a roadway. In *Deacon*, the plaintiff claimed that a fifteen-foot wide roadway had been reserved along a canal for the benefit of the owners of the lots. The defendants denied there had been such a reservation. The evidence

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91 § 22. By Transfer of Servient Tenement to Purchaser Without Notice. Certain easements are of such a nature, that the use and enjoyment of them is obvious and apparent, for example, the right of drip, or surface drains, while the use and enjoyment of others are or may be hidden and invisible to the physical eye, such as underground drainage, or may be entirely consistent with the absence of all right to such use, as in the case of the easement of light, air, or prospect over a vacant lot. The last two classes of easements may readily escape the notice of a purchaser of the servient lot, and it would be an injustice to require him to admit such a burden, when he buys without notice thereof. Hence, it is a well-established principle governing the purchase of servient tenements that an easement therein is extinguished unless the purchaser has either actual notice of the existence of the easement, or constructive notice from the recordation of the express grant or reservation creating it, or from the fact that its use and enjoyment are open and visible. *Id.* (quoting 6 M.J., Easements § 22).

92 *Id.* at 505.

93 1 RALEIGH COLSTON MINOR, THE LAW OF REAL PROPERTY § 113 (Anderson Bros. 1908). The differences are "etc." after surface drain, which appears in the Minor section, is omitted in the first sentence from the *Michie's Jurisprudence* quote; some of the words italicized in Minor are not italicized; what is two paragraphs in Minor is presented as one paragraph in *Michie's Jurisprudence*; and the punctuation is slightly different.

94 37 S.E. 664 (W. Va. 1900).

95 *See id.* at 668.

96 18 W. Va. 447 (1881).

97 75 Va. 258 (1881).
was undisputed that during the ownership by the common owner, who divided
the tract into lots, there was no roadway along the canal and that there was no
reservation in any of the deeds of any roadway or easement. The only evidence
supporting the plaintiff's claim was testimony by a surveyor, who had surveyed
the lots, that he had suggested it would be convenient to have a roadway running
along the banks of the James River and Kanawha Canal, and he made the survey
and a plat marking out fifteen feet as such roadway. The court noted, "the plat
is not referred to in any of the deeds; nor is there any evidence that such plat
was ever recorded; nor is there a particle of evidence that the defendants ever
saw or heard of it at the time of their purchase." In the context of these facts
the court said:

Where no private right of way or other easement is reserved in
the deed itself, and the purchaser has no notice of any such
claim, he takes the property without the burthen of any such
claim either, from the grantor or any person claiming under
him. Scott and als. v. Beutel and als. 23 Gratt. 1.99

The case of Scott v. Beutel100 involved the sale by a special commis-
sioner of one of two adjoining lots that had common ownership, with the lot
sold having a culvert across it to drain water from the lot not sold. The owners
of the lot not sold claimed an easement by implication across the lot sold. The
court said one of the requirements for an easement by implication was the eas-
ment must be open, visible and apparent, and in this case, the culvert was not.101

The case of Bowman v. Holland102 involved an express grant of an
easement, which was not recorded at the time Bowman's grantor purchased the
property, and the court held that "the physical evidences, as shown by the re-
cord, of the former existence of a roadway were wholly inadequate to charge
Bowman with knowledge of its existence." In summary, the facts and the
statement of law in the cases cited by the court in Fanti do not provide authority
for the court's statement.

As noted above, the "authority" for the statement in Michie's Jurispru-
dence, relied upon by the court, is Minor on Real Property. The statement in
the Ribble edition of Minor104 is identical to that appearing in The Law of Real
Property by Raleigh Colston Minor, Volume 1 § 117. In the Ribble edition, the

98 Id. at 261.
99 Id.
100 64 Va. (23 Grat.) 1 (1873).
101 Id. at 4.
102 83 S.E. 393 (Va. 1914).
103 Id. at 395.
104 MINOR, supra note 93, § 113.
cases of *Ricks v. Scott*\textsuperscript{105} and *Shaver v. Edgell*\textsuperscript{106} are added to the footnote found in the original *Minor on Real Property* as authority for the statement. Also, the Ribble edition added “See *Buckles-Irvine Coal v. Kennedy Coal Corporation* 134 Va. 1, 114 S.E. 233; *Miller v. Skaggs*, 79 W. Va. 645, 91 S.E. 536, Ann. Cas. 1918D 929.”\textsuperscript{107}

Without discussing each of the cases cited in the footnote by *Minor* as authority for the proposition, none of the cited cases could, in good faith, be cited by a court as authority supporting the statement, and in fact, one of the cases, *Wissler v. Hershey*,\textsuperscript{108} suggests the statement is wrong. In *Wissler* the issue was whether there was a way of necessity, and the court stated, “When land over which there is a right of way in another is sold, the purchaser takes it subject to the easement though he had no actual notice of it.”\textsuperscript{109}

Another secondary source cited by the court in *Fanti* is *Corpus Juris Secundum*.\textsuperscript{110} Although the edition of C.J.S. that would have been in use in 1967-68 when the *Fanti* case was decided is not available to the author, the 1920 edition of Corpus Juris and the current edition of *Corpus Juris Secundum* are available. The 1920 edition in Volume 19 “Easements” in § 147(B) states “[w]ithout [n]otice[,] [a] purchaser of land who has no notice either actual or constructive, of an easement in such land in favor of third persons is free from the burden of such easement.”\textsuperscript{111} The current edition of C.J.S. *Easements* § 137 “Want of Notice” states:

A bona fide purchaser of land for value without notice that the land is burdened by an easement takes an unencumbered title.

Ordinarily, a purchaser of land who has no notice either actual or constructive of an easement in such land in favor of third persons is free from the burden of such easement; however, in some jurisdictions this rule may be applied only when the owner of the dominant tenement has failed to do something which the owner ought to have done. One who acquires the servient estate without consideration is bound by the easement although he acquired title without notice.

The rule that a bona fide purchaser for value who takes the servient estate without knowledge of an existing easement is re-

\textsuperscript{105} 84 S.E. 676 (Va. 1915).
\textsuperscript{106} 37 S.E. 664 (W. Va. 1900).
\textsuperscript{107} *Minor*, supra note 93, § 113, at 153-54.
\textsuperscript{108} 23 Pa. 333 (Pa. 1854).
\textsuperscript{109} *Id.* at 333.
\textsuperscript{110} *Fanti*, 161 S.E.2d at 505 (citing 28 C.J.S. *Easement* § 49).
\textsuperscript{111} 19 C.J.S. *Easements* § 147B (1920).
lieved of such easement has been held not to apply to a way of necessity, or an *easement by prescription*, although with respect to the latter there is authority apparently to the contrary. A bona fide purchaser is not relieved, by this rule, where an inspection of the premises would have readily revealed such physical facts that in the exercise of ordinary diligence imposes a burden of inquiry upon the purchaser.\(^1\)

It is noted the statement in the current version of C.J.S. is significantly different from the one in the 1920 edition.

The court also cited "see 25 Am. Jur. 2d, Easements and Licenses, Section 98."\(^1\)\(^3\) Again, I do not have access to the edition that the court would have used in 1967-68, but I assume it referred to the following statement: "[A]n easement can be extinguished by an act of the dominant owner, either by release or abandonment, by the act of the servient owner by prescription or conveyance to a bona fide purchaser without notice . . . ."\(^1\)\(^4\)

In contrast to the general statements in the encyclopedia are those of the authors of leading treatises on the subject. Professors Bruce and Ely of Vanderbilt University School of Law in their book *The Law of Easements and Licenses in Land*, in the chapter on *Termination of Easements*, state:

Prescriptive Easements

The generally accepted view is that prescriptive easements, being based on adverse use rather than on an instrument of conveyance, are outside the purview of the recording system. Consequently, a purchaser of land burdened by a prescriptive easement usually takes subject to the servitude even if the purchaser is without notice of its existence. However, there are some cases in which the recording system was found to operate to extinguish a prescriptive easement when the servient estate was acquired by a bona fide purchaser without notice of the servitude.\(^1\)\(^5\)

Professor Richard Powell in his multi-volume work on Real Property states:

Under Certain Circumstances, Easements May Be Terminated by Conveyance of Servient Parcel to Bona Fide Purchaser


\(^{13}\) *Fanti*, 161 S.E.2d at 505.


In certain limited circumstances the servient owner can also extinguish an easement by conveying the servient land to a bona fide purchaser without notice. Where the easement has been created by an express conveyance or other written instrument the easement owner can prevent any such result by making sure that the conveyance creating the easement has been so recorded as to constitute notice to subsequent purchasers or acquirers of the servient land. Where the easement has been implied, upon the basis of quasi-easement that antedated the severance of ownership, there are often visible facts constituting notice to a purchaser of the servient estate, but a new owner of the servient estate, who is actually a bona fide purchaser without notice, holds free of the easement. As to easements by necessity and easements originating in prescription, the power of the servient owner to extinguish the easement by a conveyance seems to be almost wholly absent. The circumstances constituting the "necessity" usually also constitute notice to the acquirer of the servient estate. When an easement has been acquired by prescription, the recording acts cannot function, because they relate only to priorities among instruments affecting land ownership. As a result, there is substantial authority holding that an easement acquired by prescription is effective against a successor of the servient owner, even when such successor is a bona fide purchaser without notice.\footnote{4 RICHARD R. POWELL, POWELL ON REAL PROPERTY, § 34.21[2] at 34-197-99 (Michael Allan Wolfe ed., LexisNexis Matthew Bender 2008).}

Professor John E. Cribbet in his \textit{Principles of the Law of Property} explains,

If a b. f. p. buys servient land subject to an unrecorded easement that is not apparent from physical evidence of its use the easement will be extinguished. However, since the recording system does not apply to easements created by prescription or implication and since there is no written instrument to record in either case, the purchaser, even without notice, will take subject to those interests.\footnote{JOHN E. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 346 (2d ed., The Foundation Press, Inc. 1975).}

Herbert T. Tiffany, in \textit{The Law of Real Property}, explains this matter as follows:
In the case of a prescriptive easement, however, the recording acts, as ordinarily phrased, cannot well apply to protect an innocent purchaser, since they have to do with priorities as between instruments affecting land, while if the easement is prescriptive the question is one of priority as between a claim under an instrument and a claim not under an instrument. In one state there are decisions to the effect that a purchaser of land takes it subject to a prescriptive easement thereon, even though he has no notice, actual or constructive. There are on the other hand occasional decisions that the purchaser in such case takes free from the easement, the courts ignoring the consideration that the doctrine of notice, in this connection, is based primarily upon the recording acts.\textsuperscript{118}

One of the leading cases on this issue is \textit{McKeon v. Brammer}\textsuperscript{119} which gave rise to the annotation of the issue in the American Law Reports.\textsuperscript{120} In \textit{McKeon}, the plaintiff had established an easement by prescription for an underground tile drainage line across the property of the defendant. After noting that easements may be created by an express written grant, by prescription, or by implication,\textsuperscript{121} the Court explained

An easement created by express written grant is, if recorded, operative against subsequent purchasers for value without notice. But when the easement is not based upon any written instrument such as an easement by prescription or implication, it would seem the recording acts should have no application. It is the law that a purchaser of the servient estate will be charged with notice of all apparent easements and the purchaser is bound where a reasonably careful inspection of the premises would disclose the existence of the easement. But what will we say as to an easement that is created by implication or prescription, and hence not subject to recordation, and is of such nature that it cannot be seen or is not apparent from any marks on the servient land? Will the bona fide purchaser for value of the servient estate without actual notice take title free from the servitude? Will such a transfer work an extinguishment of the easement? If so, then the acquisition of such an easement, by prescription or by implication, the character of which is not appar-

\textsuperscript{118} HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 828 at 399-400 (3d ed., Callaghan and Co. 1939).
\textsuperscript{119} 29 N.W.2d 518 (Iowa 1947).
\textsuperscript{120} A. M. Swarthout, Annotation, \textit{Extinguishment of Easements by Implication or Prescription, by Sale of Servient Estate to Purchaser Without Notice}, 174 A.L.R. 1241 (1948).
\textsuperscript{121} \textit{McKeon}, 29 N.W.2d at 522.
ent, is of little value. In such a situation there are two innocent parties. On the one hand we have the innocent purchaser, in the sense that he purchased the servient estate without notice of an easement that was not apparent. On the other hand we have the owner of the dominant estate in full possession of an easement that is not apparent, which he has gained by prescription or one which the law will imply upon a severance. He has no instrument to record, that will give constructive notice to prospective purchasers of the servient estate.122

Later in the opinion, after discussing cases from other jurisdictions and secondary authorities, the court states:

The exact question of extinguishment of an existing easement, which by its very nature is not visible or apparent, by the sale of the servient estate to a bona fide purchaser without knowledge or actual or constructive notice, appears to be one of first impression in this state. It is our holding that such an easement is not terminated by such a sale and the purchaser takes subject to the easement.123

While recognizing the differences in the elements needed to establish a way of necessity and a prescriptive easement, it is noteworthy that the court in West Virginia held in Berkeley Development Corporation v. Hutzler124 that a bona fide purchaser without notice does take a servient estate subject to a way of necessity. In this case, Hutzler claimed an easement over Berkeley Development Corporation’s property. The Supreme Court of Appeals held that while there was sufficient evidence to support the finding of a prescriptive easement in favor of Hutzler, the evidence also established a way of necessity. The court, after rejecting Berkeley Development Corporation’s argument that it was a purchaser without notice, said

Even if it were assumed that the appellee had no notice of the existence of the roadway, it could not prevail. The rule that a bona fide purchaser for value who takes the servient estate without knowledge of an existing easement is relieved of a prescriptive easement does not apply to a way of necessity. A way of necessity exists in favor of a dominant estate whether it is

122 Id. (internal citations omitted).
123 Id. at 526. The annotation in 174 A.L.R. 1241, § 3 Easements by Prescription begins, “There is considerable authority to support the conclusion that an easement obtained by prescription is good as against a subsequent purchaser of the servient tenement even though he is an innocent purchaser without notice.” 174 A.L.R. at 1244.
used or not, since, as has been previously stated, the implied
 easement continues so long as the necessity exists.\textsuperscript{125}

In conclusion, it is submitted that the secondary authority relied upon by
the court in support of the dicta in \textit{Fanti} is of questionable accuracy, that the
cases cited in support of the statement do not provide sufficient authority to
support the statement, and that the dicta in \textit{Fanti} has been cited by the court as
"law" without an examination as to whether it is a correct application of the
relevant legal principle. It is, therefore, hoped the court will reconsider its reli-
ance on \textit{Fanti} and its progeny as precedent until it reexamines this particular
statement.

\textbf{V. Title Transfer}

\textbf{A. Deeds}

1. Parties and Signature

In \textit{Go-Mart, Inc. v. Olson},\textsuperscript{126} the court provided guidance as to appro-
priate relief when the grantor lacked the mental capacity to enter into a binding
agreement.\textsuperscript{127} Following the precedent articulated in Syllabus Point 1 of \textit{Morris v. Hall},\textsuperscript{128} the court held "[t]he deed of an insane person, made before an inqui-
sition of lunacy has been had, and in the absence of fraud or imposition, and
without knowledge or notice to the grantee therein of such mental disability, is
not void, but voidable only."\textsuperscript{129} The court rejected the assertion of the grantee
(i.e., Robertson-Hinkle) in the January 26, 1995 deed from Ms. Olson that, not-
withstanding Ms. Olson's lack of capacity, "the transactions were enforceable, if

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} at 736.
\item \textsuperscript{126} 482 S.E.2d 176 (W. Va. 1996).
\item \textsuperscript{127} \textit{Id.} at 177-78. Ms. Olson, a widow of 83 years of age, on September 1, 1994, signed a con-
tact with Seneca Realty Company of Lewisburg, granting Seneca an "exclusive authority to sell"
certain property located on U.S. Route 219. On January 17, 1995, Ms. Olson signed a contract
with Path Finders Realtor of Lewisburg and also granted to Path Finders an "exclusive real estate
property listing" for the same real estate. On the same day, Ms. Olson signed a purchase agree-
ment, presented by Path Finders, in which she agreed to sell the property to Go-Mart for
$190,000. Three days later on January 20, 1995, Ms. Olson signed a purchase agreement,
provided by Seneca, in which she agreed to sell the Route 219 property to Robertson-Hinkle for
$180,000. On January 26, 1995, Ms. Olson signed a deed conveying the property to Robertson-
Hinkle, and the transaction closed on February 1, 1995.

While Ms. Olson had never been adjudged incompetent and had never had a guardian or
committee appointed upon her behalf, after a trial in October 1995, the jury returned a special
verdict finding that Ms. Olson lacked the capacity to understand the two purchase agreements and
the deed. The jury's finding in this regard was not contested by any of the parties on appeal. \textit{Id.}
\item \textsuperscript{128} 109 S.E. 493 (W.Va. 1921).
\item \textsuperscript{129} \\
\textit{Olson}, 482 S.E.2d at 179.
\end{itemize}
fair and reasonable under the circumstances to the average person." The court affirmed the circuit court’s decision which voided the purchase agreements and the deed, restored the title to Ms. Olson, and directed her to return the $180,000 purchase price paid by Robertson-Hinkle, which had been placed in escrow, with the interest actually paid thereon. In affirming the circuit court, the Supreme Court of Appeals followed the precedent of Morris which stated: “And being voidable only, [the deeds of those under disability] can not be avoided without restitution of benefits secured thereby, or placing the parties affected in status quo as far as possible . . . .”

In 1977, in Trimble v. Gordon, the United States Supreme Court held that statutes which permit a child born out of wedlock to inherit only from the biological mother violated the principle of equal protection by denying the child the right to inherit from the biological father. West Virginia’s statute was similar to the statute declared unconstitutional in Trimble. In Adkins v. McEldowney, the West Virginia Supreme Court of Appeals followed Trimble and held that, under our statute, West Virginia Code § 42-1-5, an illegitimate child is permitted to inherit from both father and mother. In Williamson v. Gane, the West Virginia Supreme Court of Appeals held “that this Court’s decision in Adkins v. McEldowney is fully retroactive where there has been no justifiable and detrimental reliance upon the law invalidated therein; where the subject property has not been transferred to an innocent purchaser for value; or where the estate administration is subject to further resolution.”

The issues relative to inheritance by a child born out of wedlock continued to evolve in Taylor v. Hoffman. The case involves a child born out of wedlock seeking to have the decedent declared his biological father so that he could inherit his proportionate share of the decedent’s estate. The circuit court granted the estate’s motion for summary judgment holding the suit was filed beyond the statute of limitation provided for in the paternity statute contained in

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130 Id.
131 482 S.E.2d at 179 (citing Morris, 109 S.E. at 495).
133 Some of the practical problems that inheritance by illegitimate and “equitably adopted” children create for “title attorneys” are discussed in the earlier article. Fisher, supra note 1, at 531-32.
134 See W. VA. CODE § 42-1-5 (Repl. Vol. 1982) “From whom bastards inherit. Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten.” Id.
137 Id. at 322 (internal citation omitted).
138 544 S.E.2d 387 (W. Va. 2001). The decision provides insight into the history of our paternity statute (West Virginia Code Chapter 48A, Article 6) and the rights of a child born out of wedlock to inherit under the 1999 revision of West Virginia Code § 42-1-5.
the Code.\textsuperscript{139} While the paternity statute in effect at the time this case was decided has been repealed and superseded by the current code provision enacted in 2001 and effective March 22, 2001, in Chapter 48, Article 24, Sections 101-106 of the West Virginia Code, the holding of the case is still relevant and is succinctly stated in Syllabus Points 2 and 7 as follows:

2. The limitation of actions provisions contained in Article 6, Chapter 48A [the previous code section] of the Code of West Virginia are applicable in cases brought under that statutory structure. However, that statutory structure is not the sole means available for the resolution of claims of a right to inheritance by children born out of wedlock.

7. Limitations provisions included within the paternity statute are inapplicable to a civil action by a child born out of wedlock seeking to inherit from his or her father brought under West Virginia Code § 42-1-5 (1923) (Repl.Vol.1997), as interpreted in \textit{Adkins v. McEldowney}, 167 W.Va. 469, 280 S.E.2d 231 (1981). Prior to the 1999 amendment to West Virginia Code § 42-1-5, the Legislature had not provided a methodology for the evaluation of a child born out of wedlock’s assertion of the right to inherit from his or her father. Where that 1999 statute is not applicable, resolution of the cause of action is to be based upon case-by-case analysis, consistent with the holding of \textit{Adkins}.\textsuperscript{140}

A case which raises several interesting questions relative to conveyancing is \textit{Heartland, L.L.C. v. McIntosh Racing Stable, L.L.C.}\textsuperscript{141} The case involves an allegation of the seller's breach of contract for the sale of a horse stable located in Jefferson County. While the basis of the reversal of the circuit court’s entering of a summary judgment in favor of the seller (McIntosh Racing Stable, L.L.C.) was because the court found there were genuine issues of material fact,\textsuperscript{142} several points relevant to the present discussion were addressed.

On January 12, 2003, Dr. Siegel, Ms. Sears, and Marc J. Sharp entered into a written purchase agreement to buy a horse stable and real estate from McIntosh Racing. In February 2003, a snow storm caused a portion of the roof on the stable to collapse, which necessitated extensive repairs. On April 4, 2003, a “dry closing” was held.\textsuperscript{143}

\textsuperscript{139} See \textit{id.} at 389 (citing W. VA. CODE § 48A-6-1(c)(7) (1993) (Repl.Vol.1999)).
\textsuperscript{140} \textit{id.} at 388.
\textsuperscript{141} 632 S.E.2d 296 (W. Va. 2006).
\textsuperscript{142} \textit{id.} at 307.
\textsuperscript{143} The court explains “dry closing” in footnote 3 of its opinion as follows:

The term “dry closing” was employed by the parties to distinguish this closing from one in which the sale is completed at the closing. The evidence before
The disagreement as to what occurred during the dry closing constitutes a significant portion of the genuine issue of material fact that provided the basis of the reversal of the summary judgment. However, certain facts are not disputed. The purchasers who signed the contract of purchase, i.e., Dr. Siegel, Ms. Sears, and Marc J. Sharp, agreed that Hickory Plains, L.L.C. would replace Mr. Sharp as one of the purchasers; that Hickory Plains, L.L.C. would partner with Dr. Siegel and Ms. Sears to create Heartland, L.L.C.; that Heartland, L.L.C. Articles of Organization were signed at the dry closing and were to be filed with the Secretary of State’s office at a later date; that the deed from McIntosh Racing named Heartland as the grantee; and that on October 1, 2003, the Articles of Organization of Heartland were filed in the Secretary of State’s office.¹⁴⁴

After considering decisions in West Virginia and from our sister states, the court concluded the fact that the named grantee in the deed had not yet been formally organized as a legal entity on the date the deed was signed did not invalidate the deed. The court said:

Based upon the foregoing authority, this Court holds that a deed drawn and executed in anticipation of the creation of the grantee as a corporation, limited liability company, or other legal entity entitled to hold real property is not invalidated because the grantee entity had not been established as required by law at the time of such execution, if the entity is in fact created thereafter in compliance with the requirements of law and the executed deed is properly delivered to the entity, the grantee, after its creation.

Thus, in the case sub judice, we conclude that the lower court erred in holding that the deed was invalid simply because Heartland did not exist on the date the deed was signed. The Appellants specifically aver that all parties were aware of the status of Heartland and that Heartland would formally assume ownership of the property when the Articles of Organization were filed and the legal existence of Heartland was finalized. Thus, according

this Court raises a claim that the parties apparently anticipated that all documents would be signed at this dry closing and that the parties would discuss and agree upon additional issues which needed to be finalized prior to completion of the sale. The brief of the Appellee, for instance, indicates that “[s]ince no money was exchanged at the closing, the closing was considered a ‘dry closing.’” The brief of the Appellee also indicates, however, that Dr. Siegel, Ms. Sears, and Hickory Plains did in fact place a $60,000.00 down-payment in Mr. Howard’s trust account at the dry closing. The Appellee never received that money since those funds were returned to the purchasers when the Appellee undertook to rescind the contract.

632 S.E.2d at 298 n.3.
144 632 S.E.2d at 299-300.
to the assertions of the Appellants, there was no misrepresentation or subterfuge in the procurement of the deed. In that regard, the events and alleged agreements of the dry closing merit examination within this opinion.\(^\text{145}\)

As to whether the assignment of Mr. Sharp's interest to Hickory Plains, L.L.C. complied with the requirements of the Statute of Frauds, the court noted:

Thus, due to fact that the substitution in this transaction was memorialized by several written documents signed at the dry closing, this Court finds no merit in the Appellee's assertion that there has been a violation of the Statute of Frauds meriting a grant of summary judgment for the Appellee. Furthermore, the grantee in the subject written deed was Heartland as a legal entity. In this opinion, we have held that the deed is not invalidated by the fact that Heartland had not filed its Articles of Organization by the time the deed was signed. In this Statute of Frauds claim, it is essentially the evolution of the recipient grantee from three individuals, as contemplated in the written purchase agreement, to Heartland as a legal entity composed of three members that the Appellee is challenging. Based upon the extensive written documentation, the deed itself, and the absence of any evidence of fraud or duress, we find sufficient memorialization to permit these issues to go to a jury. We therefore reverse this matter for further development.\(^\text{146}\)

\(^{145}\) Id. at 303.

\(^{146}\) Id. at 306. The written documents the court refers to were discussed earlier in the opinion as follows:

The statute of frauds, however, may be satisfied by multiple writings if (1) the party to be charged signed at least one of them, (2) the court can determine from the face of the writings that they are related, and (3) the court can determine with certainty the essential terms of the contract without the use of parol evidence.

It is particularly significant in the present case that Mr. Cohen, as representative of Hickory Plains, L.L.C., Dr. Siegel, and Ms. Sears, signed the Balloon Note at the dry closing as the three members of borrower Heartland. Although that note was not signed by Mr. McIntosh, it identified the lender as McIntosh Racing Stables, L.L.C. Significantly, that document specified that the borrowers were "fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed." The document continued:

Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of the guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder [the
Finally, as to the "reasonableness" of the passage of time, the court said:

The lower court also found that the Appellants engaged in unreasonable delay in filing the Articles of Organization to form Heartland and in attempting to complete this sale of the stable. Indeed, it is generally held that when a condition to be performed is not limited by an agreement, the condition must be performed or abandoned within a reasonable time. See Syl. Pt. 2, E. Shepherdstown Developers, Inc. v. J. Russell Fritts, Inc., 183 W. Va. 691, 398 S.E.2d 517 (1990). However, in the present case, there is no evidence that the parties agreed that any condition precedent had to be performed by a certain date, and thus the reasonableness of any delay should be resolved by a jury. See, e.g., Howell v. Appalachian Energy, Inc., 205 W. Va. 508, 517, 519 S.E.2d 423, 432 (1999) ("What constitutes a 'reasonable period of time' is normally a question of fact"); Stone v. United Engineering, 197 W. Va. 347, 360, 475 S.E.2d 439, 452 (1996). ("The question of whether the vendee had a reasonable time to cure the defect or dangerous condition is a question of fact and is therefore for the jury").

In the present case, the determination of the reasonableness of the delay in finalizing this sale is a question of fact and must be

Appellee may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

Mr. McIntosh personally signed written documents providing evidence of the sale to Heartland. First, the deed granting the property to Heartland was in writing and signed by Mr. McIntosh. Second, the Informed Consent form was also in writing and signed by Mr. McIntosh. It permitted Mr. Howard to represent both sides of the sale and specifically identified Heartland as the borrower and the Appellee as the seller. Third, the written Settlement Statement was signed by Mr. McIntosh, identifying Mr. Howard as the borrower and the Appellee as the seller. Third, the written Settlement Statement was signed by Mr. McIntosh, identifying Heartland as the borrower and the Appellee as the seller. Fourth, Mr. McIntosh signed the Owner's Affidavit regarding the possession of the subject real estate and other conditions concerning taxes, liens, leases, or judgments affecting the property for purposes of title certifications.

Id. at 305-06 (citations omitted). The initial assertion of the Statute of Frauds issue was framed as "any attempted assignment of the initial sales contract was not in writing." Id. at 304. It is not clear if the assignment referred to is the assignment of Mr. Sharp's interest to Hickory Plains, L.L.C. or Dr. Siegel, Ms. Sears, and Hickory Plains to Heartland. The court's discussion focuses on writing that Mr. McIntire signed at the dry closing recognizing Heartland as the grantee and obligor.
made by a jury. Thus, the lower court improperly granted summary judgment on that issue.\textsuperscript{147}

2. Description

As discussed in the earlier article, in order for an easement created by express grant in a deed to be valid, its description "must be expressed in certain and definite language."\textsuperscript{148} The sufficiency of the description of an easement was again before the court in \textit{Folio v. City of Clarksburg}.\textsuperscript{149} After acknowledging the passage of West Virginia Code § 36-3-5a, entitled \textit{Easement and Right-of-Way; Description of Property; Exception for Certain Public Utility Facilities and Mineral Leases}, in 2003 and as amended in 2004,\textsuperscript{150} the court in \textit{Folio} reiterated:

However, it is well-established that there still must be a sufficient description which serves as a guide to identify the land upon which the easement is located. In that regard, this Court has held that,

\textsuperscript{147} \textit{Id.} at 306-07.


\textsuperscript{149} 655 S.E.2d 143 (W. Va. 2007).

\textsuperscript{150} The full text of the statute provides:

(a) Any deed or instrument that initially grants or reserves an easement or right-of-way shall describe the easement or right-of-way by metes and bounds, or by specification of the centerline of the easement or right-of-way, or by station and offset, or by reference to an attached drawing or plat which may not require a survey, or instrument based on the use of the global positioning system which may not require a survey: \textit{Provided}, That oil and gas, gas storage and mineral leases shall not be required to describe the easement, but shall describe the land on which the easement or right-of-way will be situate by source of title or reference to a tax map and parcel, recorded deed, recorded lease, plat or survey sufficient to reasonably identify and locate the property on which the easement or right-of-way is situate: \textit{Provided, however}, That the easement or right-of-way is not valid because of the failure of the easement or right-of-way to meet the requirements of this subsection.

(b) This section does not apply to the construction of a service extension from a main distribution system of a public utility when such service extension is located entirely on, below, or above the property to which the utility service is to be provided.

(c) The clerk of the county commission of any county in which an easement or right-of-way is recorded pursuant to this section shall only accept for recordation any document that complies with this section and that otherwise complies with the requirements of article one, chapter thirty-nine of this code, without need for a survey or certification under section twelve, article thirteen-a, chapter thirty of this code.

W. VA. CODE § 36-3-5a (2004).
"A deed granting to a railroad company land for its right of way must contain on its face a description of the land in itself certain, so as to be identified, or if not in itself so certain, it must give such description as, with the aid of evidence outside the deed, not contradicting it, will identify and locate the land, otherwise the deed is void for uncertainty." Syllabus Point 1, Hoard v. Railroad Co., 59 W. Va. 91, 53 S.E. 278 (1906).

Syllabus Point 2, Highway Properties.\(^{151}\)

3. Acknowledgment

As also discussed in the earlier article, in 1992 the West Virginia Supreme Court of Appeals in Galloway v. Cinello\(^{152}\) overruled Tavenner v. Barrett\(^{153}\) and its progeny. Under Tavenner, West Virginia had applied a bright line test. If the acknowledgment was valid, the deed was a recordable instrument\(^{154}\) and if properly recorded, it constituted constructive notice.\(^{155}\) In Tavenner,\(^{156}\) the trustee in the deed of trust was also the notary public who acknowledged the signature of the grantors in the deed of trust. This conflict (i.e., the trustee's acknowledgment of the grantor's signature) invalidated the acknowledgment and made the deed of trust unrecordable, and even though it was recorded, it did not constitute constructive notice.

In Galloway,\(^{157}\) as in Tavenner, the attorney, who was the trustee in the deed of trust, notarized the grantor's signature on the deed of trust, and the deed of trust was then recorded. In Galloway, the court decided to no longer follow the "bright line test" that had been its rule for over 100 years. The court explained that under its new rule, the issue should be resolved by an analysis under the Uniform Notary Act,\(^{158}\) which had been adopted in West Virginia in 1984. Under the Galloway test, a court is to first determine whether the notary had a disqualifying interest in the instrument because he was named as trustee, and in Galloway the court concluded: "[h]ere, there is no disagreement that the notary had a disqualifying interest because he was a party to the deed of trust that he notarized."\(^{159}\)

\(^{151}\) Folio, 655 S.E.2d at 147 (footnote omitted).
\(^{152}\) 423 S.E.2d 875 (W. Va. 1992).
\(^{153}\) 21 W. Va. 656 (1883).
\(^{154}\) W. VA. CODE § 39-1-2 (1882).
\(^{155}\) See Fisher, supra note 1, at 487-93.
\(^{156}\) 21 W. Va. 656 (1883).
\(^{159}\) 423 S.E.2d at 879.
After finding that the notary had a disqualifying interest, the court explained,

[T]he next question is the bearing this defect has on the validity of the instrument. We decline to follow the per se rule of Tavenner and its progeny, which automatically voids a deed of trust because the trustee has acted as its notary. Such a rule can be unduly harsh, as illustrated by the facts of this case. The beneficiary of the deed of trust loses her security interest not because of any claim of wrongdoing, bad faith, or other improper conduct on her part, but solely on the basis that the notary was the trustee on the document.

If the primary purpose of the rule is to shield the parties from potential wrongdoing or fraud, then the focus of the inquiry should be shifted in this direction.\textsuperscript{160}

Accordingly, we hold that a notary's disqualifying interest can result in voiding an instrument that has been notarized by him. In deciding whether to void the instrument, a court should consider whether an improper benefit was obtained by the notary or any party to the instrument, as well as whether any harm flowed from the transaction. To the extent that Tavenner v. Barrett, supra, and related cases state or imply the contrary, they are overruled.\textsuperscript{161}

Thus, we conclude that once it is shown that a notary has a disqualifying interest in an instrument which he acknowledged, and a suggestion of actual prejudice, unfair dealing, or undue advantage is raised by an adverse party, then the burden shifts to the notary or any party seeking to support the challenged document to demonstrate that no improper benefit was obtained and no harm occurred as a result of the disqualified act.\textsuperscript{162}

The court's statement in Galloway, that a notary's disqualifying interest can result in invalidating the instrument, instead of the acknowledgment,\textsuperscript{163} was a significant departure from existing law.\textsuperscript{164}

\textsuperscript{160}Id.

\textsuperscript{161}Id. at 879-80.

\textsuperscript{162}Id. at 880.

\textsuperscript{163}Id. at 879-80.

\textsuperscript{164}See Fisher, supra note 1, at 490-93.
Within a year of its decision in *Galloway*, the court was presented the opportunity to revisit the issue of the effects of defective acknowledgments in *Williams v. GMAC*. In *Williams*, the owners of property in West Virginia signed deeds of trust in West Virginia before an individual authorized as a notary in Maryland, but not authorized in West Virginia. The Maryland notary altered the acknowledgment to make it appear as if the act of notarizing the document had occurred in Maryland and not in West Virginia. *Williams* was one of 12 cases pending before the bankruptcy court in the Northern District of West Virginia with similar facts. In order to resolve the question as to the status of these cases, the bankruptcy court certified the following question to the West Virginia Supreme Court of Appeals: "[d]oes the trustee in bankruptcy, given the status of a bona fide purchaser without notice by federal bankruptcy law, prevail over the holder of a deed of trust recorded but improperly acknowledged?"

While the court in *Williams* essentially followed its reasoning adopted in *Galloway*, it did correct the statement in *Galloway* that a defective acknowledgment invalidates or voids the instrument. In its footnote 9, the court explained:

In *Galloway*, the Court discusses the "voiding" of a deed because of an improper acknowledgment. More accurately, the acknowledgment is void but the deed is good between the parties to the original transaction. In Syllabus Point 2 of *McElwain v. Wells*, 174 W. Va. 61, 322 S.E.2d 482 (1984), this Court held that "[a] defective acknowledgment on a deed does not invalidate the conveyance as between the parties."

In *Tavenner*, this Court stated:

The want of a proper acknowledgment does not however invalidate the deed (of one *sui juris*) but only go[es] to the effect of the record. . . . The deed, however, is good between the parties, (being *sui juris*) and should prevail against subsequent deeds to those who had actual notice of its existence.

21 W. Va. at 688 (internal citations omitted).

The court in *Williams* explained its reasoning in *Galloway* as follows:

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166 Id. at 924-25.
167 Id. at 925.
168 Id. at 928 n.9.
In *Galloway*, this Court moved away from a strict *per se* rule of invalidating or "voiding" deeds of trust based on imperfect acknowledgments. Instead, the focus in *Galloway* is to shield the parties from potential wrongdoing or fraud where notary misconduct results in an improperly acknowledged deed.

The principles of *Galloway* may be applied to the case at hand. While there was no disqualifying interest in the instant case, a notary's actions resulted in an improperly acknowledged deed that may deny Key Home a secured interest to which it would otherwise be entitled. "In deciding whether to void the instrument, a court should consider whether an improper benefit was obtained by the notary or any party to the instrument, as well as whether any harm flowed from the transaction." Syllabus Point 2, in part, *Galloway*. We conclude that if the Bankruptcy court finds that no improper benefit was obtained, and no harm resulted from the transaction, then the instrument is not void and provides constructive notice to the bankruptcy trustee of Key Home's perfected security interest.\(^{169}\)

Justice McGraw filed a dissent to the *Williams* decision explaining, "Though the improper conduct at the center of this case might seem minor or trifling to some, the requirement that deeds be acknowledged properly is nonetheless the law of the land in West Virginia."\(^{170}\) He also notes that Article 6 of the Uniform Notary Act makes misconduct by a notary public a misdemeanor.\(^{171}\)

In addition to the concerns raised by Justice McGraw, it is submitted that the shift from a bright line test to a case by case approach creates a practical problem for those engaged in title work. Under the bright line test, if the title examiner found a problem as to an acknowledgment not corrected by the curative statute,\(^{172}\) it was usually in the interests of "both sides" to work together to find an acceptable solution such as a quit claim deed or the re-acknowledgment of the instrument. Under the case by case approach, one can anticipate that a common response to a defective acknowledgment will be that the notary does not have a disqualifying interest or that there was no improper benefit obtained. In many, if not most, real estate transactions the cost of litigation to resolve such issues on a case by case basis makes the resort to a court for a determination unlikely. Therefore, the inability to resolve disagreements over the effect of

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\(^{169}\) *Id.* at 928 (footnotes omitted).

\(^{170}\) *Id.* at 928 (McGraw, J., dissenting).

\(^{171}\) *Id.* at 928-29. *See* W. VA. CODE §§ 29C-6-201 to -203 (1984).

\(^{172}\) *See* W. VA. CODE § 37-11-2 (1994).
defective acknowledgment, in an affordable manner, is a probable unintended consequence of the *Galloway* and *Williams* decisions.

A distinction that some courts have recognized in dealing with defective acknowledgments is between *latent* defects, i.e., a defect that does not appear on the face of the acknowledgment\(^{173}\) and *patent* defects, i.e., defects that are apparent on the face of the acknowledgment.\(^{174}\) In fact, as to latent defects, the majority of jurisdictions have recognized that a defect in the acknowledgment of an instrument required for recordation, which is not apparent on the face of the instrument, does not prevent the recordation from providing constructive notice to subsequent bona fide purchasers.\(^{175}\)

As noted above, the concern voiced herein with the *Galloway* and *Williams* decisions is the adoption of a case by case approach on a type of question where the cost of litigation, in most cases, makes the resort to the courts for resolution impractical. As the dissent in *Williams* points out, the legislature has deemed it sound public policy to require a valid acknowledgment to record certain types of instruments. There are good policy reasons to require an acknowledgment to make certain types of instruments recordable. The question, therefore, should be how to best implement those policy concerns. Since it appears doubtful there would be a complete return to the *Tavenner* rule, it is suggested that the latent versus patent distinction adopted in the majority of jurisdictions may be a better solution than the *Galloway* approach. Perhaps a refinement of the *Galloway* and *Williams* rule that incorporates the latent-patent distinction could incorporate the desirable features of both and would be another approach. Under such a hybrid rule, if the defect in the acknowledgment is patent, i.e., is apparent on the face of the acknowledgment, then the acknowledgment is defective and the instrument is not considered recordable, and if recorded, it would not provide constructive notice. In effect, in the event of patent defects, the rule would be consistent with the *Tavenner*\(^{176}\) and *South Penn Oil Company v. Blue Creek Development Company*\(^{177}\) line of decisions. The need for a case by case determination of whether an improper benefit had been gained would not be required. If, however, the defect in the acknowledgment was latent, then the court could apply the *Galloway* and *Williams* tests to determine whether the notary has a disqualifying interest and if so whether an improper benefit was gained or harm flows from the transaction.


\(^{174}\) See generally id. at 1299.

\(^{175}\) See id. at 1316.

\(^{176}\) 21 W. Va. 656 (1883).

\(^{177}\) 88 S.E. 1029 (W. Va. 1916).
4. Delivery

While the specific topic of delivery was not discussed in the earlier article, two cases decided since it was published deserve mention. The first is *Jones v. Wolfe*.\(^{178}\) The *Jones* case provides a brief summary of case law relevant to the requirement of delivery of a deed,\(^{179}\) with the date of delivery becoming important in resolving the potential tort liability of the grantee. In the *Jones* case, the circuit court granted the defendant’s motion for summary judgment on the basis that Mr. Wolfe (the defendant) was not yet the owner of premises leased by the plaintiff at the time of the injury that gave rise to her suit.\(^{180}\) The injury Ms. Jones suffered occurred on September 19, 1994. The deed transferring the property from the previous owners to Mr. Johns was dated August 29, 1994, and was acknowledged as to one of the grantors on September 1, 1994, but was not recorded until September 23, 1994.\(^{181}\) In reversing the circuit court’s grant of summary judgment, the court noted that the deed took effect on the date of its delivery, and since that date was unclear from the documents filed in the case, there was a genuine issue of fact which precluded summary judgment.\(^{182}\)

The second “delivery” case of interest is *Walls v. Click*.\(^{183}\) Although it is a per curiam decision,\(^{184}\) it instructively deals with a number of delivery related issues. Factually the case involves a conveyance by one joint tenant of his interest in three of five properties owned as joint tenants with the right of survivorship with a friend and business associate. The conveyance was to the grantor’s disabled wife and their son by a deed which was properly executed and acknowledged. In conjunction with the conveyance, the grantor had directed his

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\(^{178}\) 509 S.E.2d 894 (W. Va. 1998).

\(^{179}\) The summary provides:

The law in this state is rather clear that a deed takes effect from its actual or constructive delivery. *See Parrish v. Pancake*, 215 S.E.2d 659 (1975) and *Bennett v. Neff*, 42 S.E.2d 793 (1947). Recording of the deed is not critical, and acknowledgment is not essential to its validity. As stated in *McElwain v. Wells*, 322 S.E.2d 482, 485 (1984): “Acknowledgment is a prerequisite for recording, W. Va. Code 39-1-2, but adds nothing to the validity of a deed as between the parties and others who know about it. A defect in acknowledgment ‘does not detract from the force of the deed in making effective the conveyance intended to be made thereby.’ *State v. Armstrong*, 134 W. Va. 704, 61 S.E.2d 537, 539 (1950).”

*Jones*, 509 S.E.2d at 896.

\(^{180}\) *See generally Jones*, 509 S.E.2d at 894.

\(^{181}\) *Id.* at 895.

\(^{182}\) *Id.* at 896. The court also noted “further development of the facts of the case is desirable to clarify the question of whether or not the appellant’s claim of liability on the basis of agency is a valid claim.” *Id.* at 897.

\(^{183}\) 550 S.E.2d 605 (W. Va. 2001).

\(^{184}\) *See supra* note 24.
son to open a safe deposit box, accessible only by the son and his mother (grantor's disabled wife). The father, as grantor, delivered the deed to his son as one of the grantees and instructed the son to place the deed in the safe deposit box, and not to record the deed until the grantor's death. The grantor further advised his son that he would take care of properties for the grantees until his death. Following the grantor's death, the son obtained the deed from the safe deposit box and recorded it. The friend and business associate, i.e., the "other" joint tenant, filed suit, seeking sole ownership of the three properties as the surviving joint tenant.\textsuperscript{185} The Supreme Court of Appeals held the grantor's (husband and father) deed to his wife and son, as grantees, was a valid transfer of his one-half undivided interest. In reaching that conclusion, the court held that the grantor's intent was to vest the grantees with an immediate estate as distinguishable from a conditional delivery. In so holding, the court effectively used the presumption that "possession of a deed executed and acknowledged with all formalities is prima facie evidence of delivery."\textsuperscript{186} In holding that an interest vested immediately, the court explained how the grantor's continued involvement with the property after the delivery of the deed was consistent with his intent to immediately transfer his interest to the grantees.\textsuperscript{187} Finally, the court had to address the basis for its overturning a jury verdict in favor of the surviving joint tenant and against the wife and son. As part of its discussion, the court quoted from \textit{Evans v. Bottomlee}\textsuperscript{188} as follows:

Attempting a resolution of this issue and discussing the findings of fact regarding delivery of the deed in \textit{Evans}, this Court reasoned as follows:

We are of the view, however, that in a great measure the decision of this case calls for a proper application of legal principles to facts which are without substantial dispute. It is true that there is some conflict in the testimony but we believe it not so material or pertinent to the legal principles involved to permit more than one finding from that evidence.

150 W. Va. at 614, 148 S.E.2d at 716.

As in \textit{Evans}, we believe that the present case requires this Court to apply legal principles to established facts. Upon thorough review of the briefs, arguments of counsel, the record, and applicable precedent, we conclude that the lower court erred in fail-

\textsuperscript{185} See generally Walls, 550 S.E.2d at 609-10.
\textsuperscript{186} Id. at 612 (quoting Heck v. Morgan, 106 S.E.413, 417 (W.Va. 1921)).
\textsuperscript{187} See generally Walls, 550 S.E.2d at 615.
\textsuperscript{188} 148 S.E.2d 712 (1966).
ing to grant the Appellants’ motion for judgment as a matter of law. Viewing the evidence in a light most favorable to Ms. Walls, we conclude that such evidence was inadequate to overcome the prima facie showing of effective delivery and that the evidence was legally insufficient to support the jury verdict.\textsuperscript{189}

It is suggested that those who are presented with a delivery of a deed issue will find the court’s discussion in \textit{Walls v. Click} informative and helpful.

5. Severance of Joint Tenancy

The significance of the valid delivery of the deed of the father/husband’s interest to his son and wife in \textit{Walls v. Click} is that it severed the four unities necessary for a joint tenancy with the right of survivorship.\textsuperscript{190} In fact, the conveyance of one joint tenant’s interest in the jointly held property to a third person is the “traditional” method of severing the survivorship among the joint tenants because it destroys at least one of the four unities necessary for a joint tenancy. The court in \textit{Walls v. Click} recognized this in its first syllabus\textsuperscript{191} and in its opinion in footnote 4, in which the court said:

This Court recognized the legitimacy of a conveyance by a joint tenant with right of survivorship in \textit{Herring v. Carroll}, 171 W. Va. 516, 300 S.E.2d 629 (1983), and clearly established the ability of a joint tenant to convey his undivided interest to a third party, thereby destroying the right of survivorship. This Court stated as follows in syllabus point four:

A joint tenant may convey his undivided interest in real property to a third person. When one of two joint tenants conveys his undivided interest to a third person the right of survivorship is destroyed. Such third party and the remaining joint tenant hold the property as tenants in common.\textsuperscript{192}

\textsuperscript{189} \textit{Walls}, 550 S.E.2d at 616.


\textsuperscript{191} The syllabus point provides:

“A joint tenant may convey his undivided interest in real property to a third person. When one of two joint tenants conveys his undivided interest to a third person the right of survivorship is destroyed. Such third party and the remaining joint tenant hold the property as tenants in common.” Syl. Pt. 4, \textit{Herring v. Carroll}, 171 W. Va. 516, 300 S.E.2d 629 (1983).

\textsuperscript{192} \textit{Walls}, 550 S.E.2d at 610.
Herring v. Carroll,193 cited by the court in Walls v. Click, held that the four unities necessary for common law joint tenancy are still applicable in West Virginia. The case involved a challenge by the husband of a conveyance by his wife of all of "her right, title and interest"194 of property conveyed to her and her husband as joint tenants with right of survivorship. The grantee in the wife's deed was her son by a previous marriage.195 After discussing joint tenancy as it developed at common law196 and the effect the adoption of West Virginia statutes § 36-1-19 and § 36-1-20 had on the common law rule,197 the court stated, "we conclude that W. Va. Code 36-1-19 and 20 do not abolish the common law requirement of the four unities in a joint tenancy."198

Herring, 300 S.E.2d 629 (W. Va. 1983).

Id. at 631.

Id. at 631.

The discussion provides:

In order to create a common law joint tenancy in real property the parties must receive an undivided interest under four conditions: (1) each party's undivided interest must vest at the same time; (2) each party must receive an undivided interest in the whole estate; (3) each party's possession must be coequal so that his property interest is the same as to the legal estate and duration and, (4) each party must receive his interest in the same title document. These four conditions for the creation of a common law joint tenancy are commonly abbreviated as the four unities of time, interest, possession and title. The main attribute of a common law joint tenancy was the right of survivorship. H. Tiffany, The Law of Real Property §§ 418-419 (3d ed. 1939); 20 Am. Jur. 2d Cotenancy and Joint Ownership §§ 3 & 4 (1965). The common law incident of survivorship in a joint tenancy arose by virtue of the existence of the four unities and was not as a result of any formal words of survivorship in the title document.

Herring, 300 S.E.2d at 631.

197 The court noted that "[t]he common law incident of survivorship in a joint tenancy has been altered by W. Va. Code, 36-1-19." Syl. Pt. 3, Herring, 300 S.E.2d 629. The statute provides:

"When any joint tenant or tenant by the entireties of an interest in real or personal property, whether such interest be a present interest, or by way of reversion or remainder or other future interest, shall die, his share shall descend or be disposed of as if he had been a tenant in common."

W. VA. CODE § 36-1-19 (1931). The court continued:

We have rather uniformly held that this statute abrogates the right of survivorship in a common law joint tenancy unless under W. Va. Code, 36-1-20, "it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others." There is no question in this case that the initial deed to Mr. and Mrs. Herring contained the survivorship provision.

Herring, 300 S.E.2d at 631-32 (footnote omitted) (internal citations omitted).

198 Herring, 300 S.E.2d at 634. Section 36-1-19 was the statutory law of Virginia at the time of West Virginia statehood and was incorporated as a part of our statutes. It has not been amended since its initial adoption and reads:
The court in *Herring* concluded:

Adhering to the view expressed by the majority of jurisdictions, it is clear that Mrs. Herring's conveyance to her son destroyed the joint tenancy with the right of survivorship in the property with her husband because her conveyance destroyed part of the four essential unities that were needed to support the joint tenancy. After the conveyance, the property was then held by her husband, Mr. Herring, and the appellee as tenants in common.

When any joint tenant or tenant by the entirety of an interest in real or personal property, whether such interest be a present interest, or by way of reversion or remainder or other future interest, shall die, his share shall descend or be disposed of as if he had been a tenant in common.

Section 36-1-20 currently reads:

(a) The preceding section [§ 36-1-19] shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favor of, or on any contract with, two or more, one of whom dies.

(b) When the instrument of conveyance or ownership in any estate, whether real estate or tangible or intangible personal property, links multiple owners together with the disjunctive "or," such ownership shall be held as joint tenants with the right of survivorship, unless expressly stated otherwise.

(c) No person convicted of violating the provisions of section one [§ 61-2-1] or three [§ 61-2-3], article two, chapter sixty-one of this code as a principal aider and abettor or accessory before the fact, or convicted of a similar provision of law of another state or the United States, may take or acquire any real or personal property by survivorship pursuant to this section when the victim of the criminal offense was a joint holder of title to the property. The property to which the person so convicted would otherwise have been entitled shall go to the person or persons who would have taken the same if the person so convicted had predeceased the victim.

W. VA. CODE § 36-1-20 (1999). Subsection (a) in the provision was originally incorporated into our statutes at the time of statehood. Subsection (b) was added in 1981 as an amendment, and subsection (c) was a 1999 amendment which "overturned" the court's decision in *State ex rel. Miller v. Sencindiver*, 275 S.E.2d 10 (W. Va. 1980). See John W. Fisher, II, *Joint Tenancy in West Virginia: A Progressive Court Looks at Traditional Property Rights*, 91 W. VA. L. REV. 267 at 294-95 (1989).

Section 36-1-20a was enacted in 1981 to replace West Virginia Code § 48-3-7a, which had been adopted in 1974 and was restricted to conveyance between husband and wife. Section 48-3-7a was repealed in 1981 when § 36-1-20a was adopted. Section 36-1-20a provides:

Any conveyance or transfer of property, or any interest therein, creating a joint tenancy with right of survivorship together with the person or persons conveying or transferring such property, executed by such person or persons to or in favor of another shall be valid to the same extent as a similar transfer or conveyance from a third party or by a straw party deed.

W. VA. CODE § 36-1-20a (1981)
Upon Herring’s death, his undivided half interest in the property was passed to the appellants, devisees under Herring’s will. They hold an undivided half interest with Mrs. Herring’s son, the appellee, as tenants in common.\textsuperscript{199}

The case of Young v. McIntyre\textsuperscript{200} presents what is not an uncommon problem. David Young and Pamela McIntyre were married on June 30, 1982; the subject property was conveyed to David Young by deed dated June 13, 1983; and his ownership was transformed into joint tenants with rights of survivorship with his wife by deed dated October 2, 1987.\textsuperscript{201}

In January 2005, David Young filed for divorce and entered into a property settlement agreement dated October 24, 2005. The property settlement agreement provided:

The parties will continue to own the former marital domicile and shall list the property for sale in the spring of 2006. That Husband will continue to exclusively live in the house and pay the mortgage debts on the same. The parties agree to split the cost of repairs to sell the house up to $5,000 each. When the house sells, the parties will split the net proceeds equally.\textsuperscript{202}

David Young died intestate on July 31, 2006, before the house was sold.\textsuperscript{203} The issue was whether on the facts presented the survivorship had been severed. On cross motions for summary judgment, the circuit court granted Pamela McIntyre’s motion and denied the motion by David Young’s administrator, thereby granting ownership of the subject property to the ex-wife pursuant to the survivorship provision in the deed.\textsuperscript{204}

On appeal, the Supreme Court of Appeals rejected the Estate’s argument based on Timberlake v. Heflin\textsuperscript{205} that the property settlement had resulted in an equitable conversion. In Timberlake, Richard and Sherry were married on July 24, 1976; purchased a home on June 9, 1977, as joint tenants with right of survivorship; decided by July of 1983 to divorce and entered into parol contract for the division of marital assets; and on July 22, 1983, Sherry filed a suit for divorce. The complaint was accompanied by an affidavit signed by Sherry, under oath, that the averments contained in the complaint were true and accurate. One of the averments was: “Plaintiff [Ms. Heflin] says that she agrees to

\begin{itemize}
\item \textsuperscript{199} Herring, 300 S.E.2d at 634.
\item \textsuperscript{200} 672 S.E.2d 196 (W. Va. 2008).
\item \textsuperscript{201} Id. at 196.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} Id. at 200 (citing 379 S.E.2d 149 (W. Va. 1989)).
\end{itemize}
convey her interest to the Defendant in the jointly owned real estate, to wit: a two bedroom home located in Berkeley County, West Virginia, and known for postal purposes as P. O. Box 42, Hedgesville, West Virginia.  

On these facts, the Timberlake court held the signed complaint satisfied the statute of frauds; that equitable conversion applied; and that if the administrator completed the purchase contract, the survivorship provision in the deed would not operate to transfer his interest to the ex-spouse.

In Young, the court held that Timberlake was distinguishable inasmuch as there was no actual contract to sell, only an agreement that they would sell. The court also rejected the Estate's argument that a divorce, in and of itself, severs the survivorship created by the deed, stating:

This Court has not yet decided the effect of a divorce and property settlement agreement upon the questions of the survival of the joint tenancy. Appellants contend that several courts have found that a divorce decree itself destroys the unity of possession and, thus, causes a severance. Carson v. Ellis, 349 P.2d 807 (Kan. 1960); In re Estate of Estelle, 593 P.2d 663, 665 (Ariz. 1979); Estate of Seibert, 276 Cal. Rptr. 508, 510 (Cal. App. Ct. 1990); Gaskie v. Hugins, 640 P.2d 248, 249 (Colo. App. Ct. 1981). However, we decline to hold that a divorce decree, alone, causes a severance of a joint tenancy. The right of survivorship of a joint tenant does not arise out of the marriage relationship. Absent either an express intent to sever or conduct inconsistent with the continuation of the joint tenancy, the right of survivorship will continue after a dissolution of the marriage of joint tenants.

206 379 S.E.2d 149, 151. After the divorce, Sherry remarried.
207 Id. at 154-55.
208 Id. at 155.
209 Id. at 155.
210 The court noted:

In the case sub judice, the facts before us do not present an equitable conversion as contemplated in Timberlake. Herein, Appellants have not presented an actual contract for the sale of the subject property. Rather, they present a contract wherein the parties agree to sell the subject property at a specified future date and split the proceeds equally. Because there has been no agreement by the joint tenants to convey their interest to a specific identified purchaser, no conveyance of legal title has yet taken place. Thus, no purchaser has acquired a vendable interest making the doctrine of equitable conversion applicable.

Young, 672 S.E.2d at 200-01.
211 Id. at 202.
While holding that a divorce, *per se*, does not sever survivorship, based on the actions of the parties, the court found there was sufficient intent of the parties to sever the survivorship. In the words of the court:

We believe that in circumstances of divorce, such as the present, joint tenants can agree to hold as tenants in common and thus sever the joint tenancy. Such an agreement can be express or implied from conduct of the parties inconsistent withholding in joint tenancy. Again, we observe similar decisions from other jurisdictions. *See Dompke v. Dompke*, 542 N.E.2d; *Thomas v. Johnson*, 297 N.E.2d 712 (Ill. 1973); *Mamalis v. Burnovas*, 297 A.2d 660 (N.H. 1972); *Wardlow v. Pozzi*, 338 P.2d 564. *See generally* 48a C.J.S. Joint Tenancy § 18; Tiffany on Real Property [3d Ed.] Vol. 2, § 425. “A course of dealing by joint tenants in reference to the property jointly owned may by implication establish a severance, termination, or abandonment of the joint tenancy.” *What Acts By One or More of Joint Tenants Will Sever or Terminate the Tenancy*, 64 A.L.R. 2d 918, pp. 949-950 (1959). Acknowledging this standard, the question here becomes whether the conduct of the parties and the course of dealing between them is “sufficient to indicate that all parties mutually treated their interests as belonging to them in common.” 48 C.J.S. Joint Tenancy, § 4, p. 928.

In the instant case, the terms of this agreement were sufficient to cause destruction of the four unities by implication. The language in the property settlement agreement and the action of the parties immediately thereafter evinces an agreement to dissolve the joint tenancy as they agreed to repair the real estate, list it, sell it, and split the proceeds when sold. The decedent was given exclusive possession of the property pending the sale. When we look at the context in which the agreement was made, the circumstances at the time, and the bargaining by equals with respect to the dissolution of their marital status, it is readily apparent herein that the couple did not make the agreement with the view that their rights of survivorship would be maintained subsequent to the divorce but prior to the property being sold. The conduct of the parties plainly evidenced their intention to sever the joint tenancy with the right of survivorship and hold their property as tenants in common. The lower court merged and incorporated the property settlement agreement into its final divorce order. Therefore, each party has been entitled to its enforcement since the entry of the divorce decree, and the lower court was required to enforce performance of those obligations under the final divorce order so as to fully execute its terms.
To find that the joint tenancy remained unsevered would clearly be in direct contradiction to the intent of the property settlement agreement. Given our strong statutory presumption in favor of construing joint tenancies as tenancies in common without the right of survivorship, we believe that when the agreement of the parties evidences an intent to sever to joint tenancy, termination of the joint tenancy is the logical decision. We wish to make it clear that by holding that joint tenants in circumstances of divorce can agree, expressly or impliedly, to hold as tenants in common and thus sever the joint tenancy, this does not abolish the requirement of the traditional four common law unities for a joint tenancy. We continue to acknowledge, as we did in Herring v. Carroll, 171 W. Va. 516, 300 S.E.2d 629, that our statutory law, W. Va. Code § 36-1-19 and § 36-1-20, does not abolish the unities. The usefulness of the unities is better determined on a case-by-case basis. Subsequent to this decision, either tenant still retains the power to sever a joint tenancy by destroying one or more of the unities.  

Although the court does not explain which of the four unities the parties' intent "destroyed," it is noted that the property settlement agreement dated October 24, 2005, which was incorporated into the Final Divorce Order entered on November 8, 2005, provides in part "that Husband will continue to exclusively live in the house and pay the mortgage debts on the same." The grant to the husband of the exclusive right to live in the house would be inconsistent with the unity of possession.

While the Young decision may be applicable in some divorce case, it seems clear the preferred method to address the ownership of property held as joint tenants with rights of survivorship is to specifically address the issue and to carry out the agreement or decisions with appropriate transfer of ownership interest.

6. Deeds of Trust & Foreclosures

In the period since the earlier article, there have been several important decisions concerning deeds of trust and foreclosures. In Hafer v. Skinner, the court's decision underscored the importance of following the procedure set forth in the trust deed or the statutory provisions for appointing substitute trustees.

212 Id. at 202-03.
213 Id. at 199.
215 The relevant code section, entitled: "[by] circuit court or judge, for trustee in deed, will or other writing; appointment of ancillary trustee under certain circumstances; substitution of trustee by party secured by trust deed," provides as follows:
In the Hafer case, the secured parties designated Mr. Skinner to serve as substitute trustee under the terms of paragraph 20 of the deed of trusts.\textsuperscript{216} While the designation of substitution was made prior to the public sale, the recor-dation of the instrument of substitution was not recorded until after the sale.\textsuperscript{217} The court, in holding that the trustee's sale should be set aside as a nullity, stated "the clear

(a) When the trustee, or, if there is more than one trustee, one or more of the trustees, in any will, deed or other writing, die or remove beyond the limits of this state, or decline to accept the trust, or having accepted, resign the same, or refuse to act as trustee, or be unable due to physical or mental disability to perform his, her, or their duties under the trust, the circuit court of the county in which such will was admitted to probate, or such deed or other writing is or may be recorded, may, on motion of any party interested, and upon satisfactory evidence of such death, removal, declination, resignation, refusal or inability, appoint a trustee or trustees in the place of the trustee or trustees named in such instrument and so dying, removing, declining, resigning or refusing, or being unable to perform his, her, or their duties under the trust.

(b) As an alternative to the method of substitution provided for in subsection (a) of this section, in the case of a trust deed to secure a debt or obligation if the trust deed does not by its terms prescribe a method for substitution, the party secured by the trust deed, or any surety indemnified by the deed, or the assignee or personal representative of any such secured party or surety has the authority, in the event of such death, removal, declination, resignation, refusal or inability as is described in subsection (a), to substitute a trustee or trustees in the place of the trustee or trustees named in such instrument, independent of any court action otherwise required by the provisions of subsection (a).

(c) If any such trust, other than a security trust, include real property situate in this state, and the trustee, or, if there be more than one trustee, one or more of the trustees, appointed by or under the will, deed or other writing creating such trust and required under the provisions thereof to act in respect of such real property, be a corporation or association chartered under the laws of any other state or jurisdiction which is not qualified under the laws of this state to hold property or transact business in this state, and refuses or is unable to so qualify, such court may in like manner appoint an ancillary trustee of such trust to act with respect to such real property situate in this state pursuant to, and with all the powers and authorities granted to the trustee or trustees of such trust by, the provision of the will, deed or other writing creating such trust.


\textsuperscript{216} The paragraph reads: .

20. Substitute Trustee. Lender at its option may from time to time, without notice, remove any person or persons herein or hereafter designated as Trustee and appoint a successor Trustee to any Trustee appointed herein or hereafter by an instrument recorded in any County in which Deed of Trust is recorded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by applicable law. Trustee is hereby authorized to act by agent or attorney in the execution of this trust.

542 S.E.2d at 853.

\textsuperscript{217} The Deed of Substitution of Trustee was recorded approximately one hour after Mr. Skinner conducted the sale. \textit{Id.} at 854.
meaning of the language [Item 20 of the deed of trust] is that the substitution is, or would be, accomplished when the appropriate notice is, or has been recorded in the appropriate county . . . .”

It is fair to assume that the Hafer decision may have been part of the reason for the passage of West Virginia Code § 38-1-4a, entitled Statute of Limitation for Sales by Trustee, by the West Virginia legislature in 2006. The section provides:

Provided the grantor on the deed of trust or the agent or personal representative of the grantor is provided notice as required by section four [§ 38-1-4] of this article, no action or proceeding to set aside a trustee’s sale due to the failure to follow any notice, service, process or other procedural requirement relating to the sale of property under a deed of trust shall be filed or commenced more than one year from the date of sale.

In Dunn v. Watson, the foreclosed-upon debtor under a deed of trust sought to set aside the foreclosure sale, alleging the substitute trustee had failed to serve him with notice of the foreclosure sale. More specifically, he alleged that the trustee failed to enclose a copy of the Notice of Substitute Trustee’s Sale in the envelope that he received by certified mail, for which he had signed the return receipt card attached to the certified mail. In response to the assertion, the court responded, “we hold that when a notice of sale by a trustee is placed in the mail pursuant to West Virginia Code § 38-1-4, a rebuttable presumption of receipt is established, which is especially strong when service is made by certified mail.” The court noted the trustee established a rebuttable presumption that it had given notice when it produced the return receipt card signed by the plaintiff (the party’s interest foreclosed) confirming that he had received the certified mail. In affirming the circuit court’s grant of summary judgment, the court said, “Mr. Dunn’s mere denial that he received the notice of sale is simply insufficient to rebut the presumption of receipt established by his signature on the return receipt card for the certified mail and does not create a genuine issue of material fact.”

In Fayette County National Bank v. Lilly, the court addressed an issue of first impression, i.e., “whether a grantor [in the deed of trust under which land had been sold because of default] may assert as a defense, the fair market

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218 Id. at 855.
220 566 S.E.2d 305 (W. Va. 2002).
221 Id. at 307.
222 Id.
223 Id. at 308.
224 Id. at 309.
value of the foreclosed real property in a deficiency judgment action.\textsuperscript{226} In addressing this question, the court noted:

> It is undisputed that all statutory requirements of the State's foreclosure laws were followed. It is also undisputed that the Lillys did not seek to have the foreclosure sale set aside; but, instead sought an offset against the deficiency in the amount of what they perceived to be the fair market value of the lots.\textsuperscript{227}  

After a review of foreclosures in general and an informative analysis of the statutory provision in our sister states that have similar nonjudicial foreclosures pursuant to deeds of trust, the court concluded that the only jurisdiction analogous to West Virginia was Virginia, and in Virginia such a challenge had only been permitted in one instance and the Virginia case was distinguishable from the case before the court.\textsuperscript{228}

The court further noted:

> Under the current real property foreclosure scheme there is a conclusive presumption that, at the point of a deficiency judgment proceeding, the property sold was sold for a fair market value. The Lillys now seek to have the court redefine that presumption so that it becomes rebuttable. This we refuse to do.\textsuperscript{229}

\textsuperscript{226} Id. at 237.  
\textsuperscript{227} Id. at 234.  
\textsuperscript{228} The court described:

Research reveals that in addition to our state, eight other jurisdictions provide by statute for nonjudicial foreclosure sales only if the matter involves a trustee deed. In three of these jurisdictions deficiency judgment proceedings are barred by statute. Therefore, the issue of challenging a foreclosure sale price does not arise in those "anti-deficiency" jurisdictions, at least in the context with which we are herein concerned. Four of the remaining five jurisdictions permit, by statute, a challenge to the foreclosure sale price at a deficiency judgment proceeding. The fifth jurisdiction, Virginia, appears to have permitted in only one instance, a grantor to challenge the foreclosure sale price at a deficiency judgment proceeding. \textit{See Rohrer v. Strickland}, 116 Va. 755, 82 S.E. 711 (Va. 1914). \textit{Rohrer} is distinguishable from the instant proceeding.

\textsuperscript{229} Id. at 239 (footnotes omitted).  
\textsuperscript{229} Id. at 240. As part of this discussion, the court stated:

We find support in our position from an observation made in \textit{BFP v. Resolution Trust Corporation}, 511 U.S. 531, 544-46, 114 S. Ct. 1757, 1765, 128 L. Ed. 2d 556, 569 (1994), wherein the United States Supreme Court stated: "We deem, as the law has always deemed, that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State’s foreclosure law have been complied with.” We have discerned no violation of our foreclosure laws by the Bank or trustee in the instant proceeding.
In addition to resolving the case before it, the court provided helpful insight into issues pertaining to "foreclosures." First, the court recognized the need for stability in this area of the law and the role of the legislature in addressing the basic issues. The court explained:

We believe that the very foundation of our trustee foreclosure laws would be unsettled were we to allow grantors to challenge the value of real property at a deficiency judgment proceeding. What has formerly been a relatively quick and inexpensive proceeding, would turn into protracted and expensive litigation. The implications could negatively effect lending institutions from providing loans to its customers. The issue posed to this Court by the Lillys clearly requires legislative consideration and legislative action as it is a marked deviation from existing law.  

Second, while expressing a willingness to defer to the legislature as the appropriate body to revise the statute, the court clearly signaled its willingness to continue to address specific issues of fairness, as necessary. This message is imparted in footnote 19 of the opinion wherein the court states:

Id. See also Andy M. Perry, Jr., Note, BFP v. Resolution Trust Corporation: Supreme Court Shifts Focus onto State Law in Ruling on Mortgage Foreclosure Sales, 97 W. VA. L. REV. 255 (1994).

Lilly, 484 S.E.2d at 240.

The court provides an example of the legislature addressing a similar issue:

[T]he legislature has addressed the issue under discussion in the area of consumer goods. Under this state's Uniform Commercial Code, W. Va. Code § 46-9-507 (1963), a debtor is authorized to challenge, at a deficiency judgment proceeding, the sale price of goods sold by a secured creditor. See Wachovia Bank and Trust Company v. McCoy, 165 W. Va. 563, 270 S.E.2d 164 (1980). In syllabus point 4 of Bank of Chapmanville v. Workman, 185 W. Va. 161, 406 S.E.2d 58 (1991), we said that "[w]hen a secured creditor is found to have sold collateral in a commercially unreasonably manner, the fair market value of the collateral is rebuttably presumed to be equal to the amount of the remaining debt; to recover a deficiency, the secured creditor must prove that the debt exceeded the fair market value of the collateral." Our holding in syllabus point 4 of Bank of Chapmanville was premised upon the statutory right of a debtor to challenge the sale price of goods at a deficiency judgment proceeding.

The existence of W. Va. Code § 46-9-507 persuades this Court that any deviation from existing laws requires legislative involvement. The issue of permitting a grantor to challenge the sale price of foreclosed real property at a deficiency judgment proceeding is a legislative matter.

Lilly, 484 S.E.2d at 240-41.
We hasten to point out that merely because the legislature has failed to provide by statute a mechanism for challenging the value of real property obtained from a foreclosure sale, does not necessarily mean that this Court may not resolve the matter. Our trustee sale statutes do not address the issue of setting aside a foreclosure sale. But, our cases have applied common law principles of equity to permit an action to set aside a foreclosure sale.\textsuperscript{232}

The court concluded, “we hold that a grantor may not assert, as a defense in a deficiency judgment, that the fair market value of real property was not obtained at a foreclosure sale”\textsuperscript{233} and affirmed the circuit court’s grant of summary judgment to the bank.

The court’s “message” in its \textit{Fayette County National Bank} decision is reiterated by the court in \textit{Lucas v. Fairbanks Capital Corporation}.\textsuperscript{234} \textit{Lucas} was a putative class action law suit filed in Lincoln County which presented two certified questions to the West Virginia Supreme Court of Appeals.\textsuperscript{235}

\textsuperscript{232} \textit{Lilly}, 484 S.E.2d at 240 n.19. Footnote 19 continues with the court providing the following examples:

\textit{See Syl. Pt. 2, Corrothers v. Harris, 23 W. Va. 177 (1883) (“A sale under a trust-deed will not be set aside unless for weighty reasons.”); Syl. Pt. 12, Atkinson v. Washington and Jefferson College, 54 W. Va. 32, 46 S.E. 253 (1903) (In part: “Such sale will not be set aside on the ground of inadequacy of price . . . [where] the evidence as to the value of the land does not clearly show that the price for which it sold is so inadequate as to shock the conscience[.]”); Syl. Pt. 2, Emery's Motor Coach Lines v. Mellon National Bank & Trust Co. of Pittsburgh, 136 W. Va. 735, 68 S.E.2d 370 (1951) (“Under a deed of trust appointing three trustees and providing that any two of such trustees may act, it is necessary that two of such trustees be personally present at any sale and supervise the same. A sale by one trustee in such instance will be set aside.”)} Our cases have also held that a grantor may seek injunctive relief to prevent a real property foreclosure sale from occurring. \textit{See Villers v. Wilson}, 172 W. Va. at 115, 304 S.E.2d at 20 (where it was said that “there are instances when an injunction may lie; for example, when the proper amount due on the debt is in dispute”) (citing \textit{Wood v. W. Va. Mortgage & Discount Corp.}, 99 W. Va. 117, 127 S.E. 917 (1925)).

\textit{Id.} \textsuperscript{233} 484 S.E.2d at 241.

\textsuperscript{234} 618 S.E.2d 488 (W. Va. 2005).

\textsuperscript{235} The court reformulated the certified question as follows:

\textit{[T]he first [reformulated] certified question [is]}

1. Does the trustee in a trust deed given as security in connection with a home mortgage loan owe a fiduciary duty to, prior to foreclosing under W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997), (1) review account records to ascertain the actual amount due, or (2) consider objections to foreclosure raised by the trust grantor?

The second certified question is reformulated to ask:
In *Lucas*, the court acknowledged that the plaintiff and at least one of the defendants (the substitute trustee in many of the deeds of trust) wanted the “Court to develop and adopt a set of rules to govern the conduct of loan servicers and trustees in connection with the administration of loans in trustee foreclosure proceedings.” The court explained that while their efforts may be “laudable” and while the court does “not deny that the present statute governing sales under trust deeds, enacted long ago in 1923, may well be inadequate to address the complexities of the modern state of the home loan mortgage as it relates to trust deed transactions . . . such issues are for the legislature to resolve.”

In summary, the majority, with two judges dissenting, answered the reformulated certified questions as they related to the duty of the trustee in the negative based upon the statutory requirements set forth in West Virginia Code § 38-1-3. While disagreeing as to the obligations of the trustee, all justices agreed a trustee in a deed of trust has a fiduciary duty, which the court set forth in Syllabus 1 as follows: “1. The trustee in a trust deed given as security in connection with a home mortgage loan owes a fiduciary duty to the signatories of the trust deed.”

In *Lucas*, the court again notes, as it had in the *Fayette County National Bank* case, that even though the statute does not address a specific matter, it does not mean the court will not address it under equitable principles or that it may not be prudent practice for a trustee as a matter of “best practices” to do certain things not specifically required by the statute. In effect, the court ex-

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2. Does the principle that equity abhors a forfeiture require creditors in a deed of trust, or their representatives, to pursue remedies that are not set out in the deed of trust, or any relevant statutes, to attempt to cure a default prior to pursuing a foreclosure under W. Va. Code § 38-1-3?

*Id.* 618 S.E.2d at 492.

236 *Id.* at 493.

237 *Id.*

238 “[W]e find nothing in the language of W. Va. Code § 38-1-3 to suggest that a trustee has a duty to consider objections to the foreclosure sale” (618 S.E.2d at 497), and “we hold that W. Va. Code § 38-1-3 (1923) (Repl. Vol. 1997) does not require creditors in a deed of trust, or their representatives, to pursue remedies that are not set out in the deed of trust or any relevant statute to attempt to cure a default prior to pursuing a foreclosure under W. Va. Code § 38-1-3.” *Lucas*, 618 S.E.2d at 499.

239 Syl. Pt. 1, 618 S.E.2d 488. Justice Starcher, in writing for the dissent said, “I am in agreement with my colleagues in adapting Syllabus Point 1 . . . I dissent, however, to the rest of the opinion.” 618 S.E.2d at 499 (Starcher, J., dissenting).

240 *See supra* notes 225-33 and accompanying text.

241 The court described:

[W]e find nothing in the relevant statute to expressly prohibit a trustee from obtaining information regarding the amounts due prior to foreclosure, or from seeking the aid of a court to resolve such an issue if, in the judgment of the
plained that the trust grantor is not being deprived of the opportunity to contest matters and that it is the trust grantor's duty to seek the resolution of disputes he or she wants the court to resolve and not that of the trustee. In the language of the court,

we previously have observed that a trustee does not have the power to resolve disputes between the grantor and grantee. In *Villers v. Wilson*, we stated that "[a] trust deed sale is normally conducted by a private individual, not a court. The trustee has limited powers, which do not include the power to resolve controversies over debts owed by the secured creditor to the debtor." 172 W. Va. 111, 115, 304 S.E.2d 16, 19 (1983) (emphasis added) (citations omitted).

Instead, where the trust grantor wishes to challenge a foreclosure, the proper remedy is for the grantor to seek an injunction or to file an action to have the foreclosure sale set aside:

[T]he lending institutions of this state have operated under the current trustee foreclosure scheme since the founding of this state. This scheme has always permitted a grantor to seek an independent action to either prevent a real property foreclosure from taking place, or to have a real property foreclosure sale set aside.\(^{242}\)

In the final analysis, the court in the *Fayette County National Bank* and *Lucas* cases did not limit any substantive rights of the trust grantor. What it did do was reaffirm that the responsibilities to resolve matters that may be in dispute are primarily on the party who raises them, i.e., the trust grantor/maker of the note, and reiterate at what stage of the procedure such issues or matters need to be raised.

It is also clear that the majority of the court believed that if changes are to be made as to the statutory requirements, those changes are in the province of the legislators.

We recognize that there have been instances in which this Court has interpreted a vague statute to include a requirement that, perhaps, was not readily apparent on the face of the statute in order to give effect to the intent of the Legislature. However,
the present case certainly does not present such a circumstance. The relationship between debtors and creditors in the home mortgage industry is far too complex for this Court to endeavor to fashion a rule requiring a creditor to take additional steps before seeking foreclosure by the trustee to the deed of trust. We are ill-equipped to ascertain the potential impact of such an action. This is, without question, an issue for the Legislature to undertake.

It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms which may not be disregarded. 40 Am. Jur., Statutes, Section 228.243

Another foreclosure issue is addressed in In re Jonathan Jerome Bar- dell,244 which raised the question as to when a debtor in default on his “mortgage” is no longer entitled to cure his default. In 2001, the debtor borrowed $108,300 from BB&T, secured by a deed of trust on his residence. Following a default on his obligation, the property was sold on December 29, 2005, by the trustee pursuant to the deed of trust, and there was no issue as to whether the foreclosure was in accordance with West Virginia law. The purchase price at the foreclosure was $130,000, and at the sale the purchaser posted a 10% deposit and executed the trustee’s memorandum of sale, which provided that the final settlement would occur within twenty (20) days. On December 31, 2005, the debtor filed a Chapter 13 petition for bankruptcy, listed the foreclosed upon residence on his bankruptcy schedule, and recorded a notice of the bankruptcy filing in the office of the Clerk of the County Commission for Jefferson County. The Chapter 13 petition was filed before the foreclosure sale deed was recorded. The debtor in bankruptcy sought to cure his default and thereby prevent the delivery of the foreclosure deed.245 Under the federal bankruptcy law, resolution of the issue is dependent on whether under state law “the debtor possessed legal or equitable title to the property at the time of the filing of his petition.”246 Following a review and discussion of relative authority in West Virginia, Virginia law, the law of the Fourth Circuit and some of our sister circuits, and several scholarly treatises, the district court affirmed the bankruptcy judge’s decision.

243 Id. at 498 (footnote omitted).
244 374 B.R. 588 (N.D. W. Va. 2007).
245 Id. at 590.
246 Id. at 591.
The court held that “in West Virginia a foreclosure sale is ‘complete’ when the trustee or auctioneer accepts the bid and executes a memorandum of sale.”

In so holding, the district court explained it “respectfully disagrees with Judge Friend’s” decision in an earlier case that had raised the same issue, Smith v. Mooney, 155 B.R. 145 (Bankr. S.D.W. Va. 1993), in which Judge Friend had construed the West Virginia court’s language in Atkinson v. Washington & Jefferson College that the existence of the memorandum of sale did

An examination of the decisions of this court fails to disclose any case in which the aid of a court of equity has been sought by the debtor, or an interested creditor, in arresting the execution of the deed after the sale has progressed so far as the acceptance of a bid by the trustee, after crying the sale pursuant to advertisement, at the time and place fixed for sale, and payment of part of the purchase money by the purchaser. There is therefore no precedent to be followed in this case, and the conclusion must be determined by the general principles of equity cases involving sales by trustees under deeds of trust. There are many cases in which sales have been enjoined upon the application of the grantor in the deed of trust, showing equitable grounds, such as the misconduct of the trustee, want of notice, a defect in the notice, usury in the debt secured, or disputed claims as to credits upon the debt, but the bills have been filed and the injunction granted before the date of sale. In some cases sales have been set aside, even after the execution of the deed, upon equitable grounds. Rossett v. Fisher, 11 Grat. 492.

The nature of the contract between the trustee and the purchaser has been determined by this court in the case of Fleming v. Holt, 12 W. Va. 143, where Judge Green, delivering the opinion of the court, said, “A sale by a trustee, like a sale by a commissioner, is without warranty; but there is this obvious difference between the two: The contract of purchase at a sale by the commissioner is incomplete till his bid is accepted by the court, who is the real seller of the property, the commissioner of sale being the mere agent of the court. The bid is accepted by the court by the confirmation of the sale. After that, though the purchaser, before the deed is made to him, finds out that the title to the land is defective, he is nevertheless bound to receive it and pay the purchase money. In a sale by a trustee, the court does not accept the bid of the purchaser, but it is accepted by the auctioneer when he knocks the land down; and on the making by him of a memorandum of the sale and its terms, signed by the auctioneer, the contract for the sale is as complete as the contract for the sale made by a commissioner is when the court accepts the bid by confirming the sale. After such knocking down of the land by the auctioneer, and the making of such memorandum, the purchaser must accept the deed and pay the purchase money, though he does find the title defective. He must, if he wishes to do so, investigate the title in this case, as in the other, while the contract is incomplete; that is, in the last case, before land is knocked down to

247 Id. at 595.
248 Id. at 594.
249 Id.
250 46 S.E. 253 (W. Va. 1903). Atkinson v. Washington & Jefferson College involved an attempt by a party secured under a deed of trust junior to the lien of the deed of trust that was “foreclosed” upon, to contest the validity of the sale. The language that Judge Friend relied upon concerns a “right to call for the deed” and is a part of the following discussion by the Atkinson court:
not confer legal title on the purchaser but rather conferred the right to call for the legal title and to enforce specific performance of the contract for sale.\textsuperscript{251}

As to the language in \textit{Atkinson} of "the right to call for the deed," Judge Bailey explained:

[W]hile this is certainly true, the fact remains that after the bid is accepted and the memorandum executed, the debtor has no interest in the property. The equitable interest in the property lies with the purchaser at the sale. The legal title rests in the hands of the trustee. While the purchaser only has a right "to call for the deed," it is the trustee to whom the call is to be made, and it is the trustee who will execute the deed. \textit{See West Virginia Code} § 38-1-6.\textsuperscript{252}

Judge Bailey’s statement is consistent with the \textit{Atkinson} case, which succinctly states in Syllabus 1: “A contract of sale between a trustee in a deed of trust and a purchaser is complete when the trustee, selling at auction, knocks the land down to the bidder, makes a memorandum of the sale and its terms, and signs the same.”\textsuperscript{253}

\textbf{B. Liens}

In the original article the discussion of liens was concerned primarily with the periods of time a title examiner needed to examine the various lien in-

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\textsuperscript{251} \textit{In re Jonathon Jerome Bardell}, 374 B.R. at 592.  \\
\textsuperscript{252} \textit{Id.} at 594.  \\
\textsuperscript{253} \textit{Id.} (citing Syl. Pt. 1 \textit{Atkinson}, 46 S.E. 253).
\end{flushright}
dices as part of a title examination. In this “update,” the discussion of the recent development is more general.

1. Priority of Liens

In Barber v. Barber\(^{254}\) the issue was as to the priority between a summary judgment granted February 21, 1991 in a wrongful death civil action and a judgment obtained by an ex-spouse for failure to pay child support. The judgment for failure to pay child support was awarded on July 22, 1992, and a writ of execution on the judgment was delivered to the sheriff on September 16, 1992.\(^{255}\) As to the debtor’s real estate, all parties conceded the judgment entered on February 21, 1991 had priority under West Virginia Code § 38-3-6.\(^{256}\) The issue was, therefore, the priority to the judgment debtor’s personal assets. As to the personal property, the court held that since the judgment creditor under the February 21, 1991 wrongful death action had failed to perfect her judgment by delivering a writ of execution to the sheriff pursuant to West Virginia Code § 38-4-5, the ex-spouse’s judgment for child support had priority\(^{257}\) (the relevant portion of West Virginia Code § 38-4-8 provides, “A writ of fieri facias or execution shall create a lien, from the time it is delivered to the sheriff . . . upon all of the personal property . . .”).\(^{258}\)

\(^{254}\) 464 S.E.2d 358 (W. Va. 1995).

\(^{255}\) Id. at 360.

\(^{256}\) Id. The text of the statute provides:

Every judgment for money rendered in this State, other than by confession in vacation, shall be a lien on all the real estate of or to which the defendant in such judgment is or becomes possessed or entitled, at or after the date of such judgment, or if it was rendered in court, at or after the commencement of the term at which it was so rendered, if the cause was in such condition that a judgment might have been rendered on the first day of the term; but if from the nature of the case judgment could not have been rendered at the commencement of the term, such judgment shall be a lien only on or after the date on which such judgment or decree could have been rendered and not from the commencement of the term; but this section shall not prevent the lien of a judgment or decrees from relating back to the first day of the term merely because the case shall be set for trial or hearing on a later day of the term, if such case was matured and ready for hearing at the commencement of the term, not merely because an office judgment in a case matured and docketed at the commencement of the term does not become final until a later day of the term. A judgment by confession in vacation shall also be a lien upon such real estate, but only from the time of day at which such judgment is confessed. Such lien shall continue so long as such judgment remains valid and enforceable, and has not been released or otherwise discharged.

W. Va. Code § 38-3-6 (1931).

\(^{257}\) Barber, 464 S.E.2d at 360-61.

\(^{258}\) W. VA. CODE § 38-4-8 (1931).
In *City of Parkersburg v. Carpenter* the issue was the priority between the City of Parkersburg’s demolition lien, the State Auditor’s tax liens, and St. Joseph’s Hospital’s judgment lien. In resolving the issue of priority, the court noted that West Virginia Code § 38-10C-1 requires that liens in favor of the state, a political subdivision, or municipality take their place in chronological order upon docketing with deeds of trust and other liens. As the court noted, the statute provides for an exception for liens for real property taxes accruing under West Virginia Code § 11-8-1, which are not subject to the requirement of recordation. However, except for real property taxes, which do not need to be recorded, the court explains, “Priority is determined by the chronological order of the filing of the liens in the clerk’s office.” It rejected the City of Parkersburg’s argument, which had been accepted by the circuit court, of equitable subordination.

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259 507 S.E.2d 120 (W. Va. 1998).
260 See W. VA. CODE § 8-12-16(d) (1996).
262 See W. VA. CODE § 38-3-6 (1931).
263 The text of the statute provides:

No lien in favor of the State of West Virginia, or any political subdivision thereof or of any municipality therein, whether heretofore or hereafter accruing, except the lien for taxes accruing under the provisions of article eight, chapter eleven of the Code of West Virginia, one thousand nine hundred thirty-one, shall be enforceable as against a purchaser (including lien creditor) of real estate or personal property for a valuable consideration, without notice, unless docketed, as hereinafter provided in the office of the clerk of the county court of the county wherein such real estate or personal property is, before a deed therefor to such purchaser is delivered for record to the clerk of the county court of such county. The term “purchaser” as used herein shall be construed to include lien creditors whose liens were acquired and perfected prior to such docketing.

W. VA. CODE § 38-10C-1 (1943).
264 Carpenter, 507 S.E.2d at 122.
265 Id. at 123.
266 The court reasoned:

Equitable subordination is a doctrine of equity that is applied almost exclusively in bankruptcy proceedings, generally where there is inequitable conduct by a claimant resulting in injury to other creditors. 4 Lawrence P. King, *Collier on Bankruptcy*, 510.05[1] at 510-13 (15th ed. rev. 1998). The goal of the doctrine is to put a creditor in the place he would have occupied, but for the inequitable conduct. A three-factor test has been established to determine if the doctrine should apply: 1) the claimant must have engaged in inequitable conduct; 2) the claimant must have unfairly profited from the action or must have placed other creditors at a disadvantage; and 3) subordination must be consistent with the principles contained in the Bankruptcy Code. In re Daugherty Coal Company, Inc., 144 B.R. 320, 323 (N.D.W. Va. 1992).

Id. at 123.
The provisions of West Virginia Code § 38-10C-1 also provided the answer to the issue in *McClung Investments, Inc. v. Green Valley Community Public Service District*. The question in *McClung Investments* was the priority between a deed of trust and the public service district's lien created and enforceable under West Virginia Code § 16-13A-9.

The essence of the Public Service District's argument was that its lien came within the exception set forth in West Virginia Code § 38-10C-1 for "the lien for taxes accruing under the provision of article eight [§ 11-8-1 et seq.] chapter eleven . . . ." The court, noting that this was "an issue of first impression for this Court," cited the earlier article on the Scope of Title Examination in rejecting the public service district's argument in holding that the liens created and enforceable under West Virginia Code § 16-13A-9 are subject to the recordation requirements of West Virginia Code § 38-10C-1 and, therefore, must be docketed to be enforceable against a purchaser of the property for valuable consideration without notice.

The court's decision in the *City of Parkersburg* and the *McClung Investment* cases demonstrates that the court recognizes the importance that liens of governmental entities affecting the title to real estate need to be recorded so that those seeking information as to the status of titles can find that information in the "record room."

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268 § 16-13A-9(f) provides in part, "All delinquent fees, rates and charges of the district for either water facilities, sewer facilities, gas facilities or stormwater systems or stormwater management programs are liens on the premises served of equal dignity, rank and priority with the lien on the premises of state, county, school and municipal taxes." W. VA. CODE § 16-13A-9 (1994).
269 485 S.E.2d at 437.
270 Fisher, supra note 1, at 528-29.
271 The court further described:

We are persuaded by the reasoning of Professor Fisher and find, therefore, that public service district liens created and enforceable under W. Va. Code § 16-13A-9 are subject to the recordation requirements of W. Va. Code § 38-10C-1 so that such liens must be docketed to be enforceable against a purchaser of the property for valuable consideration, without notice. Therefore, according to W. Va. Code § 38-10C-1, for the appellant's lien for delinquent sewer service fees to be superior to the deed of trust pursuant to which the appellee holds title to the property, the appellant's lien must have been docketed prior to the date of the recording of the deed of trust. There is no dispute, however, that the deed of trust was recorded prior to the docketing of the notice of the appellant's lien.

[*McClung Inv.*, 485 S.E.2d at 438.]
2. Mechanics’ Liens

In Richards v. Harman, the court addressed the question of what constitutes “one contract” under the provision of § 38-2-16 of the mechanics’ lien law. In the late 1980s, the contractor had been hired to complete infrastructure work (roadways, water lines, and sewage systems) for a subdivision being developed in the Canaan Valley. The developers made several cash payments for the work performed by the contractor, but eventually reached a point where they executed promissory notes for the remaining balance. In the years that followed, the contractor would occasionally perform additional work at the subdivision for which he was paid. In 2003, the contractor performed work in the subdivision to repair a water line and upon completion of the water line repair, submitted a bill in the amount of $3,000.00. When the bill was not paid, the contractor filed a mechanic’s lien in the amount of $221,901.75, which included the work performed in August of 2003 and almost $219,000.00 for the unpaid balance on the promissory notes given in the early 1990s for the work performed in the late 1980s. The circuit court ruled, in effect, that under the statute the mechanic’s lien included the unpaid balance for the work performed in the late 1980s, as well as the work of August of 2003. The Supreme Court of Appeals reversed the circuit court judgment in favor of the contractor for the entire amount, stating:

Accordingly, we now hold that with respect to mechanics’ liens, there is a requirement of continuity, and in order for a mechanic’s lien to relate back to the commencement of work for which the lien is claimed, the work must be of such nature that it is reasonably apparent that both the prior and current work are directly connected and are all part of the same project. In the in-

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272 617 S.E.2d 556 (W. Va. 2005).
273 The text of the statute is as follows:

For the purposes of this article, all materials furnished, all work done, and all services provided by any one person, firm or corporation, upon any one building or the improvements appurtenant thereto, or upon the real property whereon the same stands, or to which it may have been removed, shall be deemed and considered one contract, whether or not all of such material was bought at one time, or under one general agreement or otherwise, and whether or not all of such work, labor or services provided, was contracted for at one time or otherwise.

274 617 S.E.2d at 558.
275 See id.
276 The owner did not dispute that the contractor timely preserved a mechanic’s lien for the repair of the water line in August of 2003. Id. at 559.
stant case, the appellee is unable to satisfy the continuity re-
requirement.277

C. Partition

One interesting topic receiving the court’s attention over the past decade
has been partition, with the case of Ark Land Company v. Harper278 being one
of the most interesting. Ark Land involved a suit to partition the ancestral home
of the Caudill family after some members of the family sold their interest in the
property to a coal company who wanted to strip mine the coal. Those members
of the family who had refused to sell their interest appealed the circuit court’s
order that the property could not be conveniently partitioned in kind and, there-
fore, partition would have to be by sale.

In reversing the circuit court, the Supreme Court of Appeals set forth
the relevant law in its third syllabus as follows:

In a partition proceeding in which a party opposes the sale of
property, the economic value of the property is not the exclu-
sive test for deciding whether to partition in kind or by sale. Evidence of longstanding ownership, coupled with sentimental
or emotional interests in the property, may also be considered in
deciding whether the interests of the party opposing the sale
will be prejudiced by the property’s sale. This latter factor
should ordinarily control when it is shown that the property can
be partitioned in kind, though it may entail some economic in-
convenience to the party seeking a sale.279

A student Note by John Huff entitled “Chop It Up or Sell It Off: An Ex-
amination of the Evolution of West Virginia’s Partition Statute,” published in
Volume 111 of the West Virginia Law Review280 does an excellent job of tracing
the case law development following the rewrite of the partition statute in 1931
and suggests that a coherent and workable test is possible to guide decisions as
to whether a partition in kind is possible or a sale is required.

D. Miscellaneous

In American Canadian Expedition v. Gauley River Corporation,281 the
Gauley River Corporation entered into a real estate option contract with Ameri-

277 Id. at 561.
278 599 S.E.2d 754 (W. Va. 2004).
279 Syl. pt. 3, Ark Land, 599 S.E.2d at 756.
280 John Mark Huff, Note, Chop It Up Or Sell It Off: An Examination of the Evolution of West
281 655 S.E.2d 188 (W. Va. 2007).
can Canadian Expedition giving American Canadian Expedition the exclusive right, for a three-year period, to purchase certain tracts of real estate in Fayette County. In the option agreement, logging or standing timber was not mentioned.\textsuperscript{282} Fourteen (14) months after entering into the option agreement, Gauley River Corporation contracted with a third party for the removal of timber from a portion of the option property, and over the next six months $42,000 worth of timber was removed.\textsuperscript{283} Within the option period, American Canadian Expedition filed suit for damage for the loss of timber and damages caused by the logging operation on the option property and acquired title to the option property upon the delivery of the deed and payment of the purchase price.\textsuperscript{284} The circuit court's granting of summary judgment in favor of the Gauley River Corporation was affirmed by the West Virginia Supreme Court of Appeals, holding:

During the option period of a real estate option contract, the optionee has no ownership interest in the property, or the timber on it, absent specific language in the option contract to the contrary. Therefore, Appellant's enforceable rights under the terms of this option contract were limited to being able to purchase the property at the agreed upon price within the agreed upon period. As with any contract, additional terms and conditions may be negotiated by the parties to an option contract and enforcement of those terms and conditions would be governed by contract law. No additional terms or conditions were stipulated in the option contract at issue. Having no equitable or legal ownership interest in the timber under our established law and preserving no special right under the contract, the only remedy to Appellant's objection to the damage which may have occurred to the property during the option period was to not exercise the option. Clearly, the law contains no requirement for optionees to exercise their option and thus be forced to accept the damages and acquire ownership of unsuitable, if not unusable, property. Accordingly, we hold that the basic enforceable personal rights of the holder of an option to purchase real estate include the right to purchase the property at a certain price within a prescribed period. As with any contract, additional terms and conditions may be negotiated by the parties and enforcement of

\textsuperscript{282} Id. at 190.
\textsuperscript{283} Id.
\textsuperscript{284} Id. (footnote omitted).
those terms and conditions would be governed by contract law. 285

In Wilson v. Draper & Goldberg, 286 the issue was whether an attorney acting as a trustee, in foreclosing on a deed of trust, could be a “debt collector” under the provision of the federal Fair Debt Collection Practices Act. 287 The court rejected all of the attorney/trustee’s arguments, including their argument that they were included within the exemption for “any person collecting or attempting to collect any debt . . . due another to the extent such activity . . . is incidental to a bona fide fiduciary obligation. 15 U.S.C.A. § 1692a(6)(F)(i) (West 1998).” 288 The Fourth Circuit Court of Appeals reversed the district court’s grant of summary judgment for the attorney/trustee and remanded the case to the district court for further proceeding.

On remand, Wilson can show that Defendants meet the definition of “debt collector” by demonstrating that they use “any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or . . . regularly collect[ ] or attempt[ ] to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C.A. § 1692a(6); see also Heintz, 514 U.S. at 294, 115 S. Ct. 1489 (“[A] lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly ‘attempts’ to ‘collect’ those consumer debts.”); Crossley, 868 F.2d at 569-70 (relying on volume of attorney’s mortgage foreclosure actions to show he was a debt collector); Shapiro, 823 P.2d at 124 (“Since a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt, those who engage in such foreclosures are included within the definition of debt collectors if they otherwise fit the statutory definition.”). 289

In holding that these defendants may be subject to the provisions of the Act, the court clarified that:

Our decision is not intended to bring every law firm engaging in foreclosure proceedings under the ambit of the Act. Nevertheless, it is well-established that the Act applies to lawyers “who

285 Id. at 192.
286 443 F.3d 373 (4th Cir. 2006).
287 Id. at 375-76 (citing 15 U.S.C.A. § 1692a(6) (West 1998)).
288 Id. at 377.
289 443 F.3d at 379.
‘regularly’ engage in consumer-debt-collection activity, even when that activity consists of litigation.” Heintz, 514 U.S. at 299, 115 S. Ct. 1489. Congress enacted the Act to “eliminate abusive debt collection practices by debt collectors.” 15 U.S.C.A. 1692(e) (West 1998); see also Carroll, 961 F.2d at 460. As such, lawyers who regularly engage in consumer-debt-collection activity should not be allowed to thwart this purpose merely because they proceed in the context of a foreclosure.\textsuperscript{290}

In the instant case, the court notes, “Defendants allegedly initiated over 2300 foreclosure actions in Maryland in 2003.”\textsuperscript{291}

CONCLUSION

The origins of Anglo-American property law can be traced back to William the Conqueror’s victory at the Battle of Hastings in 1066. Over the centuries, it has evolved from its feudal beginning as a way to control and govern the kingdom to its current role as a basic ingredient of our twenty-first century economy. Throughout the years, property law has reflected the social, economic, and political needs of the society of that period. In subtle but significant ways, this evolutionary process continues as we enter the early years of the twenty-first century, and this process makes the law intellectually stimulating and ours an interesting profession.

\textsuperscript{290} Id. (footnote omitted).

\textsuperscript{291} Id.