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**Property—Prescriptive Rights—Extinguishment by Conveyance
of the Servient Estate to a Purchaser Without Notice**

In 1934 Fanti constructed a private sewer under property owned by the Baltimore and Ohio Railroad Company. The railroad neither consented to nor objected to the construction. In 1963 Welsh purchased the railroad property subject to "all existing ways and servitudes, howsoever created". Fanti claimed that he had acquired an easement by prescription and instituted this action to prevent Welsh from interfering with the use and enjoyment of the sewer. It was disputed whether or not the railroad company had notice of the existence of the sewer before the conveyance to Welsh. However, the trial court, in reversing the commissioner's finding in favor of Welsh, apparently decided that Fanti acquired the easement and that a map showing the sewer and a manhole on the railroad property constituted constructive notice of the sewer. *Held*, reversed. A prescriptive easement cannot be acquired if the owner of the servient estate has no notice of the easement, and any existing easement will be extinguished if the servient estate is sold to a purchaser who has neither actual nor constructive notice of the easement. *Fanti v. Welsh*, 161 S.E.2d 501 (W. Va. 1968).

There is a split of authority as to who should prevail in situations similar to the instant case. Some states take the position that a prescriptive easement will not be extinguished by the subsequent sale of the servient estate to an innocent purchaser without notice. These decisions are based on the reasoning that the grantee cannot acquire greater rights than his grantor had,¹ or that the registry laws do not extinguish easements by prescription in favor of bona fide purchasers.² These reasons appear to be nothing more than a restatement of the familiar common law rule of "prior in time, prior in right".³

The opposite view is illustrated by *Fanti*⁴ and the following ex-

¹ *McKeon v. Brammer*, 238 Iowa 1113, 1125, 29 N.W.2d 518, 525 (1947); *Ricenbaw v. Kraus*, 157 Neb. 723, 728, 61 N.W.2d 350, 355 (1953).

² *Jones v. Harmon*, 175 Cal. App. 2d 869, 878, 1 Cal. Rptr. 192, 198 (Dist. Ct. App. 1959); *Shaughnessey v. Leary*, 162 Mass. 108, 112, 38 N.E. 197, 199 (1894); *see*, 3 R. POWELL, REAL PROPERTY, § 424 (1952); 3 H. TIFFANY, REAL PROPERTY, § 828 (3d ed. 1939; *Annot.*, 174 A.L.R. 1241, 1244 (1948)).

³ In the case of *Proudfoot v. Saffle*, 62 W. Va. 51, 57 S.E. 256 (1907), the court decided that a way of necessity could not be extinguished as long as the necessity continued to exist; therefore, a subsequent judicial sale of the servient estate to a purchaser did not extinguish the way of necessity. This principle was applied in *Dewitt v. Elmore*, 112 W. Va. 617, 166 S.E. 271 (1932), and a similar result was reached. In neither case, however, did the

planations have been advanced to substantiate this position. Courts have been thinking in terms of estoppel; however, since there is no common law or statutory duty to give notice, there is no fault, and thus no basis for estoppel.⁵ Another explanation is that the "apparentness" requirement, which is necessary in the *creation* of easements, has been incorrectly applied to the question of *extinguishment* of easements.⁶ A third approach is that these unrecordable interests endanger certainty of title and diminish the effectiveness of the recording system; therefore, courts have yielded to policy reasons which favor the protection of the innocent purchaser without notice.⁷

The last explanation seems to give some justification for the court's decision in *Fanti*. An opposite result would have placed a burden on prospective buyers, attorneys, title abstractors or anyone who relies on the recording system. It should be pointed out, however, that the court has not eliminated the problem. Instead, the court has merely shifted the burden to owners of the dominant estates. These owners are now faced with the problem of continually "advertising" their rights without any assurance that even this will protect their interests. Owners of nonapparent easements will now have an even greater difficulty in making their rights known to prospective purchasers.

A simple solution would be to expand the recording statutes to include the recording of titles acquired by adverse possession and rights acquired by prescription. This solution, of course, would require additional legislation. Appeals for expanding a state's recording system are not new. In 1926 it was suggested that an adverse claimant be permitted to file a *lis pendens* in a suit to quiet title against the record owner. Since compelling litigation might be undesirable, it

court discuss whether or not the purchaser had notice of the way of necessity. Why is notice important in dealing with prescriptive easements and yet seemingly immaterial in dealing with ways of necessity? Since both interests are unrecordable rights, there is seemingly no logical legal principle to support such a distinction. It should also be pointed out that the common law is still in effect in West Virginia except as changed by legislation. W. VA. CONSR. art. VIII, § 21; W. VA. CODE ch. 2, art. 1, § 1 (Michie 1966). Since the recording statutes, W. VA. CODE ch. 40, art. 1, § 8 (Michie 1966) and W. VA. CODE ch. 40, art. 1, § 9 (Michie 1966), do not include prescriptive rights, the common law rule of "prior in time, prior in rights" should prevail. Therefore, if an easement had been acquired by *Fanti*, it should have survived the conveyance to Welsh.

⁴ *Accord*, *Mesmer v. Uharriet*, 174 Cal. 110, 162 P. 104 (1916); *Backhausen v. Mayer*, 204 Wisc. 286, 234 N.W. 904 (1931).

⁵ *Wiesel v. Smira*, 49 R.I. 246, 254, 142 A. 148, 151 (1928).

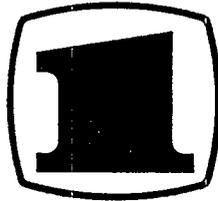
⁶ *McKeon v. Brammer*, 238 Iowa 1113, 1124, 29 N.W.2d 518, 523 (1947).

⁷ *Hawley v. McCabe*, 117 Conn. 558, 564, 169 A. 192, 194 (1933).

was further suggested that the adverse claimant be allowed to file a statement of the adverse claim in the recording office.⁸ If this statement included sufficient information for indexing, the result would be a complete recording system which would afford protection to both purchaser and adverse claimant.

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⁸ Ferrier, *The Recording Acts and Titles by Adverse Possession and Prescription*, 14 CALIF. L. REV. 287, 296 (1926).



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