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ARTICLE

TIME TO REPAIR THE CHAIN: VOID DEEDS, SUBSEQUENT PURCHASERS, AND THE TEXAS RECORDING STATUTES

RICHARD E. FLINT*

*The line it is drawn / The curse it is cast / The slow one now / Will later be fast /
As the present now / Will later be past /
The order is rapidly fadin' / And the first one now will later be last / For the times they
are a-changin'¹*

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1. BOB DYLAN, *The Times They Are a-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

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I. INTRODUCTION

Throughout the history of Texas jurisprudence, the Texas Supreme Court has often made clear and concise pronouncements of a rule of law that was to apply in all cases that fell under the parameters of that rule.² However, that same history establishes that Texas courts have often made exceptions to the application of these legal rules in situations where the application would perpetrate a fraud³ or would be inequitable.⁴ For example, in *Johnson v. Portwood*,⁵ the Texas Supreme Court stated: “Our decisions hold that an equitable mortgage cannot be created by an agreement not in writing.”⁶ However, in that case, the court noted there was an equitable exception to this very rule of law.⁷ The court held an oral agreement to give a lien upon property to secure money advanced by another to enable a purchaser to acquire the property would be enforced in equity as a mortgage.⁸ The court stated that the oral agreement had to

2. *See, e.g.*, *Wall v. Lubbock*, 118 S.W. 886, 888 (Tex. Civ. App.—Austin 1908, writ ref’d) (“One holding under a void title cannot claim protection as an innocent purchaser.” (first citing *Daniels v. Mason*, 38 S.W. 161, 162 (Tex. 1896); and then citing *Terry v. Cutler*, 39 S.W. 152, 156 (Tex. Civ. App.—Dallas 1896, writ ref’d))).

3. *See, e.g.*, *Floyd v. Hammond*, 268 S.W. 146, 147 (Tex. Comm’n App. 1925, judgment adopted) (indicating where purchase money for land was advanced under an oral agreement that the purchaser would execute a lien, such agreement would be viewed as an equitable mortgage to prevent a fraud (citations omitted)).

4. *See Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942) (concluding “it would be inequitable to permit” a mortgagor to show that a foreclosure sale was void as to subsequent purchasers when the mortgagor “made it possible for the trustee to create the appearance of good title” in the purchaser at the void foreclosure sale); *Steffian v. Milmo Nat’l Bank*, 6 S.W. 823, 824–25 (Tex. 1888) (holding a grantor could be equitably estopped from stating a conveyance was invalid for failure to consent to the delivery of the deed when the grantor “was grossly negligent in permitting the deed” to be delivered to the grantee).

5. *Johnson v. Portwood*, 34 S.W. 596 (Tex. 1896).

6. *Id.* at 599 (first citing *Castro v. Illies*, 13 Tex. 229, 233 (1854); and then citing *Boehl v. Wadgymer*, 54 Tex. 589, 592 (1881)).

7. *See id.* at 600 (reasoning the exception applies to avoid the operation of fraud upon one who provides purchase money for land under an oral contract to receive a lien on said land).

8. *See id.* (“[T]he payment of the money by him, under the circumstances alleged, was such a part

be enforced to prevent a fraud against the lender.⁹ Later courts have never called this exception into question.¹⁰

Texas courts have also announced the legal rule that one cannot be an innocent purchaser for value if there is a void deed in that purchaser's chain of title.¹¹ However, just as in the case of the equitable mortgage, Texas courts have made exceptions to this rule of law.¹² For example, in *Slaughter v. Qualls*,¹³ the court of civil appeals held subsequent grantees from the original purchaser at a void nonjudicial foreclosure sale were protected as innocent purchasers for value despite the fact that the original purchaser's trustee's deed was void.¹⁴ On appeal, the supreme court, by way of obiter dicta, explained the legal reasoning of the court of civil appeals' holding—that those who purchased interests or took liens from the purchaser at the void foreclosure sale acquired good title as against the mortgagor—in the following words:

[T]his is so not on the theory that the title actually passed, but rather on the theory that Qualls, [the mortgagor,] by the execution of the deed of trust, made it possible for the trustee to create the appearance of good title in Mrs. Slaughter, [the purchaser at the void foreclosure sale,] and it would be *inequitable* to permit Qualls[, the mortgagor,] now to show otherwise as against those who have purchased in good faith in reliance thereon.¹⁵

However, the application of equitable principles to protect subsequent

performance as entitled him to its enforcement, so far as his rights are concerned.”)

9. *See id.* (granting specific performance to avoid a fraud from being perpetrated upon one who, under an oral contract to receive a lien upon land, supplied purchase money for the acquisition of said land).

10. *See Woods v. West*, 37 S.W.2d 129, 132 (Tex. Comm'n App. 1931, holding approved, judgm't affirmed) (recognizing the well settled law that “[w]here purchase money of land is advanced under oral agreement that the purchaser will execute a mortgage or give a lien as security, such agreement is enforceable in equity as a mortgage”); *Bagley v. Pollock*, 19 S.W.2d 193, 195 (Tex. Civ. App.—Amarillo 1929, no writ) (citing the *Portwood* case for the proposition that an equitable mortgage would be imposed to prevent a fraud on a lender advancing money to another for the purchase of land under an oral agreement that a lien would be given to the lender (citations omitted)).

11. *E.g.*, *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 168 (Tex. 2013) (applying the rule to deny a subsequent purchaser innocent purchaser status (quoting *Wall v. Lubbock*, 118 S.W. 886, 888 (Tex. Civ. App.—Austin 1908, writ ref'd))), *rev'g City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82 (Tex. App.—Corpus Christi 2010).

12. *See infra* Part III.B.

13. *Slaughter v. Qualls*, 149 S.W.2d 651 (Tex. Civ. App.—Amarillo 1941), *aff'd*, 162 S.W.2d 671 (Tex. 1942).

14. *See id.* at 656 (holding the trial court erred by not granting a directed verdict for the subsequent transferees).

15. *Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942) (emphasis added) (citations omitted).

transferees following void nonjudicial foreclosure sales has recently been called into question. In *Texas Department of Transportation v. A.P.I. Pipe & Supply, LLC*,¹⁶ the Texas Supreme Court unequivocally reaffirmed the rule of law concerning the legal effect of a void instrument in a purchaser's chain of title in the following words:

The court of appeals held that API was a good-faith purchaser for value. However, we refused the writ of error in a case holding that *this doctrine does not protect a purchaser whose chain of title includes a void deed*: "One holding under a void title cannot claim protection as an innocent purchaser."¹⁷

Then, later in that opinion, the supreme court flatly rejected the obiter dicta of its earlier *Slaughter* opinion by asserting:

[That court] suggests that a recorded but void foreclosure sale could protect a subsequent good-faith purchaser. However, the statement was dicta because the subsequent purchaser's claim was not before the [c]ourt. In any event, the *Slaughter* dicta suggests that such purchasers merit protection under equitable estoppel principles . . . and not under the innocent-purchaser doctrine codified in the Property Code. Section 13.001 defines the elements of innocent-purchaser status *for all cases*, and courts may not disregard or rewrite the statute when they believe straight-up application

16. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162 (Tex. 2013), *rev'g* *City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82 (Tex. App.—Corpus Christi 2010). This Article will use the names utilized by the Texas Supreme Court, which include "API," "TxDOT," and "City of Edinburg" or "the City." *See id.* at 165 (referring to the City of Edinburg as "the City," the Texas Department of Transportation as "TxDOT," and A.P.I. Pipe & Supply, LLC and Paisano Service Company, Inc. as "API," collectively).

17. *Id.* at 168 (emphasis added) (quoting *Wall v. Lubbock*, 118 S.W. 886, 888 (Tex. Civ. App.—Austin 1908, writ *ref'd*). It should be noted that because the *Wall v. Lubbock* case, which *A.P.I.* relied on, was decided before 1927, the fact that writ of error was refused by the Texas Supreme Court did not necessarily mean the supreme court approved of the court of civil appeals' opinion or reasoning. *Tex. State Bd. of Med. Exam'rs v. Koepsel*, 322 S.W.2d 609, 614 n.6 (Tex. 1959) (citations omitted); *see also* *City of San Angelo v. Deutsch*, 91 S.W.2d 308, 312 (Tex. 1936) (clarifying that, before the law was amended, the supreme court's refusal of an application for writ of error did not reflect that the legal principles announced and judgment reached by the court of civil appeals were determined correctly).

The court of appeals held API was a good faith purchaser for value under the Texas Property Code, rather than under the equitable doctrine of innocent purchaser. *See* *City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82, 90–91 (Tex. App.—Corpus Christi 2010) (holding while one could not acquire an adverse interest against a governmental unit under the equitable doctrine of innocent purchaser, one could acquire that status under the statute because governmental units were subject to the statute's application), *rev'd sub nom.* *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162 (Tex. 2013).

would be inequitable. The statute is categorical and makes no case-by-case exceptions: A purchaser *with notice of an adverse interest* cannot claim innocent-purchaser status.¹⁸

Taken together, these two pronouncements by the *A.P.I.* court appear to announce a change in the legal status of a creditor or a subsequent purchaser following a void nonjudicial foreclosure sale.¹⁹ First, the court reaffirmed the rule of law that the mere existence of a void instrument in one's chain of title is sufficient to deprive one of innocent purchaser status.²⁰ However, this first statement was not qualified by the requirement concerning "notice of an adverse interest" that the court in the second pronouncement stated was the defining principle in the determination of innocent purchaser status in "all cases."²¹ Clearly, actual knowledge that an instrument in one's chain of title is void will give corresponding notice of the existence of an adverse interest, thereby depriving a subsequent purchaser of innocent purchaser status.²² However, notice of the existence of an instrument in one's chain of title may or may not result in a legal determination that such document is void.²³ While it is correct to assert that "a purchaser is deemed to have

18. *A.P.I.*, 397 S.W.3d at 169 (emphasis added) (citations omitted); *see also* TEX. PROP. CODE § 13.001 (West 2016) (voiding unrecorded conveyances and interests in real property as against creditors and subsequent purchasers for valuable consideration).

19. *Compare A.P.I.*, 397 S.W.3d at 169 (denying courts the ability to deem an individual an innocent purchaser through the application of equitable principles, and rather requiring such status to be based upon the elements set forth in the Texas Property Code one of which is "notice of an adverse interest"), *with Slaughter*, 162 S.W.2d at 675 (concluding the party who purchased an interest in or took a lien on the property from the individual who purchased at a void foreclosure was an innocent purchaser as the mortgagor made it possible for the original purchaser to appear to have good title and it would be inequitable to hold otherwise (citations omitted)).

20. *A.P.I.*, 397 S.W.3d at 168 (quoting *Wall*, 118 S.W. at 888).

21. *Id.* at 168–69. It is not clear whether the court is abolishing the equitable doctrine of innocent purchasers or merely stating that the elements of innocent purchaser status are the same in both the statutory and the equitable doctrines with notice of an adverse interest as the driving principle. *See id.* (rejecting *Slaughter* for its suggestion that a purchaser should be protected under principles of equity rather than the statute that codified the doctrine, but failing to abolish the equitable doctrine (citations omitted)).

22. *See id.* at 169 (denying purchasers who had "notice of an adverse interest" innocent purchaser status); *Notice*, BLACK'S LAW DICTIONARY (10th ed. 2014) (indicating an individual has notice of a condition or fact if the individual has actual knowledge of its existence).

23. *Cf. Diversified, Inc. v. Walker*, 702 S.W.2d 717, 721 (Tex. App.—Houston [1st Dist.] 1985, writ *re*fd n.r.e.) ("Even if a conveyance is regular on its face, it does not always or necessarily operate to pass title between the parties at the time of its execution, particularly in cases of fraud. A deed may be presumptively valid, and yet be utterly void as a conveyance when the presumption is rebutted.").

notice of all recorded instruments” in his chain of title,²⁴ it does not necessarily follow that actual notice of all such instruments will lead to a determination that an instrument in that chain of title is void.²⁵ Thus, if notice of an adverse interest is the defining element for determining innocent purchaser status in “*all cases*,”²⁶ one should be able to claim innocent purchaser status when he does not have actual knowledge that an instrument in his chain of title is void, because in such a situation he would have no notice of an adverse interest.²⁷ However, the *A.P.I.* case apparently rejects this analysis.²⁸ Harmonizing the two pronouncements in *A.P.I.*, one might conclude the mere existence of a void instrument in one’s chain of title charges one with notice *as a matter of law* of not only the existence of such instrument but also of its legal effect and, thus, notice of the corresponding adverse interest.²⁹ Of course, this interpretation of the two pronouncements from the *A.P.I.* case is contrary to the holding of the

24. *A.P.I.*, 397 S.W.3d at 169.

25. *See* *Slaughter v. Qualls*, 162 S.W.2d 671, 673–74 (Tex. 1942) (“[T]here is nothing on the face of the trustee’s deed that would render it void. . . . The substitute trustee’s deed contained all recitals necessary to show a valid sale by him.”).

26. *A.P.I.*, 397 S.W.3d at 169 (emphasis added).

27. *Cf. Randolph v. Citizens Nat’l Bank of Lubbock*, 141 S.W.2d 1030, 1034 (Tex. Civ. App.—Amarillo 1940, writ dism’d judgm’t cor.) (concluding parties who purchased property from the purchaser at a void foreclosure sale were innocent purchasers for value since the original purchaser had apparent title and the subsequent purchasers did not have “notice of any infirmities therein”).

28. *See A.P.I.*, 397 S.W.3d at 168–69 (denying innocent purchaser protection if an instrument has been recorded since recorded instruments charge a purchaser with knowledge of their provisions and contents).

29. The *A.P.I.* court noted that API was “constructively and actually aware of the recorded 2003 Judgment.” *Id.* at 169. That judgment awarded the City of Edinburg *fee-simple title* to the land in question. *Id.* at 167. In addition, API had actual knowledge of the existence of the 2004 Judgment (the void judgment) that awarded the City merely an *easement* in the land in question. *City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82, 91 (Tex. App.—Corpus Christi 2010), *rev’d sub nom.* *Tex. Dep’t of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162 (Tex. 2013). API argued that “even if the 2004 Judgment was void,” it was still an innocent purchaser. *A.P.I.*, 397 S.W.3d at 168. The supreme court rejected this argument, noting that a purchaser holding under a void deed cannot be an innocent purchaser, and held as API had actual notice of the 2003 Judgment, it was on notice of that adverse interest and, thus, could not be an innocent purchaser under the terms of the Texas Property Code. *Id.* at 168–69. Thus, under the facts of the case, the court did not need to address whether the mere existence of a void instrument in one’s chain of title charges one, as a matter of law, with knowledge of the legal effects of such instrument and the corresponding notice of an adverse interest. *See id.* at 169 (failing to indicate a purchaser has notice of an adverse interest as a matter of law, but stating the purchaser “was responsible for squaring the contradictory” instruments). Of course, the recording of a void instrument does not constitute constructive notice. *See Stiles v. Japhet*, 19 S.W. 450, 452 (Tex. 1892) (*per curiam*) (concluding the recording of a void deed conveyed no actual or constructive notice of an earlier deed conveying the land in question); *Terry v. Cutler*, 39 S.W. 152, 156 (Tex. Civ. App.—Dallas 1896, writ ref’d) (deciding the recording of a void deed did not convey notice of its contents).

court of civil appeals in the *Slaughter* case, which held *notice was a fact question* and concluded that because there was no evidence in that case that the creditors or subsequent purchasers had notice of the void instrument in their chain of title, they qualified as innocent purchasers.³⁰

The confusion and uncertainty as to the status of creditors and subsequent purchasers with a void instrument in their chain of title was exacerbated later in the same *A.P.I.* opinion. When addressing whether equitable estoppel could be asserted in the case against the governmental entity, the court stated:

API argues that TxDOT's acquiescence to the 2004 Judgment bars it from objecting now to what it accepted then. While the argument has a certain force—purchasers should be able to rely upon facially valid judgments—this argument goes to *equitable estoppel*, a doctrine inapplicable against the government in this case.³¹

This statement by the court seemingly acknowledges the possibility that equity might protect a subsequent purchaser who relied upon an agreed facially valid instrument forming a link in his chain of title, even when that very instrument was void,³² notwithstanding the court's earlier assertions that one could not be an innocent purchaser when there was a void instrument in such purchaser's chain of title and that equitable principles could not trump knowledge of an adverse interest to create innocent purchaser status.³³ This statement, of course, was also the precise legal basis of the obiter dicta in the supreme court's *Slaughter* case,³⁴ which the *A.P.I.* court disparaged and rejected earlier in its opinion.³⁵ The *A.P.I.* case has not only called into question time honored precedents,³⁶ but it

30. *Slaughter v. Qualls*, 149 S.W.2d 651, 655 (Tex. Civ. App.—Amarillo 1941) (recognizing the record was devoid of any evidence that established the subsequent creditors or purchasers “had any knowledge of the” improper manner in which the foreclosure sale was conducted), *aff'd*, 162 S.W.2d 671 (Tex. 1942).

31. *A.P.I.*, 397 S.W.3d at 170 (emphasis added).

32. *See id.* at 168, 170 (explaining that since the agreed, facially valid judgment was void, it did not convey title to the property in question, and thus, a purchaser from the purported owner of that property could not buy what his vendor did not own, but also recognizing the “force” in the argument that “purchasers should be able to rely upon facially valid judgments”).

33. *Id.* at 169.

34. *See Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942) (noting the mortgagor had authorized the trustee to cloak the purchaser at the foreclosure sale with apparent legal title, and therefore, holding it would be “inequitable to permit” the mortgagor to establish otherwise “against those who purchased in good faith in reliance thereon” (citations omitted)).

35. *A.P.I.*, 397 S.W.3d at 169.

36. *Compare id.* at 168–69 (indicating “one cannot be ‘innocent’ of a *recorded*” instrument in one’s

has also muddled the law concerning the status of creditors and subsequent purchasers when there is a void instrument in their chain of title. Therefore, clarification, correction, and direction are needed in this area of the law.

This Article examines and evaluates Texas courts' treatment of subsequent purchasers prior to the *A.P.I.* decision in cases where there was a void instrument in such purchaser's chain of title.³⁷ In doing so, this Article examines and evaluates whether the Texas rule of law holding that "[o]ne holding under a void title cannot claim protection as an innocent purchaser,"³⁸ as reaffirmed in the *A.P.I.* case,³⁹ is in the best interest of Texas jurisprudence. Part II of this Article traces the legal development of the innocent purchaser for value status in Texas. Part II discusses the distinctions between the equitable doctrine and its statutory counterpart. Part III of this Article then examines some of the major historical developments in Texas jurisprudence concerning the legal effect of a void instrument in one's chain of title. Specifically, this third section reviews Texas courts' treatment of subsequent purchasers following void nonjudicial foreclosure sales. In doing so, the *Slaughter* case will be thoroughly examined and evaluated. In addition, this part of the Article examines other situations where Texas courts have made equitable exceptions to protect subsequent purchasers when void instruments were in their chain of title. Part IV focuses on the Texas law of actual and constructive notice as it relates to instruments in one's chain of title. Initially, the fourth part of the Article investigates the scope of inquiry notice imposed by the supreme court on subsequent purchasers concerning instruments in their chain of title.⁴⁰ Then, the *A.P.I.* case will be examined and analyzed in light of the then-Texas jurisprudence dealing

chain of title), *with Slaughter v. Qualls*, 149 S.W.2d 651, 655 (Tex. Civ. App.—Amarillo 1941) (concluding the subsequent purchasers and creditors were protected under the innocent purchaser doctrine since the record was devoid of any evidence that they had any knowledge of the manner in which the foreclosure sale was conducted), *aff'd*, 162 S.W.2d 671 (Tex. 1942).

37. *See, e.g., Randolph v. Citizens Nat'l Bank of Lubbock*, 141 S.W.2d 1030, 1034 (Tex. Civ. App.—Amarillo 1940, writ *dism'd* *judgm't* *cor.*) (determining the trustee's deed was void, but applying the equitable doctrine of innocent purchaser to protect the parties who bought from "another who ha[d] the apparent title, without notice of the infirmities therein, and who pa[id] a valuable consideration therefor").

38. *Wall v. Lubbock*, 118 S.W. 886, 888 (Tex. Civ. App.—Austin 1908, writ *ref'd*) (first citing *Daniels v. Mason*, 38 S.W. 161, 162 (Tex. 1896); and then citing *Terry v. Cutler*, 39 S.W. 152, 156 (Tex. Civ. App.—Dallas 1896, writ *ref'd*)).

39. *A.P.I.*, 397 S.W.3d at 168 (quoting *Wall*, 118 S.W. at 888).

40. *See Flack v. First Nat'l Bank of Dalhart*, 226 S.W.2d 628, 632 (Tex. 1950) ("[W]hatever fairly puts a person upon inquiry is actual notice of the facts which would have been discovered by reasonable use of the means at hand." (citations omitted)).

with notice and the effect of such notice on subsequent purchasers. In addition, Part IV of the Article details the ambiguity and confusion that the *A.P.I.* case has generated in those situations where a void instrument is in a subsequent purchaser's chain of title. This Article concludes with recommendations for the enactment of legislation by the Texas Legislature to protect subsequent purchasers for value who have no knowledge of the existence of a void instrument in their chain of title.

II. THE STATUTORY FRAMEWORK FOR THE INNOCENT PURCHASER AND THE EFFECT OF RECORDING

A system of land registration was unknown in the early common law.⁴¹ The initial common law rule was “first in time, first in right.”⁴² Eventually, this early common law approach was supplanted by a system requiring the transfer of land to be evidenced in writing and recorded to be effective as a conveyance.⁴³ The system proved ineffective as lawyers

41. Under early English common law, there were no registration laws providing for the recording of deeds and other documents relating to title to land. See 3A ALOYSIUS A. LEOPOLD & NANCY SAINT-PAUL, *TEXAS PRACTICE SERIES: LAND TITLES AND TITLE EXAMINATION* § 11.5 (3d ed. Supp. 2016) (distinguishing the common law approach, which lacked a “system of registration or recording,” from the types of recording systems existing in the United States (citation omitted)). The practice of land transfer in the early common law was briefly explained as follows:

Prior to the seventeenth century the typical form of conveyance of a present freehold estate in land was the feoffment with livery of seisin. A “feoffment” was the grant of a fief or feudal tenement, and “livery of seisin” was the means by which the grant was effected. . . . If O was seised of Blackacre in fee simple absolute and wished to convey his estate to B, it was necessary that O invest B with the seisin. This was done by means of a feoffment with livery of seisin, or more shortly, a feoffment. O and B, or their agents, would go upon the land and O would formally “give” or “deliver” the seisin to B in the presence of witnesses from the neighborhood. O would usually hand over to B a branch, twig, or piece of turf as a symbol of the land, although this ceremonial act was not essential. What was essential was the investiture of B with the seisin. Thus, O, the feoffor, must declare that he gives the seisin to the feoffee, B; and having installed B in occupancy of the land, O must completely relinquish the possession.

SHELDON F. KURTZ, *MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY* 223 (6th ed. 2015). Eventually, the livery of seisin was replaced with a document of conveyance and its registration under the recording acts. See *Watkins v. Edwards*, 23 Tex. 443, 449 (1859) (discussing the system of registering documents effecting title to land, and noting the registration system replaced the livery of seisin).

42. Dwight A. Olds, *The Scope of the Texas Recording Act*, 8 SW. L.J. 36, 43 (1954). “[T]he rule between claimants of the same title was found in the maxim ‘prior in tempore potior est in jure,’ which means, he who is first in time has the better right.” LEOPOLD & SAINT-PAUL, *supra* note 41. See generally 14 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 82.01[1][a], at 82–4 to –5 (Michael Allan Wolf ed., LexisNexis Matthew Bender 2016) (admitting the recording statutes abrogated the common law first-in-time rule in most cases).

43. See John H. Scheid, *Down Labyrinthine Ways: A Recording Acts Guide for First Year Law Students*, 80 U. DET. MERCY L. REV. 91, 98 (2002) (recognizing the purpose of the English Statute of

developed methods to circumvent the registration requirement to avoid the fees for registering and to keep transactions out of the public's knowledge.⁴⁴ Furthermore, the equity courts developed the equitable doctrine of bona fide purchaser to protect subsequent purchasers who did not have actual notice of recorded instruments.⁴⁵ However, unlike the English system,⁴⁶ there have been recording statutes in Texas that have

Enrollments was to give notoriety to land ownership by requiring the registration of interests after the conveyance). This development was briefly described as follows:

Written documents later came into use merely as a convenient method of memorializing the terms of the conveyance. In 1535 the Statute of Uses was enacted and it became possible to convey property without a public ceremony of enfeoffment. In 1536 the Statute of Enrollment was passed as a companion bill to the Statute of Uses. The Statute of Enrollment proved largely ineffective. In its final version it only covered bargain and sale of freehold estates which, under the act, had to be accomplished by a sealed writing enrolled in one of the king's courts of record within six months.

The Statute of Enrollment was not well received from the beginning. It frequently was avoided by a one-year lease, creating a leasehold estate not covered by the statute and followed immediately by a release of the reversion to the lessee-purchaser. In 1677 the Statute of Frauds was enacted and written documents became necessary for the creation or transfer of most real property interests. It was now possible to create interests in land without public ceremony or public knowledge.

However, under the English common law all deeds to real property went with the land to the purchaser. There was no system of recording to preserve the evidence of transfer or documents of title. When the owner wished to sell real estate or pledge it as a mortgage security, ownership was demonstrated by producing the original deeds and other instruments affecting title to the property.

Ray E. Sweat, *Race, Race-Notice and Notice Statutes: The American Recording System*, PROB. & PROP., May/June 1989, at 27, 27. See generally Scheid, *supra*, at 92–100 (tracing the English development of land registration, and describing its ineffectiveness from 1620–1845 since only freehold estates were covered by the enrollment statutes and attorneys developed mechanisms to avoid the statutes' application).

44. See Scheid, *supra* note 43, at 98–99 (addressing the methods used by lawyers to avoid registering land transfers under the enrollment statutes).

45. The bona fide purchaser doctrine was an exception to applying the enrollment rule. John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 540 (1996). "Equity courts construed the seemingly absolute language of the registry statutes as protecting only the grantee without actual notice of previously created interests." *Id.* (footnote omitted).

46. One author traced the development of the American system of recording to the English precedents, and stated:

The lineage of the American title recording system may be traced to the 1536 Statute of Enrollments, which required the registration of English deeds. Mere delivery of a deed to the grantee was insufficient to transfer title; a conveyance became effective only upon registry in the "king's courts of record at Westminster." Although the statute and its successors were eventually circumvented by various legal devices, this farsighted effort ultimately served as a model for the highly successful American system.

Id. (footnotes omitted).

encouraged the recording of documents relating to real property since the days of the Republic of Texas.⁴⁷ The primary purpose of Texas's recording statutes is to provide notice of the contents of the various recorded documents effecting title to land.⁴⁸ As one early court explained:

[Registration] laws protect purchasers and creditors against conveyances which could be, but are not, recorded. It is doubtless the purpose and policy of such laws to furnish means of information to parties buying lands, as to the condition of titles, and to protect them against all claims of which notice should be found upon, but the existence of which is not disclosed by, the records.⁴⁹

The basic consequences of recording statutes are the protection of creditors and subsequent purchasers for value against prior deeds, mortgages, and other instruments that are not recorded and, also, the abolishment of the common law priority of the holder of the prior unregistered conveyance or lien.⁵⁰

The principal Texas recording statute, entitled "Validity of Unrecorded Instrument" and referred to as the "Innocent-Purchaser Statute,"⁵¹ provides as follows:

(a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent

47. The encouragement stemmed from rendering unrecorded documents void as to creditors and subsequent purchasers. See Act approved Feb. 5, 1840, 4th Cong., R.S., § 4, 1840 Repub. Tex. Laws 153, 154, reprinted in 2 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 327, 328 (Austin, Gammel Book Co. 1898) (proclaiming all conveyances of land, as well as all deeds of trust and mortgages, void as to creditors and innocent purchasers for value, unless properly recorded).

48. The main purpose of the Texas registration statutes was providing notice and advising individuals where they could acquire information concerning the state of title to land. *Hancock v. Tram Lumber Co.*, 65 Tex. 225, 232 (1885); see also *Ojeda de Toca v. Wise*, 748 S.W.2d 449, 450-51 (Tex. 1988) (explaining the legislative intent behind the recording statutes included the purpose of protecting purchasers and creditors from secret grants and liens (quoting 66 AM. JUR. 2D *Records and Recording Laws* § 48 (1973))).

49. *MacGregor v. Thompson*, 26 S.W. 649, 649 (Tex. Civ. App.—Galveston 1894, no writ); see also *Anderson v. Barnwell*, 52 S.W.2d 96, 101 (Tex. Civ. App.—Texarkana 1932) (asserting the legislative intent was to compel registration of conveyances to protect both the person who recorded the conveyance and those who might subsequently consider acquiring an interest in the same property), *aff'd sub nom. Anderson v. Brawley*, 86 S.W.2d 41 (Tex. 1935).

50. *Cox v. Clay*, 237 S.W.2d 798, 804 (Tex. Civ. App.—Amarillo 1950, writ ref'd n.r.e.).

51. See *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 168 (Tex. 2013) (refusing to apply the "Innocent-Purchaser Statute" on the basis that the statute does not protect purchasers from recorded instruments, but only from unrecorded conveyances (citing TEX. PROP. CODE § 13.001(a) (West 2012))), *rev'g City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82 (Tex. App.—Corpus Christi 2010).

purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

(b) The unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

(c) This section does not apply to a financing statement, a security agreement filed as a financing statement, or a continuation statement filed for record under the Business & Commerce Code.⁵²

52. PROP. § 13.001 (West 2016). The present statute, like all of its predecessors other than the 1836 statute, specifically provides protection to creditors and subsequent purchasers for value. Compare *id.* § 13.001(a) (limiting the scope of protection to creditors or subsequent purchasers without notice and who pay valuable consideration), and *Gibraltar Sav. Ass'n v. Martin*, 784 S.W.2d 555, 557 (Tex. App.—Amarillo 1990, writ denied) (viewing section 13.001 and its predecessors as “similar in all material respects”), with Act approved Dec. 20, 1836, 1st Cong., R.S., § 40, 1836 Repub. Tex. Laws 148, 156, reprinted in 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1208, 1216 (Austin, Gammel Book Co. 1898) (voiding unrecorded deeds, liens, conveyances, and other written instruments that affect the rights and interests “of *third parties*” (emphasis added)), and *Ryle v. Davidson*, 115 S.W. 28, 29 (Tex. 1909) (recognizing the 1836 statute was broader in scope). The 1836 statute protected all third persons whose interests would be affected by certain unrecorded instruments. See Act approved Dec. 20, 1836, 1st Cong., R.S., § 40, 1836 Repub. Tex. Laws 148, 156, reprinted in 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1208, 1216 (Austin, Gammel Book Co. 1898) (voiding deeds, conveyances, and liens affecting “the interests and rights of third parties” if the requirements to record the instrument are not met). However, since 1840, the scope of the statute’s protection has been limited to creditors and subsequent bona fide purchasers for value. See *Ryle*, 115 S.W. at 29 (describing the differences between the 1836 and 1840 statutes). In discussing the 1840 Act, the Supreme Court of Texas said:

This provision is not regarded as introducing a new rule, but only as declaratory of the law, as recognized in the chancery jurisprudence of England and the United States. It is but the declaration of positive law to the effect that the want of registration shall avoid the deed only as to “creditors and subsequent purchasers *without notice*,” but that, as to “subsequent purchasers, *with notice thereof*,” the deed “shall nevertheless be valid and binding.”

Parks v. Willard, 1 Tex. 350, 354 (1846). In an early analysis of the statute, the supreme court pointed out:

The statute, in plain and unmistakable language, says that unrecorded conveyances, whether by deed or bond, are void as to two classes of persons, viz[.], “all creditors” and “[s]ubsequent purchasers for valuable consideration without notice.” Now, it will be noted that there is a marked distinction between these two classes of persons for whose benefit the statute was enacted; for while such unrecorded instruments are void as to “all creditors,” they are only so as to “purchasers for a valuable consideration and without notice.”

Grace v. Wade, 45 Tex. 522, 526 (1876); see also *Gibraltar Sav. Ass'n*, 784 S.W.2d at 557 (deeming legal decisions interpreting the statute’s predecessors relevant to interpreting the present statute since all of the innocent purchaser statutes since statehood have been “so similar in all material respects” (citing PROP. § 13.001(a) (West 1990))).

While the language of the statute is broad, the cases have held a creditor⁵³ or a subsequent purchaser for value⁵⁴ is only charged with notice of those instruments that form an essential link in the chain of title under which they claim.⁵⁵

53. The term “creditor,” as used in the statute, refers to both voluntary and involuntary lien holders. See *R. A. Brown & Co. v. Chancellor*, 61 Tex. 437, 444 (1884) (interpreting the statute’s use of “creditor” to apply only to those who possessed a lien on the property (first citing *Ayres v. Duprey*, 27 Tex. 593, 607 (1864); and then citing *Grace*, 45 Tex. at 527)); *McKeen v. Sultenfuss*, 61 Tex. 325, 329 (1884) (determining the statute granted protection to a subsequent “creditor who, without notice of the unrecorded deed, secures a lien upon the land by contract” or by operation of law); *Henderson v. Odessa Bldg. & Fin. Co.*, 24 S.W.2d 393, 393–94 (Tex. Comm’n App. 1930, judgm’t affirmed) (echoing “settled law” that defines the term creditor to include one who acquired a lien on property by judicial process or by filing a judgment of record (citations omitted)). Apparently, the only difference between the contractual (voluntary) lienholder and the involuntary lienholder, under the statute, relates to the burden of proving protection under the statute. See *Turner v. Cochran*, 61 S.W. 923, 924 (Tex. 1901) (comparing the burdens of proof applicable to the two types of lienholders). The voluntary lienholder must establish lack of notice of the unrecorded prior interest; while in the case of the involuntary lien holder, the burden of proof rests on the prior unrecorded interest to establish notice. See *id.* (detailing the two lienholders’ burdens of proof under the recording statutes).

54. The words “subsequent purchaser” in the innocent purchaser statute refers to purchasers who are subsequent in chain and not subsequent in time. See *White v. McGregor*, 50 S.W. 564, 565–66 (Tex. 1899) (noting the order of recordation is not regarded by the statute). The *White v. McGregor* court explained:

As to the matter in hand, the substance of that article is to declare a deed not duly recorded void as against subsequent purchasers for value without notice; and the question arises, what is meant by “subsequent purchasers”? Do the words mean all persons who purchase the land after the deed is recorded, or only those who are subsequent in the chain of title? If a grantor conveys the same property twice, and the second grantee puts his deed upon record, is it notice to one who subsequently purchases from the first grantee? We think not. The record is not notice to the first grantee, for he is a prior purchaser. Nor do we think it was intended to be notice to any one who should purchase from him. In other words, we think the subsequent purchasers who are meant are only those the origin of whose title is subsequent to the title of the grantee in the recorded deed.

Id. at 565. This analysis continued with the court noting:

A purchaser is bound to take notice of a deed from the grantor of his grantor prior to that under which his grantor claims, although the latter may be recorded first, for the statute does not regard the order in which the deeds appear upon the registry. But when one takes a conveyance from another who holds under the first deed from his grantor, such purchaser is not bound to look further for a subsequent deed from that grantor, for the reason that such deed is out of the chain of title under which he buys.

Id. at 565–66.

55. See *Wessels v. Rio Bravo Oil Co.*, 250 S.W.2d 668, 670 (Tex. Civ. App.—Eastland 1952, writ *ref’d*) (indicating a purchaser is on notice of “every recital, reference[,] and reservation contained in or fairly disclosed” in instruments in her chain of title (citation omitted)). “‘Chain of title’ has been defined to be ‘[t]he successive conveyances, commencing with the patent from the government, each being a perfect conveyance of the title down to and including the conveyance to the present holder.’”

In addition to this “shall” statute,⁵⁶ section 12.001 of the Property Code, referred to as the “may” statute,⁵⁷ is another Texas statute pertaining to the recording of documents relating to real property and provides in part:

(a) An instrument concerning real or personal property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law.

(b) An instrument conveying real property may not be recorded unless it is signed and acknowledged or sworn to by the grantor in the presence of two or more credible subscribing witnesses or acknowledged or sworn to before and certified by an officer authorized to take acknowledgements or oaths, as applicable.⁵⁸

The final significant registration statute addresses the legal effect of recorded documents.⁵⁹ Section 13.002 of the Texas Property Code provides that “[a]n instrument that is properly recorded in the proper county is . . . notice to all persons of the existence of the instrument.”⁶⁰

Reserve Petrol. Co. v. Hutcheson, 254 S.W.2d 802, 806 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.) (citations omitted).

56. See 5 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE SERIES: LAND TITLES AND TITLE EXAMINATION § 28.1 (3d ed. 2005) (identifying Texas Property Code section 13.001 as the “innocent purchaser statute” or “shall” statute”).

57. Article 6626, which is “the so-called ‘may’ statute” and the predecessor to section 12.001, did not set forth a penalty for failing to record an instrument concerning real property. Olds, *supra* note 42, at 37. Compare Act effective Sept. 1, 1925, 39th Leg., R.S., tit. 115, ch. 3, art. 6626, printed in 2 Revised Civil Statutes of the State of Texas, at 1881, 1888 (Austin, A. C. Baldwin & Sons 1925) (setting forth a provision entitled “[w]hat may be recorded,” which provides certain written instruments that are “acknowledged or proved according to law are authorized to be recorded” (emphasis added)), repealed and codified by Act of May 30, 1983, 68th Leg., R.S., ch. 576, §§ 6, 1, 1983 Tex. Gen. Laws 3475, 3729–30, 3489 (adopting nonsubstantive revisions of statutes relating to property into the Property Code) (current version at PROP. § 12.001(a)), with PROP. § 12.001(a) (West 2016) (“An instrument concerning real or personal property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law.” (emphasis added)).

58. PROP. § 12.001(a)–(b). This statute’s roots also trace back to the Republic of Texas. See Act approved Feb. 5, 1840, 4th Cong., R.S., § 5, 1840 Repub. Tex. Laws 153, 154, reprinted in 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 327, 328 (Austin, Gammel Book Co. 1898) (authorizing and requiring the clerks of the county courts to record any conveyance that was properly acknowledged or proved).

59. See PROP. § 13.002(1) (establishing that a properly recorded instrument provides “notice to all”).

60. *Id.* This statute also traces its roots going back to the Republic of Texas. See Act approved Feb. 5, 1840, 4th Cong., R.S., § 7, 1840 Repub. Tex. Laws 153, 155, reprinted in 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 327, 329 (Austin, Gammel Book Co. 1898) (declaring every properly recorded “title, bond, or other written contract” concerning land provides all subsequent purchasers with notice).

While the “shall” statute voids unrecorded instruments of conveyance or mortgages or deeds of trust as to an innocent purchaser,⁶¹ there are no adverse consequences for failing to file a document under the “may” statute.⁶² However, there are significant advantages to filing all written instruments affecting the title to real property since properly recorded instruments are constructive notice of the existence of such instrument.⁶³

61. The Texas Supreme Court stated:

The equity of the purchaser is made by the statutes of registration a legal right, and grows out of the fact that he has parted with a valuable consideration for the land, without notice of the prior grant. He is protected because the first grantee, through neglect, has put him in a position to be defrauded.

La Pice v. Key, 30 S.W. 867, 867 (Tex. 1895); *see also Hous. Oil Co. of Tex. v. Hayden*, 135 S.W. 1149, 1152 (Tex. 1911) (listing “[v]aluable consideration, absence of notice, and good faith” as the elements essential to qualifying as an innocent purchaser (citation omitted)). Of course, the innocent purchaser must acquire the interest in the property from one who qualified as the apparent owner of the property. *See Simonds v. Stanolind Oil & Gas Co.*, 114 S.W.2d 226, 234 (Tex. 1938) (stating that to be able to assert the innocent purchaser doctrine, one must “have acquired the apparent title or the legal title as appearing of record to” an interest in land (citations omitted)); *Waggoner v. Dodson*, 73 S.W. 517, 518 (Tex. 1903) (defining the innocent purchaser under the statutes as a purchaser who “bought from one apparently invested with title[] and . . . secured from him that which on its face is the title”).

62. Specifically, an earlier version of the statute (article 6626) was referenced as the “may” statute.” Olds, *supra* note 42, at 37. The earlier statute’s language was equally as permissive as the language found in the Texas Property Code today. *Compare* Act effective Sept. 1, 1925, 39th Leg., R.S., tit. 115, ch. 3, art. 6626, *printed in 2 Revised Civil Statutes of the State of Texas*, at 1881, 1888 (Austin, A. C. Baldwin & Sons 1925) (repealed and codified 1983) (providing written instruments, such as “deeds, mortgages, and conveyances,” “are authorized to be recorded” if they are “acknowledged or proven according to law” (emphasis added)), *with* PROP. § 12.001(a) (“An instrument concerning real or personal property *may be recorded* if it has been acknowledged, sworn to with a proper jurat, or proved according to law.” (emphasis added)).

63. In discussing article 4652 of the Revised Civil Statutes, an early predecessor statute to Texas Property Code section 13.002, the *White* court stated:

The proposition is frequently announced that under the registration laws the proper record of an instrument authorized to be recorded is notice to all the world. Although the language of article 4652 of the Revised Statutes gives countenance to the doctrine as thus broadly stated, it has been decided by this court that the proposition is subject to important qualifications. For example, [an earlier] court quote[d] with approval the following language: “The registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed.” The doctrine was applied in the decision of that case, and the decision has been followed in subsequent cases.

White v. McGregor, 50 S.W. 564, 564–65 (Tex. 1899) (citations omitted). *Compare* Act effective Sept. 1, 1895, 24th Leg., R.S., tit. XCVI, ch. 3, art. 4652, *printed in Revised Civil Statutes of the State of Texas*, at 928, 937 (Austin, Eugene Von Boeckmann 1895) (“The record of any grant, deed[,] or instrument of writing authorized or required to be recorded, which shall have been . . . duly recorded in the proper county, shall be taken and held as notice to all persons of the existence of such grant, deed[,] or instrument.”), *with* PROP. § 13.002 (“An instrument that is properly recorded in the proper county is . . . notice to all persons of the existence of the instrument.”).

The Texas recording statutes add to the early common law doctrine by requiring that “the purchaser must record to get the common law protection of a first purchaser.”⁶⁴ More importantly, these statutes create a mechanism such that notice of earlier interests becomes the focal point for effectuating the old common law priority system.⁶⁵

In addition to these statutes, Texas law recognizes the equitable doctrine of bona fide purchaser for value, which entitles those meeting the doctrine's requirements to defeat a much broader array of interests.⁶⁶ Specifically, this doctrine assists one who acquires legal or apparent title⁶⁷

64. Olds, *supra* note 42, at 45.

65. *See id.* at 44–45 (recognizing recording acts benefitted land purchasers by providing notice of earlier interests, and indicating “notice is usually the focal point of discussions of the recording act”).

66. *See id.* at 48 (noting the Texas recording statutes did not eliminate the equitable doctrine of bona fide purchaser for value). The supreme court outlined the elements of this equitable doctrine as follows:

It is a well[-]recognized doctrine in equity, that a bona fide purchaser of the legal title to property, who pays a valuable consideration therefor, without notice, actual or constructive, of the right of other persons is entitled to protection against others who may have equitable title to or interest in the thing purchased; and it matters not whether the thing purchased be real or personal property.

Hill v. Moore, 62 Tex. 610, 613 (1884) (citations omitted); *see also* Johnson v. Darr, 272 S.W. 1098, 1101 (Tex. 1925) (stating equitable titles were not governed by the registration statutes and innocent purchasers for valuable consideration are protected against such interests under the equitable doctrine of estoppel); Olds, *supra* note 42, at 44 (noting that this equitable doctrine would defeat the common law rule of “prior in time, prior in right” in certain cases).

67. *See* Daniels v. Mason, 38 S.W. 161, 162 (Tex. 1896) (determining a bona fide purchaser who purchased legal title from one with capacity to contract would prevail over “the undisclosed equit[ies] of another”); *Moore*, 62 Tex. at 613 (asserting equity protects a bona fide purchaser for value of the legal title to property who took without notice of the equitable title or interest held by other persons). The concept of legal title in this context was described as:

As used in respect to bona fide purchasers, the word “title” has no reference to what may be the real beneficial interest of the vendor as disclosed by extrinsic proof. It has relation merely to what constitutes the evidence of his right. As is clearly explained in [an earlier] case, if this were not so, there could be no instance of an innocent purchase unless the vendor were, in fact, invested with the beneficial interest. As used in this sense, therefore, “title” does not mean the beneficial interest in the property conveyed. It means such written evidence as under the laws of the state confers upon the vendor the legal estate in the land. Nothing else appearing, this constitutes a legal title in the vendor—the apparent title, upon which the good-faith purchaser may rely, though, as between himself and others, the vendor may have no actual right to the land. “The question is not one of real beneficial ownership or of superior right, but of apparent ownership evidenced as the law requires ownership to be.”

Hennessy v. Blair, 173 S.W. 871, 873 (Tex. 1915) (emphasis added) (citations omitted); *see also* Moran v. Adler, 570 S.W.2d 883, 886 n.1 (Tex. 1978) (defining the holder of “apparent title” as “the ‘one apparently invested with title’ when viewed from the recorded instruments, ‘rely[ing] on the record’” (alteration in original) (quoting *Waggoner v. Dodson*, 73 S.W. 517 (Tex. 1903))); *York's Adm'r v. McNutt*, 16 Tex. 13, 16 (1856) (agreeing the protection that equity gives innocent purchasers

for value and without notice to defeat unrecorded equitable interests or titles in real property.⁶⁸ The guiding principle behind equitably protecting the “innocent purchaser” was aptly described as follows:

The doctrine of innocent purchaser grows out of the idea that a court of equity will not grant relief against an innocent party where the plaintiff has placed in the hands of another, the apparent power to cause the said party to act to his detriment, and that where one of two innocent parties is to suffer, then the one who has placed in the hands of another the means by which a wrong is done must be the one to suffer.⁶⁹

Thus, a subsequent purchaser from the apparent owner of an interest in land can use the equitable doctrine of innocent purchaser to defeat the assertion of certain secret unrecorded equitable titles or interests,⁷⁰ such as the interests of equitably adopted children⁷¹ or the interests of heirs of a deceased wife when the title, although community, was only in the name of the husband.⁷² It should be noted that in both of these situations the

“extends only to cases where they have taken a conveyance, or, in other words, where they have purchased the legal title” (citations omitted).

68. See *Moore*, 62 Tex. at 612 (describing equitable title as “any right in land inferior to the legal title, such as a court of equity, as distinguished from a court of law, in the exercise of its well[-]recognized powers would enforce”). An equitable interest is defined as “[a]n interest held by virtue of an equitable title or claimed on equitable grounds.” *Equitable Interest*, BLACK’S LAW DICTIONARY (10th ed. 2014). Clearly under the wording of the “may” recording statute, an equitable interest or title is not subject to being recorded to the extent that it is not in writing. Olds, *supra* note 42, at 39. However, if such interest concerns real estate and is reflected in a written instrument, it “may be recorded,” and in that event, it will give constructive notice. *Id.* There is an exception to this general rule. Although an executory contract for conveyance creates an equitable interest, this writing *must* be recorded in certain situations. PROP. § 5.076; see also *Johnson v. Wood*, 157 S.W.2d 146, 148 (Tex. 1951) (concluding a vendee under an executory contract for conveyance had merely an equitable right until performance was made, but upon performance the equitable “right ripened into an equitable title” superior to the vendor’s title).

69. *Pure Oil Co. v. Swindall*, 58 S.W.2d 7, 10 (Tex. Comm’n App. 1933, holding approved, *judgm’t affirmed*); see also *Fed. Life Ins. Co. v. Martin*, 157 S.W.2d 149, 152 (Tex. Civ. App.—Texarkana 1941, writ *ref’d*) (holding the rights of the equitable title holder to real property were inferior to the rights “of an innocent purchaser or mortgagee for value without notice” because the equitable title holder allowed “naked legal title to remain in” another).

70. See, e.g., *Edwards v. Brown*, 5 S.W. 87, 89 (Tex. 1887) (stating the equitable doctrine protects innocent purchasers “against secret titles, whether they be legal or equitable”).

71. See *Moran*, 570 S.W.2d at 887 (agreeing with precedent that held an innocent mortgagee or purchaser for value from the apparent legal owner took free of the claims of equitably adopted children because their interests were not apparent from the record).

72. See *Patty v. Middleton*, 17 S.W. 909, 912 (Tex. 1891) (acknowledging the heirs of the deceased wife acquired her equitable interest, but concluding such interest could not prevail over an innocent purchaser from the husband). As one court stated:

It is thoroughly settled by the decisions of this court that, when land belonging to the

“shall” recording statute will not protect the innocent purchaser,⁷³ and absent the equitable doctrine of innocent purchaser, the old common law rule of first in time, first in right will apply.⁷⁴

III. THE LEGAL EFFECT OF VOID INSTRUMENTS OR VOIDABLE INSTRUMENTS IN ONE'S CHAIN OF TITLE

A. *The Forged Deed vs. Deeds Procured Through Fraud*

The Texas law dealing with a forged deed in one's chain of title has been uniform and unwavering.⁷⁵ As stated by the Texas Supreme Court:

community of husband and wife is deeded to both, each has legal title to it, but, when the conveyance is made to one only, the legal title is vested in that one, and the other has an equitable title. Such deed does not constitute notice to subsequent purchasers for value without notice of the community interest of the unnamed member.

... Beyond cavil, [the innocent purchaser] acquired the legal and equitable title to the land by his purchase from Lytle, who had the legal title, and [the innocent purchaser] had no notice of the equity of the former wife or her children.

Mitchell v. Schofield, 171 S.W. 1121, 1122 (Tex. 1915).

73. Under the “shall” recording statute, equitable interests or titles reflected by an unrecorded writing are not rendered void as to creditors and subsequent purchasers for value so long as such interests or titles are not a conveyance, a mortgage, or deed of trust; rather, the doctrine of estoppel protects subsequent creditors and purchasers for value against the assertion of such equitable titles. *See Fed. Life Ins.*, 157 S.W.2d at 152 (concluding the equitable title owners were estopped from claiming superior rights in the land as against good faith creditors or innocent purchasers for value because the appellees “suffered the naked legal title to remain in” their grantor); *see also Johnson v. Darr*, 272 S.W. 1098, 1100–01 (Tex. 1925) (stating estoppel cannot be asserted by a judgment lien creditor as he has not parted with valuable consideration, and concluding an attachment lien creditor can derive no greater interest than the debtor's interest and if that interest is bare legal title, the judgment creditor will be defeated by the equitable title owner).

74. *See Olds*, *supra* note 42, at 48 (proclaiming the recording act does apply if one “acquires the legal title as against earlier equitable interests where one or both of the interests are not within the recording act” and in such a situation, the circumstance that is not covered “leaves the preceding common law rules in force” with the equitable doctrine of bona fide purchaser able to “aid” the individual who acquired legal title).

75. Simply put, one cannot be a bona fide purchaser for value if a forged deed is in one's chain of title. *See Pure Oil Co. v. Swindall*, 58 S.W.2d 7, 10 (Tex. Comm'n App. 1933, holding approved, judgment affirmed) (asserting one cannot be an innocent purchaser if one link in that purchaser's chain of title was a forged instrument); *see also Dyson Descendant Corp. v. Sonat Expl. Co.*, 861 S.W.2d 942, 947 (Tex. App.—Houston [1st Dist.] 1993, no writ) (“No person can be an innocent purchaser of land where one of the links in the chain of title is a forgery.” (first citing *Swindall*, 58 S.W.2d at 10; and then citing *Bellaire Kirkpatrick Joint Venture v. Loots*, 826 S.W.2d 205, 209 (Tex. App.—Fort Worth 1992, writ denied))); *Bellaire Kirkpatrick*, 826 S.W.2d at 209 (denying a party innocent purchaser protection since, “by definition, [one] cannot be a bona fide purchaser” with a forged deed in one's chain of title); *Erwin v. Curtis*, 5 S.W.2d 547, 548–49 (Tex. Civ. App.—Eastland 1928, writ ref'd) (observing the innocent purchaser rule is inapplicable when one's “claim is dependent upon a forged instrument”). A forged deed is considered void per se for two interrelated reasons: (1) as the forger

The difference between the title carried by a patent issued upon a forged assignment of the certificate and that resting upon a forged deed in the chain of transfer, as affecting the defense of an innocent purchaser, is apparent. A forged deed is an absolute nullity; a purchaser under it acquires no title; and it therefore affords no foundation for the defense. In the former case, . . . the patent is not a nullity, but passes the legal title to the patentee and those holding under him.⁷⁶

It is a well-recognized legal principle that a grantor cannot convey to a grantee a greater or better title than that which the grantor holds.⁷⁷ Thus, because a forger does not have legal or equitable title, the forger's grantee will receive no interest in the property purported to be conveyed.⁷⁸ Accordingly, the initial grantee, receiving no ownership of the legal title, cannot be an innocent purchaser.⁷⁹ As the original grantee does not receive legal title, a subsequent purchaser in this chain can never acquire legal title from her grantor and, therefore, cannot qualify as an innocent purchaser.⁸⁰

The proper recording of a deed in the proper county gives constructive notice of the recorded deed's existence to all persons.⁸¹ Such notice of the recording is a conclusive presumption of the law.⁸² But this is not the case with the recording of a forged deed.⁸³ Texas courts have held “[a]

had no interest to convey, “the forged document cannot pass a property interest”; and (2) the person whose signature was forged cannot protect himself from the forgery and, thus, “is innocent while the defrauded person had a hand in her own misfortune.” Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 884 (2011).

76. *Hennessy v. Blair*, 173 S.W. 871, 874 (Tex. 1915).

77. *See Collora v. Navarro*, 574 S.W.2d 65, 70 (Tex. 1978) (concluding the grantor was unable to transfer an interest greater than he possessed).

78. *See Hennessy*, 173 S.W. at 874 (noting “[a] forged deed is an absolute nullity” and thus, a purchaser under such deed acquires no title and has no foundation for the innocent purchaser defense); *Janes v. Stratton*, 203 S.W. 386, 388 (Tex. Civ. App.—Austin 1918, no writ) (holding a forged deed conveys no interest in property).

79. *See, e.g., York's Adm'r v. McNutt*, 16 Tex. 13, 16 (1856) (stating the protection afforded to innocent purchasers only applies when one acquires the legal title through purchase and without notice).

80. *See Swindall*, 58 S.W.2d at 10 (affirming when one of the links in a chain of title is a forged deed a subsequent purchaser cannot be an innocent purchaser).

81. TEX. PROP. CODE § 13.002(1) (West 2016).

82. *See White v. McGregor*, 50 S.W. 564, 566 (Tex. 1899) (“The effect of the statute of registration is to create a legal, irrebuttable presumption on part of subsequent purchasers that they know of the existence of the duly-recorded deed.”); *Quarles v. Hardin*, 249 S.W. 459, 462 (Tex. Comm'n App. 1923, judgment affirmed) (emphasizing constructive notice provides such a violent and conclusive presumption that no court will allow it to be controverted (citations omitted)).

83. *See Commonwealth Land Title Ins. Co. v. Nelson*, 889 S.W.2d 312, 318 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (emphasizing recording a forged deed does not give it any

forged deed is void ab initio";⁸⁴ thus, the recording of a forged deed neither constitutes constructive notice to any subsequent purchasers nor validates the forged deed.⁸⁵ A court of civil appeals explained the bases for these propositions as follows:

This case must be considered exactly as though no deed from Scott and wife was upon record, and appellant occupies the same position that it would have occupied had the forged deed not been recorded. That instrument was a nullity, and its record could not and did not give it vitality. The forged deed could not affect the title to the land, and was therefore not entitled to record. The provisions of the statutes as to deeds being void as to subsequent purchasers, without notice, if not recorded, have no application to forged deeds. Reliance on a recorded forged deed may bring loss on him who so relies, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolutely void and ineffective as though it had never existed.⁸⁶

However, notwithstanding that a forged deed is a nullity and void ab initio, it is clear that a grantee or his successors under a forged deed can gain limitation title to the property under two of Texas's adverse possession

legal effect as it lacks effectiveness ab initio); see also *Hennessy*, 173 S.W. at 874 (differentiating forged deeds in the chain of title from other forged instruments because a forgery renders a deed null and deprives subsequent purchasers of the innocent purchaser defense).

84. *Dyson Descendant Corp. v. Sonat Expl. Co.*, 861 S.W.2d 942, 947 (Tex. App.—Houston [1st Dist.] 1993, no writ) (citations omitted); see also *Hennessy*, 173 S.W. at 874 (indicating "[a] forged deed is an absolute nullity" and affords no legal title thereby depriving subsequent purchasers of the innocent purchaser defense). One court succinctly stated the law in Texas concerning a forged deed in one's chain of title in the following way:

A forged deed is void ab initio and inoperative. Title to land cannot pass under a forged deed. The fact that the grantee and his assigns are innocent purchasers makes no difference because no person can be an innocent purchaser of land where there is a forgery in the chain of title. A forged deed lacks effectiveness ab initio and neither consent, waiver, estoppel, implications, delivery, nor recording can give any legal effect to such an instrument.

Commonwealth Land Title, 889 S.W.2d at 318 (citations omitted).

85. See *Dyson Descendant Corp.*, 861 S.W.2d at 947 (concluding "[t]he recording of a forged deed does not give it any vitality" or afford constructive notice of the deed's existence); *Bibby v. Bibby*, 114 S.W.2d 284, 287 (Tex. Civ. App.—El Paso 1938, writ dismissed) (considering forged deeds ineffective for all purposes even if they are recorded (citations omitted)); *Abee v. Bargas*, 65 S.W. 489, 490 (Tex. Civ. App.—San Antonio 1901, no writ) ("A forged deed is not entitled to record, and if such a deed is recorded it cannot affect title to the land." (citations omitted)).

86. *Alamo Tr. Co. v. Cunningham*, 203 S.W. 413, 414 (Tex. Civ. App.—San Antonio 1918, writ dismissed w.o.j.) (citations omitted).

statutes.⁸⁷

Texas courts have drawn different legal conclusions concerning the effect of deeds that were forged from those deeds procured by fraud.⁸⁸ The Texas Supreme Court has held deeds obtained by fraud are voidable and not void⁸⁹ and can be set aside at the election of the individual who is defrauded.⁹⁰ The difference in treatment is generally considered to rest upon the culpability of the parties involved.⁹¹ An individual whose

87. See TEX. CIV. PRAC. & REM. CODE § 16.026, .028 (West 2016) (detailing the ten-year and twenty-five-year statutes for adverse possession with a recorded instrument, but limiting the acreage that may be adversely possessed in the absence of a title instrument under the ten-year statute for adverse possession). In *Moses v. Dibrell*, the court stated:

It is contended by plaintiffs that a forged deed, or a deed under a forged power of attorney, will not support the plea of limitation. This is true as to the 5-years statute of limitations, as expressly provided by statute, but the statute does not reach the case under the plea of 10[-]years[] limitation. It seems reasonable that, as the statute specially refers to the bar by 5[-]years[] limitation without including the 10-years limitation, it was intended to exclude the claim by the 10-years, and that the statutory rule would not apply to the latter.

Moses v. Dibrell, 21 S.W. 414, 416 (Tex. Civ. App.—Austin 1893, no writ) (citations omitted); see also *Wilhite v. Davis*, 298 S.W.2d 928, 934 (Tex. Civ. App.—Dallas 1957, no writ) (concluding the parties could acquire limitation title under the five-, ten-, and twenty-five-year adverse possessions statutes even though their deed was a forgery and void). The five-year statute of limitations specifically states, “This section does not apply to a claim based on a forged deed or a deed executed under a forged power of attorney.” CIV. PRAC. & REM. § 16.025(b).

88. Compare *Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d 615, 618 (Tex. 2007) (per curiam) (“Deeds obtained by fraud are voidable rather than void, and remain effective until set aside.” (citing *Nobles v. Marcus*, 533 S.W.2d 923, 926 (Tex. 1976))), with *Hennessy*, 173 S.W. at 874 (“A forged deed is an absolute nullity . . .”).

89. *Ford*, 235 S.W.3d at 618 (citing *Nobles*, 533 S.W.2d at 926). One court succinctly pointed out the difference in effect between void and voidable deeds in the following language:

The primary distinction we find between void and voidable deeds in Texas law is with respect to the rights of an innocent purchaser. A voidable deed operates as valid and perfect until set aside. Such a deed may be voidable as between grantor and grantee; it may nevertheless be effectual to convey title to an innocent purchaser from the grantee. A deed which is void, however, cannot pass title even to an innocent purchaser from the grantee.

Lighthouse Church of Cloverleaf v. Tex. Bank, 889 S.W.2d 595, 601 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citations omitted).

90. See *Deaton v. Rush*, 252 S.W. 1025, 1031 (Tex. 1923) (acknowledging a defrauded property owner can file an action to cancel the deed obtained by fraud (citing *Cook v. Moore*, 39 Tex. 255, 260 (1873))); *Lighthouse Church*, 889 S.W.2d at 602 (stressing voidable deeds are valid until set aside by the one defrauded); see also *Nobles*, 533 S.W.2d at 926 (reiterating deeds obtained by fraud are “prima facie evidence of title until there has been a successful suit to set it aside” (first citing *Meiners v. Tex. Osage Coop. Royalty Pool, Inc.*, 309 S.W.2d 898, 902 (Tex. Civ. App.—El Paso 1958, writ ref’d n.r.e.); and then citing *Whalen v. Richardson*, 353 S.W.2d 941, 943 (Tex. Civ. App.—Amarillo 1962, no writ))).

91. See *McFarlane*, *supra* note 75 (distinguishing between a person whose signature is forged and cannot adequately protect against the forgery and a defrauded party who can investigate or seek legal

signature is forged is generally unaware of the forgery and, thus, is considered innocent and incapable of protecting herself; whereas the defrauded person participated and created his own misfortune.⁹² The residual four-year statute of limitations applies to setting aside a voidable deed as the equitable powers of the court must be invoked to cancel the deed before maintaining an action to recover the land.⁹³ In giving the rationale for this approach, the Dallas Court of Appeals said:

Hence, as a voidable deed, it effectually accomplishes the thing sought to be accomplished, until set aside in a suit for rescission or cancellation. Such a deed prima facie conveys the title to the land, and, where the recovery of the title necessarily follows the rescission or cancellation of the deed, the action brought thereon is not, strictly speaking, a suit to recover real estate. The recovery of the land could not be obtained until the deed was canceled; the judgment for the land would be the consequence of the relief primarily granted, and could not, but for that relief, be recovered.⁹⁴

Unlike the case of a forged instrument, the innocent purchaser rule applies to protect subsequent purchasers in the case of a deed obtained by fraud.⁹⁵ The legal reasoning for permitting the innocent purchaser rule to

advice to guard against the fraud).

92. *See id.* (contending “the defrauded person ha[s] a hand in her own misfortune” by giving consent even if it was fraudulently obtained, and comparing this to the “innocent” victim of forgery). The Texas Supreme Court explained:

[W]here the owner of real property negligently clothes another with the apparent title to it, although the execution of the instrument which purports to convey the title may be obtained by fraud, and third parties being misled thereby innocently purchase and pay value for the property, [the owner] should be held estopped to deny the validity of the conveyance.

Link v. Page, 10 S.W. 699, 701 (Tex. 1889).

93. *See, e.g., Ford*, 235 S.W.3d at 618 (declaring deeds obtained by fraud voidable unless such deed was cancelled and set aside before limitations expired under the residual limitation statute (citations omitted)). The residual statute of limitations that applies in cases to reform, cancel, or rescind a deed or an equitable action to remove a cloud when the deed is voidable provides: “Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.” TEX. CIV. PRAC. & REM CODE § 16.051 (West 2016).

94. *Neill v. Pure Oil Co.*, 101 S.W.2d 402, 404 (Tex. Civ. App.—Dallas 1937, writ ref’d) (citations omitted); *see also Deaton*, 252 S.W. at 1031 (agreeing when a vendee acquired a deed by fraud his “title [wa]s prima facie good[] and it could only be avoided by a suit and a decree annulling and canceling the deed” (citing *Cook*, 39 Tex. at 260–61)).

95. *See Link*, 10 S.W. at 701 (providing where an instrument purporting to convey title is obtained by fraud, a subsequent innocent purchaser will be protected under principles of estoppel); *see also Nobles*, 533 S.W.2d at 926 (explaining a deed procured by fraud represented prima facie title until set aside (first citing *Meiners*, 309 S.W.2d at 902; and then citing *Whalen*, 353 S.W.2d at 943)).

apply in such cases was explained as follows:

The doctrine of innocent purchaser grows out of the idea that a court of equity will not grant relief against an innocent party where the plaintiff has placed in the hands of another[] the apparent power to cause the said party to act to his detriment, and that where one of two innocent parties is to suffer, then the one who has placed in the hands of another the means by which a wrong is done must be the one to suffer. We assume that the execution and delivery of the instrument, dated February 22, 1924, was procured through fraud. So assuming, such an instrument so executed and delivered, in the absence of notice of the circumstances under which its execution and delivery was procured, apparently was fair on its face, and therefore not void, though subject to be declared so by a court of competent jurisdiction under proper pleadings and due proof. In other words, such an instrument so executed, as between the parties, was voidable, and was not void, even between the parties. Furthermore, until such an instrument has been declared to be void, in an authoritative manner, persons who are ignorant of the circumstances under which the instrument was executed and delivered are entitled to consider it genuine.⁹⁶

Thus, while a deed procured by fraud by the initial grantee is voidable, if the initial grantee conveys the property to a subsequent innocent purchaser without notice for value, the initial grantor will be unable to set aside the interest of the innocent purchaser.⁹⁷

96. *Pure Oil Co. v. Swindall*, 58 S.W.2d 7, 10 (Tex. Comm'n App. 1933, holding approved, judgm't affirmed).

97. *See, e.g., Ramirez v. Bell*, 298 S.W. 924, 928 (Tex. Civ. App.—Austin 1927, writ ref'd) (indicating the maker of an instrument procured by fraud cannot assert such fraud against an innocent purchaser). While this part of the Article deals with deeds procured by fraud, the same rules apply to other voidable deeds; deeds procured by undue influence, mutual mistake, or duress are also voidable. *See Beville v. Jones*, 11 S.W. 1128, 1130 (Tex. 1889) (ruling a deed procured by undue influence may be set aside); *Spain v. Fuston*, 242 S.W.2d 892, 894 (Tex. Civ. App.—Fort Worth 1951, no writ) (asserting a deed may be cancelled on proof of mutual mistake); *Kinnear v. Tolbert*, 262 S.W. 900, 901 (Tex. Civ. App.—Texarkana 1924, writ dism'd w.o.j.) (“A deed obtained by duress is voidable only and not void . . .”). In these cases, the courts have also acknowledged that an innocent purchaser will prevail. *See Slay v. Wheeler*, 84 S.W.2d 841, 844 (Tex. Civ. App.—Eastland 1935, writ ref'd) (warning a voidable deed may not be rescinded following a transfer to a bona fide purchaser). Thus, in *Slay v. Wheeler*, the court recognized the rights of an innocent purchaser with a voidable deed in his chain of title are determined by this rule of law:

“Though a deed or mortgage may have been procured by means of fraud or false representations[] or by duress or undue influence, or without consideration[] so as to make it voidable at the instance of the grantor, yet it cannot be rescinded or canceled after the property has been transferred to a bona fide purchaser for value[] who takes[,] without knowledge of, or participation in[] the fraud or other invalidating circumstance.”

B. *Void Deeds in a Subsequent Purchaser's Chain of Title*⁹⁸

To determine whether a deed is voidable or void the courts examine the deed's effect upon the title at the time of its execution and delivery.⁹⁹ A void deed "is without vitality or legal effect."¹⁰⁰ A voidable deed, on the other hand, "operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared."¹⁰¹ Following the logic used in forgery cases,¹⁰² Texas courts have held the recording of a void deed is not constructive notice to creditors and subsequent purchasers.¹⁰³ Furthermore, Texas courts have

Id. (alterations in original) (quoting 3 HENRY CAMPBELL BLACK, A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS § 640, at 1547 (Jay M. Lee ed., 2d ed. 1929)).

98. This section of the Article deals specifically with those situations where the courts have held a subsequent purchaser can be deemed an innocent purchaser for value in spite of the existence of a void deed in such purchaser's chain of title. *E.g.*, *Randolph v. Citizens Nat'l Bank of Lubbock*, 141 S.W.2d 1030, 1034 (Tex. Civ. App.—Amarillo 1940, writ dismissed judgment cor.) (deeming the subsequent purchasers following a void foreclosure sale to be innocent purchasers despite the existence of a void deed in their chain of title because they had paid valuable consideration for the title and had no notice the foreclosure sale was void).

99. *Slaughter v. Qualls*, 162 S.W.2d 671, 674 (Tex. 1942). The *Slaughter* court needed to determine whether the particular deed involved in the case was void or voidable to ascertain whether limitations had run. *Id.* The court noted:

The rule has long been established in this [s]tate that where a deed is absolutely void, a suit at law in trespass to try title may be maintained to recover the land without setting the deed aside, and the statutes of limitation governing actions for the recovery of land apply. On the other hand, where a deed is merely voidable and the equity powers of the court must first be invoked to cancel the deed before a suit can be maintained at law to recover the land, then the four-year statute[] controls.

Id. (citation omitted).

100. *Id.* (quoting *Smith v. Thornhill*, 25 S.W.2d 597, 598 (Tex. Comm'n App. 1930), *vacated on other grounds on reh'g*, 34 S.W.2d 803 (Tex. Comm'n App. 1931, holding approved, judgment adopted)).

101. *Id.* (quoting *Smith*, 25 S.W.2d at 598).

102. *See Abec v. Bargas*, 65 S.W. 489, 490 (Tex. Civ. App.—San Antonio 1901, no writ) (indicating forged deeds are not entitled to be filed for record, and if it is recorded, the forged deed "cannot affect title to the land"); *McFarlane*, *supra* note 75 ("[A] forger[y] victim] cannot protect him or herself from the forgery and is innocent . . .").

103. *See Stiles v. Japhet*, 19 S.W. 450, 452 (Tex. 1892) (per curiam) (concluding recording a void deed conveys no actual or constructive notice); *Terry v. Cutler*, 39 S.W. 152, 156 (Tex. Civ. App.—Dallas 1896, writ refused) (affirming that the recording of a void deed conveys no notice of its contents (citations omitted)).

Texas courts have also held recording a deed with a defective acknowledgment is not constructive notice to future purchasers since the instrument was not entitled to recordation. *See Gulf Prod. Co. v. Con'l Oil Co.*, 164 S.W.2d 488, 494 (Tex. 1942) (recognizing the recording of an instrument with a defective acknowledgment does not impart constructive notice to subsequent purchasers where the defect appears on the face of the instrument (citations omitted)); *Taylor v. Harrison*, 47 Tex. 454, 458 (1877) (indicating when the acknowledgment is left off the recorded

consistently held a void deed does not convey legal title to the grantee¹⁰⁴ and one holding under a void deed is not an innocent purchaser for value.¹⁰⁵ Nevertheless, in spite of such unequivocal language, Texas courts have, from time to time, announced exceptions to these rules of law.¹⁰⁶

instrument, the instrument was not properly recorded and creditors and subsequent purchasers were not charged with notice). However, this rule is only true when the defect in the acknowledgment is on the face of the certificate. *See, e.g., Gulf Prod. Co.*, 164 S.W.2d at 494 (determining that if the recorded instrument disclosed the defect in the acknowledgment, subsequent purchasers would not have constructive notice). Thus, in the situation where the notary's certificate appears regular on its face, the recording of the instrument does give constructive notice. *See id.* at 493 (noting if a notary's certificate were regular on its face with no evidence of any defect, subsequent purchasers would be charged with constructive notice of the recorded instrument); *Titus v. Johnson*, 50 Tex. 224, 240 (1878) (stating where the defect in an acknowledgment did not appear on the face of the certificate, the recorded instrument provided constructive notice and parol evidence was not admissible to establish that the certificate was not proper). Of course, "as between a grantor and a grantee deeds are valid even without a valid acknowledgment." *Haile v. Holtzclaw*, 414 S.W.2d 916, 928 (Tex. 1967) (citations omitted).

104. *See Wall v. Lubbock*, 118 S.W. 886, 888–89 (Tex. Civ. App.—Austin 1908, writ *ref'd*) (holding a deed executed by the agent and attorney of the grantor did not convey title to the grantee because the grantor was dead at the time of the execution and, therefore, the agent had no authority to execute the deed); *Terry*, 39 S.W. at 156 (deeming a sheriff's deed null and void since "the sheriff was without power to make the sale" and, therefore, his deed conveyed no title).

105. *See Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 168 (Tex. 2013) (indicating one cannot claim to be an innocent purchaser when a void deed is in one's chain of title (quoting *Wall*, 118 S.W. at 888)), *rev'g City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82 (Tex. App.—Corpus Christi 2010); *Wall*, 118 S.W. at 888 (asserting a person claiming under a void title could not be an innocent purchaser, and thus asserting the conveyance at hand was void since the owner of the property was dead at the time of its execution (first citing *Daniels v. Mason*, 38 S.W. 161, 162 (Tex. 1896); and then citing *Terry*, 39 S.W. at 156)). The *Wall* court relied in part on the earlier case of *Daniels v. Mason* where the court said:

The proposition is that a bona fide purchaser for value from the holder of the legal title with no capacity to contract will be protected against the subsequent claims of such vendor or his heirs, seeking to avoid the binding force of such contract by reason of such want of capacity, on the ground that such purchaser had no notice of such want of capacity. We know of no instance in which such protection has ever been extended. . . . In the case before us the legal title was in [the deceased wife of the defendant], but during coverture, in the absence of special circumstances, not shown to have existed, she was without capacity to convey, whether the land be considered community or her separate estate; and the rules of equity, established for the protection of bona fide purchasers against secret or undisclosed equities in the thing conveyed, afford purchasers from her, and those claiming under them, no protection against the consequences of such want of capacity, though they were ignorant thereof.

Daniels, 38 S.W. at 162.

106. *See Randolph v. Citizens Nat'l Bank of Lubbock*, 141 S.W.2d 1030, 1034 (Tex. Civ. App.—Amarillo 1940, writ *dism'd judgm't cor.*) ("[I]t has long been the law in this state that one who purchases land from another who has the apparent title, without notice of any infirmities therein, and pays a valuable consideration therefor, is protected under the equitable doctrine of innocent purchaser." (citing *Mast v. Tibbles*, 60 Tex. 301, 305 (1883))).

1. Deeds Considered Void Because of the Failure to Comply with Statutes Relating to Conveyances by Married Women

Prior to August 23, 1963, a married woman had to be joined by her husband in a conveyance of her separate property.¹⁰⁷ Furthermore, until January 1, 1968,¹⁰⁸ for a married woman to join her husband in a conveyance of real property she had to have her acknowledgment to the conveyance "privily and apart from her husband."¹⁰⁹ The courts

107. The statute requiring the joinder provided:

The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded, and certified to in the mode pointed out in articles 6605 and 6608.

Act effective Sept. 1, 1925, 39th Leg., R.S., tit. 31, art. 1299, *printed in 1 Revised Civil Statutes of the State of Texas*, at 389, 391 (Austin, A. C. Baldwin & Sons 1925), *repealed by* Act approved June 10, 1963, 58th Leg., R.S., ch. 473, § 1, 1963 Tex. Gen. Laws 1189, 1189 (effective Aug. 23, 1963).

108. *See* Allen v. Monk, 505 S.W.2d 523, 524-25 (Tex. 1974) (acknowledging the repeal, effective January 1, 1968, of the promulgated form of a married woman's acknowledgment and the statute setting out the requirements of the privily examination).

109. *See, e.g.*, Humble Oil & Ref. Co. v. Downey, 183 S.W.2d 426, 429 (Tex. 1944) (recognizing that since 1841 a privy examination and an acknowledgment were essential to the validity of a conveyance of a married woman's separate property (citations omitted)). A later supreme court stated the reason for the requirement of the separate acknowledgment was to protect a married woman from "careless divestment" of her separate property. Coakley v. Reising, 436 S.W.2d 315, 319 (Tex. 1968) (citations omitted). The statute requiring the privily examination stated:

No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken, unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment on an examination privily and apart from her husband; nor shall he certify to the same, unless she thereupon acknowledges to such officer that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it.

Act effective Sept. 1, 1925, 39th Leg., R.S., tit. 115, ch. 2, art. 6605, *printed in 2 Revised Civil Statutes of the State of Texas*, at 1881, 1884 (Austin, A. C. Baldwin & Sons 1925), *repealed by* Act approved May 27, 1967, 60th Leg., R.S., ch. 309, § 6, 1967 Tex. Gen. Laws 735, 741 (effective Jan. 1, 1968). The certificate of acknowledgment of a married woman had to be substantially in compliance with the following promulgated form:

The State of _____,
County of _____.

Before me, _____ (here insert the name and character of officer) on this day personally appeared _____, wife of _____, known to me (or proved to on me on the oath of _____) to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said _____, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

unequivocally held the failure to comply with these statutes made the conveyance void, to be treated as a nullity.¹¹⁰ However, the courts engrafted two equitable exceptions to this absolute rule of law to protect innocent purchasers.¹¹¹

First, the courts held a married woman could be estopped from recovering her separate property or claiming title in cases where her fraudulent misrepresentations were relied on by an innocent purchaser.¹¹²

(Seal) "Given under my hand and seal of office this ____ day of _____, A. D., _____."
 _____"

Id. tit. 115, ch. 2, art. 6608, printed in 2 *Revised Civil Statutes of the State of Texas*, at 1881, 1884 (Austin, A. C. Baldwin & Sons 1925), repealed by Act approved May 27, 1967, 60th Leg., R.S., ch. 309, § 6, 1967 Tex. Gen. Laws 735, 741.

110. See *Downey*, 183 S.W.2d at 428 (holding a married woman's failure to comply with the separate acknowledgment rendered the instrument conveying her separate property an absolute nullity (citations omitted)); *Veeder v. Gilmer*, 129 S.W. 595, 596 (Tex. 1910) (noting compliance with the statutes' privity and acknowledgment requirements was absolutely essential to passing title of a married woman's separate real property); *Chester v. Breitling*, 32 S.W. 527, 527 (Tex. 1895) (deeming a deed executed by a married woman void because the officer "failed to certify to the privity examination and acknowledgment" as required by statute); *Williams v. Ellingsworth*, 12 S.W. 746, 747 (Tex. 1889) (concluding a deed executed by a married woman that purported to convey her separate property was ineffective to pass title for failure to comply with the statutes). In *Berry v. Donley*, the court explained the importance of the privity examination and indicated American courts give statutes similar to Texas's the following "general if not universal construction":

"A *feme covert* cannot convey a title to her lands except by a deed *executed upon her private examination, made as the law directs*; her signature to a deed without such private examination is a nullity; her deeds of all kinds are void without such examination; it is the examination which gives them validity, and not the signature; the signature being a nullity without such examination. It then necessarily follows that there is no divesture of title till such examination be had," etc.

Berry v. Donley, 26 Tex. 737, 745-46 (1893) (quoting *Perry v. Calhoun*, 27 Tenn. 551, 556 (1847)); see also *Buvens v. Brown*, 18 S.W.2d 1057, 1061 (Tex. 1929) (acknowledging the courts sometimes referred to deeds not properly acknowledged by a married woman as being no deeds at all or a "mere waste paper" (quoting *Cross v. Everts*, 28 Tex. 523, 532 (1866))).

111. See *Downey*, 183 S.W.2d at 428 (providing protection to innocent purchasers for value, in certain situations, if they did not have notice of the officer's failure to perform "his duty in taking the acknowledgment" of the married woman appearing before him); *Berry*, 26 Tex. at 746 (suggesting relief would be denied to a married woman who made fraudulent misrepresentations upon which another acted or was misled).

112. See, e.g., *Berry*, 26 Tex. at 746 (indicating a married woman may be estopped from recovering her separate property as a result of her fraudulent acts or misrepresentations relied upon by others). An early Texas Supreme Court set forth this explanation of the estoppel principle:

While [the law] extends its protection to the rights of a married woman, it does not permit her to act fraudulently or inequitably to the injury of others. . . . "[T]he law protects her, but it gives her no license to commit a fraud against the rights of an innocent party."

A *feme covert*, acting on her own responsibility, may act fraudulently, deceitfully, or inequitably, so as to deprive her of any claim for relief in a court of equity. This results from the capacity to

In *Humble Oil & Refining Co. v. Downey*,¹¹³ the court stated:

The only instances in which a married woman can be prevented from asserting the invalidity of a deed not separately acknowledged as required by our statutes is where she has been guilty of such active fraud in regard to the transaction as would estop her from pleading the invalidity of her acknowledgment or the certificate thereto.¹¹⁴

The *Downey* court also announced another exception noting that the certificate of the officer taking the acknowledgment could be conclusive in certain cases, thereby protecting an innocent purchaser.¹¹⁵ This exception to the general rule of law was clearly articulated in *Wheelock v. Cavitt*¹¹⁶ in the following words:

Under the facts alleged in the plaintiff's petition as shown in the statement accompanying the question, the certificate of the officer showing that the plaintiff had acknowledged the deed in question was void; and, notwithstanding the vendee may have paid value for the land without notice that the certificate was in fact false, no title passed by the conveyance. In

hold property and make contracts, with which the law invests her. Her voluntary acts and representations made to deceive and which do deceive others to their prejudice, will be binding upon her. If she makes admissions and representations in respect to her rights of property by which others are deceived and induced to give credit to her husband on the faith of the property, she will be precluded from asserting her claim against the rights of those who have confided in and acted upon her representations and admissions. ["Indeed," . . . in treating of fraudulent concealments and representations, "cases of this sort are viewed with so much disfavor by courts of equity that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation, for neither infants nor *femes covertis* are privileged to practice deceptions or cheats on other innocent persons."

It is a well-settled principle of the law, from the influence of which not even married women are exempted, that "admissions which have been acted upon by others are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced." "The party is estopped, on grounds of public policy and good faith, from repudiating his own representations."

Cravens v. Booth, 8 Tex. 243, 248-49 (1852) (citations omitted).

113. *Humble Oil & Ref. Co. v. Downey*, 183 S.W.2d 426 (Tex. 1944).

114. *Id.* at 428 (citing *Johnson v. Bryan*, 62 Tex. 623, 625 (1884)); *see also* *Hussey v. Moser*, 7 S.W. 606, 608 (Tex. 1888) (stating, by way of obiter dicta, that a married woman who concealed facts that her daughter had signed and acknowledged her name to a deed giving it the appearance of a valid conveyance had a "duty to denounce the fraud" and might be estopped for the protection of innocent third parties).

115. *See Downey*, 183 S.W.2d at 428 (asserting an innocent purchaser would be protected where the married woman appeared for the purposes of acknowledging the instrument and the certificate of acknowledgment complied with the statutes except the officer failed to perform his legal duty to take the acknowledgment).

116. *Wheelock v. Cavitt*, 45 S.W. 796 (Tex. 1898).

this state the rule is firmly established that where a married woman, who has, with her husband, signed a deed conveying her separate real estate, appears before an officer authorized by law, for the purpose of acknowledging the conveyance, and the officer fails to do his duty in taking such acknowledgment, but makes a certificate which shows a full compliance with the law, such certificate is conclusive upon the married woman in favor of an innocent vendee who paid value for it without notice that the officer failed to perform his duty as required by law. . . . But where it is shown that the married woman has not appeared before the officer for the purpose of acknowledging the execution of the deed, and no acknowledgment has been in fact made, she having in no way invoked the exercise of the officer's authority in that respect, the certificate, however formal, is not binding upon her, even in favor of an innocent purchaser for value and without notice.¹¹⁷

The courts also used equitable principles in those situations where the earlier instrument was void because the requirements of the statute had not been complied with; thus, a new instrument that was properly acknowledged and accompanied by a proper certificate could ratify the lawful terms of the earlier document and become effective on the date of the new instrument's execution.¹¹⁸

117. *Id.* at 797 (citations omitted).

118. The court in *Montgomery v. Hornberger* stated:

It may be true, as contended by [the heirs of the grantor], that the deed of 1845 was void because it was not acknowledged by Mrs. Sawyer[, the grantor]. It is also true that, being a nullity, it could not be confirmed by the subsequent deed, so as to have any validity of its own. The attempt to confirm it could not change the fact that the title had not previously passed out of Mrs. Sawyer, or, retroactively, impart to the nullity an efficacy which it had not before possessed. But at the date of the second instrument, Mrs. Sawyer was still the owner of the land, and had capacity to convey it by complying with the law. An attempt to confirm a void deed, so as to make it operative, may fail to effect that purpose, but may still operate as a new grant. In some of the authorities it is said that such effect may be given to the deed of confirmation if apt words to convey the title in *præsenti* are employed. In order that the deed shall so operate, we think it is only essential that the intention to convey should appear, and such intention could hardly be more effectually expressed than by saying that a deed by which the party had undertaken to convey the land at a past time shall operate from such date. As surely as the greater includes the less, and the whole all of its parts, the expression of an intention to make a deed operate for all time from a past date includes the intent that it shall operate from the present. So the objection urged by [the grantor's heirs], that the confirming deed does not expressly purport by its own terms to convey the title, cannot be sustained. Besides, the true view of the matter, as before stated, in the instrument last signed by [Mr.] Sawyer and [his] wife, is not the whole of the deed. By its reference to the attached document[, the void deed,] it imparted into, and made part of itself, the terms of that paper, which supplied everything essential to a complete conveyance.

Montgomery v. Hornberger, 40 S.W. 628, 629 (Tex. Civ. App.—Galveston 1897, writ *ref'd*) (citations omitted); *see also* *Thompson v. Crim*, 126 S.W.2d 18, 20 (Tex. 1939) (noting a married woman's

However, in situations where the certificate of acknowledgment was insufficient on its face, although the acknowledgment was properly taken pursuant to the terms of the statute, courts held the deed was inoperative as a conveyance but was not void.¹¹⁹ In such a case, the certificate of acknowledgment could be corrected pursuant to an action in court, as provided by statute, within four years after the execution of the instrument.¹²⁰ Furthermore, such certificate could be corrected by the

ratification of an earlier void deed, which regards her separate property, must clearly and unequivocally reflect an intent to ratify and confirm the earlier instrument); *Humble Oil & Ref. Co. v. Clark*, 87 S.W.2d 471, 474 (Tex. 1935) (clarifying that although the original mineral lease was void for failure to comply with the statutes concerning the conveyance of a married woman's separate property, its lawful terms could be adopted in a new lease that became effective upon execution).

119. See *Hill v. Foster*, 186 S.W.2d 343, 345 (Tex. 1945) (determining where a married woman properly acknowledged the deed, but the officer failed to attach the proper certificate of acknowledgment, "the deed was not void but merely inoperative as a conveyance"); *Interstate Bldg. & Loan Ass'n v. Goforth*, 59 S.W. 871, 873 (Tex. 1900) (deciding if a deed was properly acknowledged, but a proper certificate was not attached, the deed was not void).

120. See *Foster*, 186 S.W.2d at 345-46 (asserting a defective certificate of acknowledgment could be corrected by an action, as permitted by statute, to have it conform to the actual facts); *Goforth*, 59 S.W. at 873 (noting an action to correct the certificate could be brought within four years from the making of the instrument). The statute authorizing the correction of the certificate by an action, as referred to by the *Hill v. Foster* court, stated: "When the acknowledgment or proof of the execution of any instrument in writing may be properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate." Act effective Sept. 1, 1925, 39th Leg., R.S., tit. 115, ch. 5, art. 6655, printed in 2 *Revised Civil Statutes of the State of Texas*, at 1881, 1895 (Austin, A. C. Baldwin & Sons 1925), repealed and codified by Act of May 30, 1983, 68th Leg., R.S., ch. 576, §§ 6, 1, 1983 Tex. Gen. Laws 3475, 3729-30, 3488 (adopting nonsubstantive revisions of statutes relating to property into the Property Code) (current version at TEX. PROP. CODE § 11.005(b)).

An action to correct the certificate is covered by the four-year residual statute of limitations. See TEX. CIV. PRAC. & REM. CODE § 16.051 (West 2016) (requiring every action, other than an action to recover real property, to be brought within four years from the date it accrues if no specific limitation period exists); see also *Norton v. Davis*, 18 S.W. 430, 431 (Tex. 1892) (per curiam) (indicating an action to correct a certificate of acknowledgment of a married woman was barred by the four-year statute). Until a statute authorizing a correction of the certificate of acknowledgment came about, the certificate was the only evidence, and where it did not satisfy the requirements of the law, the deed failed. See, e.g., *Looney v. Adamson*, 48 Tex. 619, 621-22 (1878) (concluding a deed was incomplete since the certificate of acknowledgment was silent as to the acknowledgment and privily examination by a married woman, and a married woman's voluntary execution of a deed could not be established by parol evidence). The first statute authorizing an action to obtain a judgment correcting the certificate came into existence in 1879. See Act of Feb. 21, 1879, 16th Leg., R.S., tit. LXXXVI, ch. 5, art. 4353, printed in *The Revised Statutes of Texas*, at 620, 628 (Galveston, A. H. Belo & Co. 1879) (current version at PROP. § 11.005(b)) ("When the acknowledgment or proof of the execution of any instrument in writing may be properly made, but defectively certified, any party interest may have an action in the district court to obtain a judgment correcting the certificate."). In explaining the purpose of the correction statute, the supreme court stated:

The only change the statute makes is to permit the facts which actually existed and ought to have been stated in, but were omitted from, the certificate to be established and evidenced by

execution of another instrument recognizing the validity of the prior instrument.¹²¹ However, unless the certificate was corrected by court order or the execution of another proper instrument, the recorded instrument was not effective to give notice to a subsequent purchaser from the original grantor.¹²²

Although the courts were clear that a conveyance of separate property by a married woman was invalid and void for failure to comply with the statutes absent one of the equitably adopted exceptions, a stranger to that title could not take advantage of such failure.¹²³ In explaining this position, the Texas Supreme Court said:

This court has consistently held the privity examination, acknowledgment, and declaration before the officer, as required by the statute, essential to the validity of a married woman's conveyance, and that a defectively acknowledged deed to her separate lands did not convey her title to the vendee, and was void. It repeated that "to hold otherwise would be practically to repeal the statute." In order to give the statute effect and to protect the married woman, such holdings were necessary and correct. But we repeat that the only purpose of the statute was to protect the married woman, and it was enacted for her benefit.

Though a deed of a married woman which is not acknowledged as required by the statute be considered void as to her and her privies, we think the proposition that a stranger to such title cannot be heard to raise the issue of its invalidity is thoroughly reasonable and legally sound. Certainly it is equitable and just.¹²⁴

judgment in an action brought for that purpose within the time prescribed by law, and it must follow that such facts can be shown only in two ways for the purpose of passing the title of the married woman: (1) [b]y the certificate; or (2) by judgment as stated.

Veeder v. Gilmer, 129 S.W. 595, 596 (Tex. 1910).

121. See *Foster*, 186 S.W.2d at 345–46 (noting a properly executed subsequent instrument could correct the defective certificate of acknowledgment (citations omitted)); *Chester v. Breitling*, 32 S.W. 527, 529 (Tex. 1895) (stating a subsequent deed with a proper certificate of acknowledgment was the equivalent of a re-execution of the first deed that had a defective certificate of acknowledgment).

122. See *Foster*, 186 S.W.2d at 347 (distinguishing how a proper correction of the certificate related back to the original instrument's effective date as to the original parties, but as to the innocent purchaser, the correction took effect on the date of the correction (citations omitted)); *Hayden v. Moffat*, 12 S.W. 820, 821 (Tex. 1889) (indicating where the first deed from the grantor was not entitled to registration due to an improper certificate of acknowledgment, a second grantee from the same grantor took title free of the first recorded deed).

123. See *Buvenus v. Brown*, 18 S.W.2d 1057, 1062–63 (Tex. 1929) (reasoning the statute's only purpose was the protection of married women, and thus deciding "a stranger to such title cannot be heard to raise the issue of its invalidity").

124. *Id.*

Therefore, the court acknowledged a void deed in a subsequent purchaser's chain of title would not prevent such a subsequent purchaser from being successful in a trespass to try title action in those cases where the married woman or her heirs or privies were not parties to the suit.¹²⁵ Thus, notwithstanding the general rule concerning the invalidity of a conveyance by a married woman because of the failure to comply with the statutes concerning her acknowledgment, Texas courts applied equitable principles to protect innocent purchasers¹²⁶ when doing so was authorized by statute or did not conflict with the ultimate purpose of the statutes.¹²⁷

2. Deeds Considered Void as the Grantor Had No Intent to Deliver the Deed

The Texas Property Code provides: "A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and *delivered by the conveyor* or by the conveyor's agent authorized in writing."¹²⁸ Thus, to constitute a valid conveyance, it is necessary that the grantor deliver the deed to the grantee with the specific intent that such delivery will "become operative as a conveyance."¹²⁹ However, absent proof to the contrary, delivery is presumed when a deed is signed, acknowledged, recorded, and in the possession of the grantee.¹³⁰

125. *See id.* at 1060, 1063 (holding the defendant in the case could not raise the issue of invalidity of the deed in the plaintiff's chain of title). In *Buwens v. Brown*, the void deed was a necessary link in the plaintiff's chain of title from the sovereign, but the court held the defendant could not defeat the plaintiff's claim to title in the trespass to try title suit as the defendant was a stranger to that chain. *Id.* The court indicated the sole purpose of the statute was to protect and benefit the married woman. *Id.* at 1062.

126. *See, e.g.,* *Humble Oil & Ref. Co. v. Downey*, 183 S.W.2d 426, 430 (Tex. 1944) (limiting the application of equitable rules that "estop married women from asserting the invalidity of their deeds[] or other instruments required to be acknowledged" to circumstances involving "bona fide purchasers for value and without notice").

127. *See Buwens*, 18 S.W.2d at 1062-63 (proclaiming a stranger to the title cannot attack its invalidity when the married woman or her privies are not parties to the action as the statute setting forth the requirements was meant solely for her protection).

128. TEX. PROP. CODE § 5.021 (West 2016) (emphasis added).

129. *See id.* (requiring a conveyance to be in writing "and delivered by the conveyor"); *see also* *Steffian v. Milmo Nat'l Bank*, 6 S.W. 823, 824 (Tex. 1888) (asserting the intention of the grantor to effect a delivery makes the delivery of the deed operative).

130. *See* *Stephens Cty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261-62 (Tex. 1974) (contending the filing of a deed for record presented "[a] prima facie case of delivery" with the requisite intent to convey the land (first citing *Thornton v. Rains*, 299 S.W.2d 287, 289 (Tex. 1957); and then citing *Vannerberg v. Anderson*, 206 S.W.2d 217, 219 (Tex. 1947)); *Morrison v. Parish*, 384 S.W.2d 764, 765-66 (Tex. Civ. App.—Texarkana 1964, writ *dism'd w.o.j.*) (noting the

*Steffian v. Milmo National Bank*¹³¹ is the leading case explaining the legal consequences subsequent purchasers face when there was no intent to deliver a deed.¹³² In that case, a deed was executed for the sale of land, and the deed was to be held by the grantor until the purchase price was paid.¹³³ However, the grantee obtained possession of the deed before paying the purchase price by representing to the grantor that he needed the deed to copy the field notes.¹³⁴ Having obtained possession of the deed, the grantee offered to give the bank a lien on the property that was covered by the deed to obtain an extension of time to pay his debt to the bank.¹³⁵ The bank agreed, and the grantee executed a deed to the bank conveying the property in question.¹³⁶ The bank had no knowledge or notice that the original grantor had not intended for the delivery of the deed to the grantee to evidence the sale.¹³⁷ The issue for the court was whether the bank was a bona fide mortgagee.¹³⁸ The court recognized that courts have held “a deed delivered without the consent of the grantor is of no more effect to pass title than if it were a forgery,” and, therefore, concluded the lower “court was in error in holding appellee a *bona fide* purchaser for a valuable consideration without notice.”¹³⁹ However, by way of dicta the *Steffian* court said:

It does not follow, however, that appellee may not make out a case entitling it to judgment, although no effective delivery of the deed is shown. But in order to do this he must bring himself within the rules applicable to an

presumption of intent to deliver arose, absent proof to the contrary, when a signed and acknowledged instrument was recorded and in the possession of the grantee (citation omitted); see also *West v. First Baptist Church of Taft*, 71 S.W.2d 1090, 1099 (Tex. 1934) (determining the filing for record of a deed of trust by the grantor “at the request or with the consent of the” mortgagee amounted to a constructive delivery). The presumption of intent can be rebutted upon showing: “(1) that the deed was delivered or recorded for a different purpose, (2) that fraud, accident[,] or mistake accompanied the delivery or recording, or (3) that the grantor had no intention of divesting himself of title.” *Stephens Cty. Museum*, 517 S.W.2d at 262 (citations omitted).

131. *Steffian v. Milmo Nat'l Bank*, 6 S.W. 823 (Tex. 1888).

132. See generally *id.* at 824–25 (outlining the consequences of a deed delivered without the necessary intent).

133. *Id.* at 823.

134. *Id.* at 824.

135. *Id.* at 823.

136. The bank and the grantee understood the deed was intended as a mortgage, despite the fact that the “deed was an absolute conveyance on its face.” *Id.*

137. *Id.* at 823–24.

138. *Id.* at 824.

139. *Id.* at 824–25 (citations omitted). The court also noted “even a vendee from the [initial] grantee, who has paid value without knowledge of the facts, is not an innocent-purchaser.” *Id.* at 824.

equitable estoppel, and must show that appellant's testator was grossly negligent in permitting the deed to pass into the possession of [the grantee], and also that, as a result of this, some substantial injury has accrued to the bank, by reason of the transaction, which it entered into upon faith of the deed.¹⁴⁰

In applying the equitable estoppel principle announced in the *Steffian* case,¹⁴¹ one court stated:

We do not think the court erred, as contended by appellant, in failing to find for him on the issue of estoppel. J. D. Risinger put the deed in a drawer in an organ, where he kept his private papers, in his residence. It is true that Minnie Q. White was an inmate of his home; but she was his step-daughter, and there is nothing in the testimony to indicate that he had any reason to suppose that she would attempt, without permission, to obtain possession of the deed. We do not think the court erred in failing to find that J. D. Risinger was guilty of negligence in keeping the deed at the place and in the manner referred to, and the plea of estoppel is based upon the theory of negligence.¹⁴²

Furthermore, in the event the grantor is fraudulently induced to have the deed delivered to a grantee, a subsequent purchaser will be protected as an innocent purchaser.¹⁴³ Thus, again, even in a case where the deed is incapable of passing title, an innocent purchaser may be protected by estoppel upon showing that either the delivery of the deed by the grantor was a result of fraud committed on the grantor or that the grantor's negligence resulted in the unauthorized delivery of the deed.¹⁴⁴

140. *Id.* at 825 (emphasis added). In a later case, the supreme court indicated the *Steffian* court held "one who signs and acknowledges a conveyance, to be delivered only upon conditions, may be estopped to set up the non-delivery by *negligently* permitting it to pass into the hands of the grantee." *Link v. Page*, 10 S.W. 699, 701 (Tex. 1889) (emphasis added) (citing *Steffian*, 6 S.W. at 825). The *Link v. Page* court explained this result by stating "where the owner of real property negligently clothes another with the apparent title to it," the owner was estopped to deny the innocent purchaser title to the property. *Link*, 10 S.W. at 701.

141. *See Steffian*, 6 S.W. at 825 (remanding a case to trial to determine whether the grantor was grossly negligent in loaning the deed to the grantee when the grantor had no intention that such transfer should be considered an operative delivery and conveyance).

142. *Garner v. Risinger*, 81 S.W. 343, 344 (Tex. Civ. App.—Austin 1904, writ ref'd).

143. *See, e.g., Lynn v. McCoy*, 200 S.W. 885, 889 (Tex. Civ. App.—Fort Worth 1917, no writ) (concluding where a deed was delivered out of escrow because of a fraud committed on the grantor, the delivery was valid and the innocent sub-vendee was protected).

144. For example, in *Lynn v. McCoy*, the grantee committed a fraud against the grantor, and as a result of the fraud, the grantor executed a deed and a contract, which authorized the escrow agent to deliver the deed to the grantee upon the occurrence of certain specified conditions. *Id.* at 887–88. Since the fraud was committed against the grantor by the grantee, rather than by "the bank in delivering the deed" or by the grantee against the bank in procuring delivery of the deed, the court

3. Trustee's Deeds Considered Void Following a Void Nonjudicial Foreclosure Sale

Texas courts have distinguished between void and voidable nonjudicial foreclosure sales.¹⁴⁵ Texas has adopted a general rule concerning void foreclosure sales, which provides “[p]urchasers of land from a substitute trustee’s sale are not relieved from the necessity of inquiring whether the trustee had been empowered to sell. One who bids on property at a foreclosure sale does so ‘at his peril.’”¹⁴⁶ Furthermore, “[i]f the trustee conducting the sale has no power or authority to offer the property for sale, or if there is other defect or irregularity which would render the foreclosure sale void, then the purchaser cannot acquire title to the property.”¹⁴⁷ Thus, Texas courts have stated “[t]he general effect of a ‘good faith purchaser for value without notice’ does not apply to a purchaser at a *void* foreclosure sale. A purchaser at a foreclosure sale obtains only such title as the trustee had authority to convey.”¹⁴⁸

held a subsequent purchaser from the grantee was protected and the grantor could not cancel the deed. *Id.* at 889. The court distinguished the instance in which a grantor executes a deed without delivering it or authorizing another to deliver it. *Id.* On the other hand, in *Spotts v. Whitaker*, the grantee obtained the deed by a fraud committed against the depository, which the grantor had not authorized to deliver the deed until certain conditions were satisfied. *Spotts v. Whitaker*, 157 S.W. 422, 422–23 (Tex. Civ. App.—El Paso 1913, writ *ref'd*). In that case, the court refused to afford the innocent purchaser with protection unless the purchaser could establish that an act of negligence by the grantor resulted in the delivery. *See id.* at 424 (“[A] deed obtained from [the] depository without the consent of the grantor, through the fraud of the grantee, is wholly insufficient to pass title, and parties claiming thereunder as innocent purchasers or incumbrancers will be protected only upon an estoppel based upon a showing that the grantor was guilty of negligence which brought about the unauthorized delivery.” (citations omitted)).

145. The difference between a void and voidable deeds has been explained as follows:

Whether the trustee’s deed is void or voidable depends on its effect upon the title at the time it was executed and delivered. If it was a mere nullity, passing no title and conferring no rights whatsoever, it was absolutely void, but if it passed title to . . . the purchaser, thereby accomplishing the thing sought to be accomplished, *subject only to the right of Walker to have it set aside upon proof that the sale was improperly made*, then it was merely voidable. Even if a conveyance is regular on its face, it does not always or necessarily operate to pass title between the parties at the time of its execution, particularly in cases of fraud. A deed may be presumptively valid, and yet be utterly void as a conveyance when the presumption is rebutted.

Diversified, Inc. v. Walker, 702 S.W.2d 717, 721 (Tex. App.—Houston [1st Dist.] 1985, writ *ref'd* n.r.e.) (citation omitted).

146. *Id.* at 723 (quoting *Henke v. First S. Props., Inc.*, 586 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1979, writ *ref'd* n.r.e.)).

147. *Henke*, 586 S.W.2d at 620.

148. *Diversified, Inc.*, 702 S.W.2d at 721 (citing *First S. Props., Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976)); *see also* *Bowman v. Oakley*, 212 S.W. 549, 552 (Tex. Civ. App.—Fort Worth 1919, writ *ref'd*) (stating purchasers at a void foreclosure sale were not bona fide purchasers for value (citation omitted)). *See generally* *Daniels v. Mason*, 38 S.W. 161, 162 (Tex. 1896) (holding the

Texas courts have held nonjudicial foreclosure sales and their related trustees' deeds void in a number of situations, including: foreclosure sales conducted by persons other than the duly qualified trustee or substitute trustee,¹⁴⁹ foreclosure sales conducted when there had been no default by the mortgagor under the terms of the deed of trust,¹⁵⁰ foreclosure sales conducted without a court order where the property was in receivership,¹⁵¹ foreclosure sales when the trustee has not been authorized,¹⁵² foreclosure sales conducted during dependent administration of an estate without court authorization,¹⁵³ and failure to give the statutory notice of the trustee's sale.¹⁵⁴ In the case of a void foreclosure, since the purchaser acquires no title or rights in the property, an action in law for trespass to try title may be brought, and "the statutes of limitation governing actions for the recovery of land apply."¹⁵⁵ On the other hand, in the case of a voidable foreclosure sale, title passes to the

purchaser of the legal title from one who was without the power to convey it could not be a bona fide purchaser for value).

149. *See, e.g., Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942) (concluding a nonjudicial foreclosure sale conducted by one who possessed no authority was void as to the purchaser at the foreclosure sale).

150. *See, e.g., Henke*, 586 S.W.2d at 620 (rejecting the applicability of the doctrine of good faith purchaser "to a purchaser at a void foreclosure sale").

151. *See, e.g., Vallone*, 533 S.W.2d at 342 (stating it was not necessary for the receiver to file notice of lis pendens to authorize setting aside an unauthorized sale).

152. *See, e.g., Bowman*, 212 S.W. at 551 (regarding a foreclosure sale as void because the trustee was only authorized to conduct the sale at the request of the beneficiary or holder of the notes and such request was never made). The authority of a trustee to conduct a sale depends upon the terms of the deed of trust. *See id.* ("[A] power of sale given in a deed or mortgage must be strictly followed in all its details." (quoting *Bemis v. Williams*, 74 S.W. 332, 333 (Tex. Civ. App.—San Antonio 1903, no writ))). In *Bowman v. Oakley*, the trustee was authorized to sell "only 'at the request of [the] beneficiary or other holder of [the] notes.'" *Id.* at 550. Therefore, the sale was void as the holder of the notes had not requested the trustee to conduct the foreclosure sale. *Id.* at 551.

153. *See, e.g., Pearce v. Stokes*, 291 S.W.2d 309, 310-11 (Tex. 1956) (determining the opening of a dependent administration suspended the power of sale and, thus, a sale conducted without court authority was void). However, a nonjudicial foreclosure sale under a deed of trust is effective to pass title when made during the pendency of an independent administration. *See, e.g., Taylor v. Williams*, 108 S.W. 815, 817-18 (Tex. 1908) (deciding a creditor, during the pendency of an independent administration, "is left to pursue the general rules of law by which remedies are given," including exercising the creditor's power of sale).

154. *See Hous. First Am. Sav. v. Musick*, 650 S.W.2d 764, 769 (Tex. 1983) (concluding a substitute trustee's deed was void due to the failure to give the required notice of the trustee's sale); *Shearer v. Allied Live Oak Bank*, 758 S.W.2d 940, 942 (Tex. App.—Corpus Christi 1988, writ denied) (ruling the foreclosure sale void because notice of the trustee sale was not sent by certified mail as required by the statute and the deed of trust).

155. *See, e.g., Slaughter v. Qualls*, 162 S.W.2d 671, 674 (Tex. 1942) (explaining "the statutes of limitation governing actions for recovery of land apply," as opposed to the four-year statute of limitations, since a void deed does not need to be set aside).

purchaser subject to the right of the mortgagor or those claiming under him to have the sale set aside upon proof of the improper sale within four years.¹⁵⁶ Texas courts also allow the purchaser at a void or irregular foreclosure who has taken possession in reliance of such foreclosure to remain in possession until the debt is paid by the original mortgagor.¹⁵⁷

Notwithstanding the rather unequivocal position that one cannot be an innocent purchaser if a void deed exists in one's chain of title,¹⁵⁸ Texas courts have made an exception to this rule of law in certain cases where one's chain of title contained a void trustee's deed as a result of a void foreclosure sale.¹⁵⁹ *Randolph v. Citizens National Bank of Lubbock*¹⁶⁰ was one of the first cases to thoroughly discuss this issue.¹⁶¹ In that case, the jury found the properly appointed successor trustee had not conducted the foreclosure sale.¹⁶² As a result, the sale, which was conducted "by one who possessed no authority to make it, was void in so far as [the mortgagors], the purchaser at such sale, and any subsequent purchasers with notice [were] concerned."¹⁶³ The sale was made under a deed of trust, which the mortgagors executed, that contained the following provision:

156. See *S. Tr. & Mortg. Co. v. Daniel*, 184 S.W.2d 465, 467 (Tex. 1944) (explaining when a deed of trust did not authorize a trustee/nonbeneficiary to purchase at the nonjudicial foreclosure sale, the sale was voidable at the election of the mortgagor); see also TEX. CIV. PRAC. & REM. CODE § 16.051 (West 2016) (declaring every action that does not have a limitation period specified, other than an action to recover land, must be brought within four years of accruing).

157. See, e.g., *Jasper State Bank v. Braswell*, 111 S.W.2d 1079, 1081, 1084 (Tex. 1938) (clarifying this rule applies even if "the debt is barred by limitation"). The *Jasper State Bank v. Braswell* court indicated that in the event of a void or irregular foreclosure sale, third persons or mortgagees who purchased at the void sale would become subrogated "to the rights of the mortgagee to the extent of the purchase money paid at the foreclosure sale" and the mortgage would be treated as still in effect. *Id.* at 1084 (citations omitted).

158. See, e.g., *Henke v. First S. Props., Inc.*, 586 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (affirming the trial court's decision "because the doctrine of good faith purchaser for value without notice does not apply to a purchaser at a void foreclosure sale").

159. See *Randolph v. Citizens Nat'l Bank of Lubbock*, 141 S.W.2d 1030, 1034 (Tex. Civ. App.—Amarillo 1940, writ dismissed judgment corrected) (denoting an exception to the general rule that permits the innocent purchaser doctrine to apply to a buyer who pays valuable consideration to purchase land from a seller holding the apparent title and who has no notice of infirmities therein (citing *Mast v. Tibbles*, 60 Tex. 301, 305 (1883))).

160. *Randolph v. Citizens Nat'l Bank of Lubbock*, 141 S.W.2d 1030 (Tex. Civ. App.—Amarillo 1940, writ dismissed judgment corrected).

161. See generally *id.* at 1034–35 (elucidating the scenarios when one is not eligible to be an innocent purchaser and the exceptions that may entitle one to such protection).

162. *Id.* at 1032. The evidence was undisputed that an agent of the substitute trustee conducted the foreclosure sale, received the bids, accepted a bid, "and announced that the property was sold to Bob Slaughter." *Id.*

163. *Id.*

“And it is further specially agreed by the parties hereunto that in any deed or deeds given by any [t]rustee or substitute duly appointed hereunder, any and all statements of facts or other recitals therein made as to the non[]payment of the money secured, or *as to the request to sell*, the time, place, terms of sale, and property to be sold having been duly published, or as to any other act or thing having been duly done by any [t]rustee, or substitute, shall be taken by any and all courts of law and equity as prima facie evidence that said statements or recitals do state facts, and are without further question to be accepted.”¹⁶⁴

The trustee's deed was signed on the same day of the foreclosure by the actual substitute trustee and contained the following language:

“Whereas, I did, in accordance with said notices, on the first Tuesday in December, 1933, being the 5th day of the month, between the hours of 10:00 A. M. and 4:00 o'clock P. M. on said date, offer said property for sale at public auction to the highest bidder for cash at the courthouse door in Hockley County, in the town of Levelland, at which sale the property was struck off to Bob Slaughter for the sum of \$1[,]500.42.”¹⁶⁵

The land purchased at the foreclosure sale was conveyed by Bob Slaughter to Citizens National Bank who, three years after acquiring the land, entered into an oil and gas lease and, four years subsequent to the foreclosure sale, sold the land by general warranty deed.¹⁶⁶ The jury found that all of these subsequent transferees paid valuable consideration

164. *Id.* at 1032–33 (emphasis added). In reaching its decision, the court distinguished the case of *Bowman*, 212 S.W. 549 (Tex. Civ. App.—Fort Worth 1919, writ ref'd). *Randolph*, 141 S.W.2d at 1033–34. In *Bowman*, the evidence was clear that the holder of the notes had not requested the trustee to sell the property, but the subsequent purchaser asserted he relied upon recitals in the trustee's deed that indicated the holder of the notes did request the sale. *Bowman*, 212 S.W. at 551. However, the deeds of trust at issue did not authorize the trustee to make the statement in the trustee's deed that he had been requested to conduct the sale. *Id.* While the recitals were merely prima facie evidence, the court was authorized to determine what truly happened. *Id.* at 552. The court concluded that since the trustee had not been requested to conduct the foreclosure sale and did not have the power to conduct the foreclosure sale, the sale was, thus, void irrespective of the recitals in the trustee's deed. *Id.* However, the court stated, by way of obiter dicta, that had the deeds of trust authorized the trustee to state in the trustee's deed that he was requested to conduct the sale and the trustee had done so, the grantors of the deed of trust would have been bound by the representation in the deed under principles of estoppel, even if the request had not been made. *Id.* The *Randolph* court noted that in the case before it, the recitals made by the trustee, in the trustee's deed, were all authorized by the language in the deed of trust, unlike in the *Bowman* case. *Randolph*, 141 S.W.2d at 1034.

165. *Randolph*, 141 S.W.2d at 1033.

166. *Id.*

without any knowledge of the void foreclosure sale.¹⁶⁷ The question for the appellate court was whether the void foreclosure sale would deprive the subsequent transferees of innocent purchaser status.¹⁶⁸

The court held the subsequent transferees were protected by the *equitable doctrine of innocent purchasers*.¹⁶⁹ This determination was first based upon the fact that the grantors, in the deed of trust, authorized the trustee to make all the necessary recitals in the trustee's deed detailing his actions concerning the sale.¹⁷⁰ In addition, the court found there was nothing in the record to put the subsequent transferees who had paid valuable consideration on inquiry as to the falsity of the recitals in the deed.¹⁷¹ The court concluded by saying:

This conclusion is impelled, not because of the actual power in the trustee to convey the land, as he attempted to do by the trustee's deed, but by the beneficent provisions of the doctrine of equity which shields one who purchases land under such conditions and imposes the loss upon him who has been generous in the extension to others of authority to bind him in such situations.¹⁷²

The court then noted that because the subsequent transferees acquired

167. *Id.*

168. *See generally id.* at 1033–34 (listing the three main issues controlling the court's disposition, and summarizing the appellants' arguments).

169. *Id.* at 1034.

170. *Id.*

171. *Id.*

172. *Id.* The court cited three cases to support this proposition. *Id.* Two of the cases dealt with an innocent purchaser extinguishing the rights of individuals with an unrecorded equitable title or interest to property and, thus, did not fully support the proposition for which they were cited. *See Burnham v. Hardy Oil Co.*, 195 S.W. 1139, 1143 (Tex. 1917) (blocking the equitable claims of a deceased wife's heirs by applying the equitable doctrine of innocent purchaser to protect a party who purchased from the deceased wife's husband, a legal title holder, without notice that the property was community property); *Blair v. Hennessy*, 138 S.W. 1076, 1078 (Tex. Civ. App.—Galveston 1911) (asserting an innocent purchaser for value takes free of the claims of unrecorded equitable interests), *aff'd*, 173 S.W. 871 (Tex. 1915). However, the third case was right on point. In *Schneider v. Sellers*, the court, noting that land had been released from the deed of trust prior to the foreclosure sale, stated:

The release of the land from the lien of the deed of trust terminated the power of the trustee to sell the same, and the subsequent sale which was made by the trustee for the benefit of [the lien holder] was void and conferred no title upon [the purchaser at the foreclosure sale]; but the deed of trust and the sale conferred upon [the purchaser at the foreclosure sale] the apparent title to the land, whereby they were enabled to convey to the [subsequent purchaser]—a bona fide purchaser for value—the legal title to the land, which constituted a good defense against the action of the plaintiffs below for the recovery of the land.

Schneider v. Sellers, 84 S.W. 417, 421 (Tex. 1905).

their interest in the property from the apparent legal title owner for value and without knowledge of any infirmities, they were "protected under the equitable doctrine of innocent purchaser."¹⁷³ The court also stated, by way of obiter dicta, that the mortgagors were estopped from asserting that no title passed to those who acquired their interest from the purchaser at the foreclosure sale because of the broad authority given to "the trustee to make binding representations" in the trustee's deed.¹⁷⁴ As a result of such authorization, the court indicated the mortgagors could not "now be heard to say that the statements of the trustee in his deed are untrue and thereby deprive innocent purchasers of the title which, through the assurance of appellants, they had the right to believe they were acquiring by the payment of valuable considerations."¹⁷⁵

In 1942, the holding in *Randolph* was reaffirmed by the Texas Supreme Court in *Slaughter*.¹⁷⁶ In the *Slaughter* case, the foreclosure was void for two reasons: (1) the note secured by the deed of trust was not in default; and (2) like the *Randolph* case, the substitute trustee failed to personally conduct the foreclosure sale.¹⁷⁷ The purchaser at the foreclosure sale later sold the property twice; however, in each instance the grantee subsequently conveyed the property back to the purchaser at the foreclosure sale.¹⁷⁸ Then, the purchaser at the foreclosure sale executed an oil and gas lease and conveyed certain mineral interests.¹⁷⁹ The court of civil appeals held these subsequent transferees from the purchaser at the void foreclosure sale were innocent purchasers.¹⁸⁰ The primary issue

173. *Randolph*, 141 S.W.2d at 1034 (citing *Mast v. Tibbles*, 60 Tex. 301, 305 (1883)).

174. *Id.* at 1035.

175. *Id.*

176. See *Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942) (concluding the mortgagor, "by the execution of the deed of trust, made it possible for the trustee to create the appearance of good title in [the purchaser at the foreclosure sale], and it would be inequitable to permit [the mortgagor] now to show otherwise as against those who have purchased in good faith in reliance thereon" (citations omitted)); see also *Randolph*, 141 S.W.2d at 1035 ("In addition to . . . the status of appellees as innocent purchasers it may be said that appellants are estopped from contending that no title passed to appellees on account of the unauthorized manner in which the trustee's sale was conducted because of the liberal authority conferred by them upon the trustee to make binding representations as to the manner in which he sold the land.").

177. *Slaughter*, 162 S.W.2d at 674; see also *Randolph*, 141 S.W.2d at 1032 (reciting the facts of the case, one of which was "that the sale was not made by any person who had authority to make it").

178. See *Slaughter*, 162 S.W.2d at 673-74 (listing the conveyances of the property from 1933 to 1937). The first subsequent purchaser imposed a lien on the land, which remained on the land at the time of suit. *Slaughter v. Qualls*, 149 S.W.2d 651, 653 (Tex. Civ. App.—Amarillo 1941), *aff'd*, 162 S.W.2d 671 (Tex. 1942).

179. *Slaughter*, 162 S.W.2d at 673-74. These interests were subsequently assigned, and a deed of trust was executed on these interests to secure indebtedness. *Qualls*, 149 S.W.2d at 654.

180. See *Qualls*, 149 S.W.2d at 656 (concluding the lower court erred in failing to provide the jury

before the supreme court was whether the trustee's deed was void so that no title passed from the grantor of the deed of trust.¹⁸¹ The court noted there was "nothing on the face of the trustee's deed that would render it void" and the recitals in the deed contained all that was "necessary to show a valid sale."¹⁸² However, the court determined the "conditions and limitations on the trustee's power to convey the land were never fulfilled" and, therefore, held "the foreclosure sale and trustee's deed were absolutely void."¹⁸³ As such, it was not necessary for the mortgagor to set aside the trustee's deed because it conveyed no title to the purchaser.¹⁸⁴ Consequently, the mortgagor's suit for trespass to try title was not barred by limitations,¹⁸⁵ and he could redeem the land by paying the unpaid

with a peremptory instruction in favor of the subsequent purchasers). In doing so the court of civil appeals stated:

There being nothing in the record to show that [the subsequent grantees] had knowledge of any infirm[ities or irregularities in the substitute trustee's sale, and the resignation of the original trustee, the appointment of the substitute trustee[,] and the substitute trustee's deed being regular in form and complying in every detail with the provisions of the deed of trust, and showing on their faces that each and every condition, even to the minutest detail, which had been laid down by appellee in the deed of trust had been observed, they were warranted in assuming that Sue Alice Slaughter had procured at the trustee's sale the full title owned by appellee in the land and in our opinion the court erred in refusing to give to the jury the peremptory instruction in their favor.

Id. Qualls, the mortgagor, did not appeal from that part of the court of civil appeals' decision that denied him recovery from those creditors and subsequent purchasers who had acquired their interest in good faith. *See Slaughter*, 162 S.W.2d at 674 (reasoning the lack of appeal leaves the court unconcerned with those purchasers' rights).

181. *See Slaughter*, 162 S.W.2d at 673 (delineating the issues of the case). The defendants pleaded that the cause of action was barred by the residual four-year statute of limitations because the foreclosure sale had occurred over four years prior to the filing of the suit. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE § 16.051 (West 2016) (setting forth the modern day four-year statute of limitations). If the deed was voidable, an equitable suit to cancel the deed would have had to have been brought before a suit to recover the land. *Slaughter*, 162 S.W.2d at 674 (citations omitted). Such a suit would have been barred by the four-year statute of limitations. *See id.* (explaining the necessity of determining whether the trustee's deed was voidable or void since if it was merely voidable, the four-year statute of limitations would control (citations omitted)). However, if the deed were void, then the statute of limitations for the recovery of land would apply; therefore, the mortgagor's trespass to try title suit would not have been barred by limitations. *See id.* (deciding the court must determine "whether the trustee's deed was void or merely voidable to determine whether or not the suit was barred by limitation").

182. *Slaughter*, 162 S.W.2d at 674.

183. Namely, the issues with the sale's validity were the absence of a default authorizing the sale and the substitute trustee's failure to conduct the sale. *Id.* at 675.

184. *See id.* at 674–75 (recognizing the availability of a collateral attack on the judgment by way of trespass to try title since the trustee's sale and deed were void).

185. The mortgagor's action was controlled by the statutes of limitation for recovery of land, not the four-year residuary statute. *Id.* at 675.

purchase price.¹⁸⁶ Although the mortgagor did not appeal the judgment against him in favor of the subsequent purchasers,¹⁸⁷ the supreme court, by way of obiter dicta, stated:

It is true that under circumstances such as we have here, those who purchased interests in or took liens on the land in good faith from Mrs. Slaughter[, the purchaser at the foreclosure sale,] after the purported sale to her by the substitute trustee acquired good title as against Qualls[, the mortgagor]; but this is so not on the theory that the title actually passed, but rather on the theory that Qualls, by the execution of the deed of trust, made it possible for the trustee to create the appearance of good title in Mrs. Slaughter, and it would be *inequitable* to permit Qualls now to show otherwise as against those who have purchased in good faith in reliance thereon.¹⁸⁸

Both the *Randolph* and the *Slaughter* courts of appeals' decisions held the question of notice was a fact question and was not determined as a matter of law from the mere presence of a void instrument in the subsequent purchaser's chain of title.¹⁸⁹ Neither this legal reasoning nor the reference to equitable considerations in the *Slaughter* court's obiter dicta had been questioned until the *A.P.I.* case.¹⁹⁰

186. *Id.* at 677.

187. *Id.* at 674. The court of civil appeals held the parties who had taken interests from the purchaser at the void foreclosure sale were protected as innocent purchasers because there was no evidence they had actual knowledge of the irregularities in the sale and the trustee's deed contained recitals, authorized by the deed of trust, indicating every condition precedent for the sale had been properly performed. *Slaughter v. Qualls*, 149 S.W.2d 651, 655-56 (Tex. Civ. App.—Amarillo 1941), *aff'd*, 162 S.W.2d 671 (Tex. 1942).

188. *Slaughter*, 162 S.W.2d at 675 (emphasis added) (citations omitted).

189. *Cf. Qualls*, 149 S.W.2d at 656 (deciding the applicability of the innocent purchaser doctrine to the subsequent purchasers was unaffected by the void deed due to the deed's compliance with all provisions set forth in the deed of trust that gave the initial purchaser apparent title and the lack of evidence that the purchasers had notice); *Randolph v. Citizens Nat'l Bank of Lubbock*, 141 S.W.2d 1030, 1034 (Tex. Civ. App.—Amarillo 1940, writ *dism'd* judgm't *cor.*) (applying the doctrine of innocent purchaser to protect the appellee who paid valuable consideration for the land since the record did not contain anything in the chain of title to put them on inquiry notice "as to the falsity of the representations made by the trustee").

190. *See, e.g., Gholson v. Peeks*, 224 S.W.2d 778, 782 (Tex. Civ. App.—Eastland 1949, writ *ref'd*) (relying on *Slaughter* to hold that where the mortgagor's execution of a deed of trust permitted the trustee to create the appearance of good title in the purchaser at the foreclosure sale, it would be inequitable to permit the mortgagor to show otherwise as to subsequent purchasers for value).

IV. THE NOTICE REQUIREMENT FOR AN INNOCENT PURCHASER OF LAND

A. *Actual and Constructive Notice*

To receive the special protection of taking free of unrecorded instruments, a subsequent purchaser must acquire property in good faith for value and without notice of any third party's interest or claim.¹⁹¹ Such notice¹⁹² can "be either actual or constructive."¹⁹³ Constructive notice is imputed to one who does not have personal information or knowledge; instead, such notice is implied by law and arises from properly recorded instruments or the possession of land.¹⁹⁴ In fact, "recorded instruments in a grantee's chain of title generally" "establish an irrebuttable presumption of notice."¹⁹⁵ Actual notice literally means personal information or knowledge and is considered to be a question of fact.¹⁹⁶ However, actual notice is broader than just express actual notice as it also includes implied actual notice.¹⁹⁷ Almost one hundred years ago, the

191. See TEX. PROP. CODE § 13.001(a) (West 2016) ("A conveyance of real property or an interest in real property or a mortgage or a deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.").

192. An unrecorded deed is binding on subsequent purchasers who have notice of it. *Id.* § 13.001(b). In describing notice, the Texas Supreme Court said:

"Notice may be broadly defined as information concerning a fact actually communicated to a person by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired. The latter (presumed) information is regarded as equivalent in legal effects to a full knowledge, and to it the law attributes the same consequences as would be imputed to knowledge. Notice as thus defined is not always synonymous with 'knowledge' or 'information' as commonly understood, for in law a person may be held to have notice of something about which he has no actual knowledge or information."

Flack v. First Nat'l Bank of Dalhart, 226 S.W.2d 628, 631 (Tex. 1950) (citation omitted).

193. *Flack*, 226 S.W.2d at 631 (citation omitted).

194. See *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001) (per curiam) (enumerating the types of possession that will charge a purchaser with constructive notice); *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 887 (Tex. 1998) (discussing the doctrine of constructive notice's consequence of "an irrebuttable presumption of actual notice" of certain matters (citing *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981))); *White v. McGregor*, 50 S.W. 564, 565 (Tex. 1899) (recognizing recorded documents constitute constructive notice to subsequent purchasers).

195. While not all recorded documents give rise to "an irrebuttable presumption of notice," those in one's chain of title usually do. *Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d 615, 617 (Tex. 2007) (per curiam) (citations omitted). An early supreme court stated "constructive notice is no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." *Briscoe v. Bronaugh*, 1 Tex. 326, 333 (1846) (citation omitted).

196. *Flack*, 226 S.W.2d at 631–32 (citation omitted). Actual notice has been described as that which is "directly communicated to the person to be affected." *Id.* at 631 (citation omitted).

197. See *id.* at 631–32 (claiming actual notice also includes knowledge that could be ascertained by reasonable inquiry (citation omitted)).

Texas Commission of Appeals distinguished the various notices:

In common parlance, "actual notice" generally consists in express information of a fact, but in law the term is more comprehensive. In law[,] whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand, which if pursued by the proper inquiry the full truth might have been ascertained. Means of knowledge with the duty of using them are in equity equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed. Actual notice is always a question of fact.

Constructive notice is as effectual and binding as actual notice, but it is the very opposite of actual notice and would not exist but for statute. It is the legal effect prescribed by law of certain things most frequently illustrated by registration statutes, *lis pendens* notices, and the like. Unlike actual notice, the inference is not rebuttable.¹⁹⁸

Thus, it had been clear that, in Texas, "[a] purchaser is charged with and bound by every recital, reference[,] and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims."¹⁹⁹

198. *Hexter v. Pratt*, 10 S.W.2d 692, 693 (Tex. Comm'n App. 1928, judgment affirmed) (citations omitted). An earlier supreme court explained the duty of inquiry in the following words:

"The general doctrine is, that whatever puts a party upon an inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding."

Wethered's Adm'r v. Boon, 17 Tex. 143, 150 (1856) (citation omitted); *see also Champlin Oil & Ref. Co. v. Chastain*, 403 S.W.2d 376, 388 (Tex. 1965) (asserting the legal consequences of implied actual notice and express actual notice are the same).

199. *Wessels v. Rio Bravo Oil Co.*, 250 S.W.2d 668, 670 (Tex. Civ. App.—Eastland 1952, writ *ref'd*) (citations omitted). The rationale for this rule was described as follows:

It is a familiar and thoroughly well-settled principle of realty law that a purchaser has constructive notice of every matter connected with or affecting his estate which appears by recital, reference, or otherwise upon the face of any deed which forms an essential link in the chain of instruments through which [the purchaser] derails his title. The rationale of the rule is that any description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and [the purchaser] is bound to follow up this inquiry, step by step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained. Being thus put upon inquiry, the purchaser is presumed to have prosecuted it until its final

However, the Texas Supreme Court later made a significant shift in the scope of inquiry that was required as a result of facts or knowledge acquired through actual notice.²⁰⁰ Prior to 1982, it was understood the duty of inquiry under implied actual notice was limited to those documents and facts in one's chain of title that would appear to be title related to an ordinary prudent purchaser or creditor.²⁰¹ Yet, in 1982, the supreme court expanded the scope of inquiry required of a subsequent purchaser by adopting a kind of "incorporation by reference" doctrine²⁰² under which "a purchaser must search *all* instruments referenced by any other instruments he is required to search, whether or not reasonably related to title."²⁰³ In *Gulf Oil Corp. v. Westland Oil Development Corp.*,²⁰⁴ the court of appeals, in reversing a summary judgment for an equitable title owner, held a question of fact existed as to whether a reasonable purchaser was placed on a duty to review an operating agreement due to a reference to that

result and with ultimate success.

Loomis v. Cobb, 159 S.W. 305, 307–08 (Tex. Civ. App.—El Paso 1913, writ ref'd).

200. See Angus Earl McSwain, Note, *Westland Oil Development Corp. v. Gulf Oil: New Uncertainties As to the Scope of Title Search*, 35 BAYLOR L. REV. 629, 629 (1983) (opining the *Gulf Oil Corp. v. Westland Oil Development Corp.* case signaled a change in the rule governing when to impose the scope of implied actual notice on purchasers).

201. See *id.* at 650 (indicating before the *Westland Oil* case, the doctrine of implied actual notice did not impute "notice of *all* facts," but rather implied notice of only those facts that "reasonably refer to and serve to excite his interest in title matters"). Due to this prior understanding, the court of civil appeals held a question of fact existed as to whether a reasonable purchaser was under inquiry notice to review an operating agreement because its normal function was not title related. *Gulf Oil Corp. v. Westland Oil Dev. Corp.*, 620 S.W.2d 765, 770 (Tex. Civ. App.—El Paso 1981), *rev'd*, 637 S.W.2d 903 (Tex. 1982); see also *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 913–14 (Tex. 1982) (Wallace, J., dissenting) (distinguishing all the cases cited in the majority opinion since they dealt with different facts wherein an instrument that reflected an equitable interest and suggested outstanding title rights were referenced in documents in the purchaser's chain of title), *rev'g* 620 S.W.2d 765 (Tex. Civ. App.—El Paso 1981). Furthermore, in *White*, the court limited the scope of inquiry as follows:

The effect of the statute of registration is to create a legal, irrebuttable presumption on part of subsequent purchasers that they know of the existence of the duly-recorded deed. Now, to presume notice of the deed, and then from the face of it to presume that the land was sold by the sheriff because the prior deed of the defendant on execution was fraudulent, is to build one presumption upon another, which is never allowed.

White v. McGregor, 50 S.W. 564, 566 (Tex. 1899).

202. See McSwain, *supra* note 200 (positing this new doctrine "foreshadows significant changes in the imposition of notice").

203. *Id.*

204. *Gulf Oil Corp. v. Westland Oil Dev. Corp.*, 620 S.W.2d 765 (Tex. Civ. App.—El Paso 1981), *rev'd*, 637 S.W.2d 903 (Tex. 1982).

document in their assignment of a property interest.²⁰⁵ The operating agreement referenced a letter agreement, which contained an area of mutual interest clause, creating an equitable title in an adverse party.²⁰⁶ The supreme court reversed the court of appeals and entered judgment for the equitable title holder, holding:

[T]he reference to the March 1, 1968, operating agreement contained in the May 22, 1973, assignment from Mobil to Gulf and Superior, as a *matter of law*, charged Gulf and Superior[, the subsequent purchasers,] with the duty of inspecting said agreement. As a result, Gulf and Superior were charged with notice of the November 15, 1966, letter agreement and the equitable claim of Westland, and cannot enjoy the status of innocent purchasers.²⁰⁷

This expanded scope of inquiry, under implied actual notice, to documents that a reasonably prudent purchaser would not think to be title related was sharply criticized.²⁰⁸

205. *Id.* at 770. The court of civil appeals stated:

As an example of the difficulty facing the [p]laintiffs, the normal function of an operating agreement is to explain in detail the operation between the various interests in the development of a tract of land for the economical production of the minerals. Reference as to the superiority of the letter agreement over its terms could well have alerted a diligent purchaser of the title that such a letter only controlled operations and in no way affected title.

Id.

206. *Westland Oil*, 637 S.W.2d at 905-06.

207. *Id.* at 908. Although the operating agreement was not filed of record, the defendants had copies of it in their files. *Id.* The dissent argued that, under principles of implied actual notice, a purchaser is not required, as a matter of law, to inquire for title defects in documents outside of her chain of title that reference other documents that "do not necessarily suggest a title matter." *See id.* at 912 (Wallace, J., dissenting) (noting implied actual notice is generally a question of fact, and recognizing "the duty of inquiry extends only to matters which are fairly suggested by the facts really known" (citations omitted)). The dissent acknowledged the purchasers were on notice of the operating agreement because their title derived from an assignment that referenced the operating agreement. *Id.* at 913. But, the dissent asserted the operating agreement was not in the defendants' chain of title, and furthermore, the operating agreement contained no reference to any equitable rights or title in the plaintiff. *Id.*

208. One commentator, in criticizing the court's opinion, stated:

The prudent purchaser's standard of inquiry and the principles of implied actual notice should not be so easily abandoned. The "two step" analysis has been developed through the years, and is considered a reasonable burden on the purchaser. Under this burden the purchaser is only required to reasonably ascertain the strength of his title and to take sufficient steps to protect it.

McSwain, *supra* note 200, at 654. This commentator contended that the supreme court disregarded "the second step of the 'chain of title' analysis, and adopt[ed] a type of 'incorporation by reference' doctrine." *Id.*

B. Texas Department of Transportation v. A.P.I. Pipe & Supply, LLC

The *A.P.I.* case began as a simple case involving an inverse-condemnation claim against the City and TxDOT for the taking of soil on land API claimed to own.²⁰⁹ API asserted it was a bona fide purchaser for value of the property in question, a 9.869-acre tract of land, having bought it as part of a 34-acre purchase from Herschell White in September of 2004.²¹⁰ Both defendants filed pleas to the jurisdiction claiming immunity from the suit because the plaintiff did not own the property and, thus, had no standing to bring the suit.²¹¹ As relevant to the case, there were two documents in API's chain of title for the property in question.²¹² First, there was a judgment from 2003 (the 2003 Judgment) that adopted a special commissioners' award vesting the City with fee-simple title to the 9.869 acres of land.²¹³ On April 28, 2004, this judgment was recorded in Hidalgo County's official records.²¹⁴ The

209. See *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 166 (Tex. 2013) (acknowledging API brought suit when TxDOT started digging), *rev'g* *City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82 (Tex. App.—Corpus Christi 2010).

210. See *id.* at 166 & n.3 (Tex. 2013) (reporting API purchased the 34 acres, which included the 9.869 acres in dispute, for \$292,800).

211. *City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82, 87 (Tex. App.—Corpus Christi 2010), *rev'd sub nom.* *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162 (Tex. 2013); see also TEX. CONST. art. I, § 17(d) (waiving immunity for state and political subdivisions in inverse-condemnation suits). One of the obvious conditions for a plaintiff to recover on an inverse-condemnation suit is ownership of the property being taken. See *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001) (explaining the takings clause of the Constitution prohibits taking a person's property without just compensation (citing TEX. CONST. art. I, § 17(d))).

212. See *A.P.I.*, 397 S.W.3d at 165 (listing two judgments as the “conflicting records” in API's chain of title).

213. *City of Edinburg*, 328 S.W.3d at 86–87. The City's petition for condemnation “sought to acquire fee title to 9.869 acres of land . . . for the public purpose of laying out, opening, constructing, reconstructing, maintaining, and operating a certain right-of-way for U.S. Highway 281 drainage outfall ditches.” *Id.* at 86. The prayer to the petition requested to have three commissioners appointed and for the City to “have a final judgment of condemnation vesting in the fee title to said land.” *Id.* The commissioners awarded compensation to the owner of the land and “also awarded the City ‘all rights described and prayed for in’” its petition. *Id.* Thereafter, the court “entered its 2003 Judgment, which “adopt[ed] the special commissioners' award that vested fee title in the City.” *Id.* at 86–87.

214. *Id.* at 88. After the trial court denied the defendants' pleas to the jurisdiction, the appellate court affirmed since the record in the case was unclear as to whether API had notice of the 2003 Judgment. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, No. 13-07-221-CV, 2008 WL 99629, at *5 (Tex. App.—Corpus Christi Jan. 10, 2008, no pet.) (mem. op.). The court explained its affirmation of the denial of the pleas to the jurisdiction in the following language:

[T]o recover on its inverse condemnation claim, API must have owned the property at issue. Although we have concluded that the City acquired the property at issue in fee simple pursuant to the 2003 Judgment, an unrecorded conveyance of any interest in real property is void as to a

second relevant document in API's chain was a judgment nunc pro tunc (the 2004 Judgment), which arose in the same case as the 2003 Judgment and pertained to the same 9.869 acres of property.²¹⁵ However, unlike the earlier judgment, the 2004 Judgment stated the City acquired "a *right of way easement over*" the property in question for purposes of "opening, constructing[,] and maintaining a permanent channel or drainage easement."²¹⁶ The 2004 Judgment stated it "super[s]edes and makes [the] 'Judgment of Court in Absence of Objection' signed on June 3, 2003[.] null and void, without effect and vacated by this [c]ourt. This [c]ourt hereby enters the [j]udgment [n]unc [p]ro [t]unc as the sole and final judgment of the case."²¹⁷ It was undisputed that the "2004 Judgment was filed in the real property records" of Hidalgo County on May 19, 2004,²¹⁸ and that "(1) counsel for the Whites; (2) counsel for the City of Edinburg; and (3) TxD[OT] representatives" agreed and consented to the 2004 Judgment.²¹⁹ Subsequently, "the City granted an easement over the property in question to the State of Texas, by and through TxDOT, 'for the purpose of opening, constructing[,] and maintaining a permanent channel or drainage easement.'"²²⁰

The trial court denied the defendants' pleas to the jurisdiction, and an interlocutory appeal was taken.²²¹ The court of appeals affirmed the trial court's decision that the 2004 Judgment was void because it was an attempt to correct a judicial error after the court's plenary power had

creditor or subsequent purchaser who gives valuable consideration and is without actual notice of the transaction. There is evidence in the record that only the void 2004 Judgment was recorded and that API purchased the property from White subject to an easement owned by the City. There is no support in the record to establish that the conveyance to the City in fee simple, awarded pursuant to the 2003 Judgment, was recorded. Furthermore, API asserts it did not have actual knowledge of the 2003 Judgment. Thus, fact questions remain which affect the jurisdictional issue of appellants' immunity claim. Because a trial court cannot grant the plea to the jurisdiction if the evidence creates a fact question regarding the jurisdictional issue, the trial court correctly denied appellants' pleas to the jurisdiction.

Id. (citations omitted).

215. *City of Edinburg*, 328 S.W.3d at 87.

216. *Id.*

217. *Id.* (second and third alterations in original).

218. *Id.*

219. *See id.* at 88 (noting this was "an agreed judgment"); *see also* Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC, 397 S.W.3d 162, 170 (Tex. 2013) (stating "no evidence suggests deliberate inducement (as opposed to mistaken acquiescence) by TxDOT or the City" in acquiescing to the 2004 Judgment), *rev'g* City of Edinburg v. A.P.I. Pipe & Supply, LLC, 328 S.W.3d 82 (Tex. App.—Corpus Christi 2010).

220. *City of Edinburg*, 328 S.W.3d at 87.

221. Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC, No. 13-07-221-CV, 2008 WL 99629, at *2 (Tex. App.—Corpus Christi Jan. 10, 2008, no pet.) (mem. op.).

expired.²²² However, the court of appeals concluded there was a fact issue pertaining to API's status as an innocent purchaser and, therefore, affirmed the trial court's denial of the pleas to the jurisdiction.²²³ The defendants then filed a second plea to the jurisdiction of the court asserting API was on actual notice of the 2003 Judgment because the 2004 Judgment referred to it and, also, on constructive notice of the 2003 Judgment as it was filed for record before API purchased the land.²²⁴ API argued that the defendants intended third parties to rely on the 2004 Judgment, which gave its grantor, White, apparent fee ownership in the acreage, and thus, since API had in fact relied on the 2004 Judgment, it was a good faith purchaser.²²⁵ The second plea to the jurisdiction was denied by the trial court.²²⁶ Ultimately, the court of appeals held API was a good-faith purchaser for value because the 2003 Judgment was superseded by the 2004 Judgment and affirmed the trial court's denial of the plea to the jurisdiction.²²⁷

The defendants appealed to the Texas Supreme Court.²²⁸ The court deemed the 2004 Judgment void.²²⁹ Thus, with the 2003 Judgment being

222. *Id.* at *4.

223. *See id.* at *5 (concluding API must have owned an interest in the property to bring its inverse condemnation claim, and since API might be an innocent purchaser, a fact question existed that precluded the trial court from granting a plea to the jurisdiction). Upon remand to the trial court, the City and TxDOT established through evidence that the 2003 Judgment was recorded in the official records of the county on April 28, 2004, prior to API's purchase of the land in August 30, 2004. *City of Edinburg*, 328 S.W.3d at 88.

224. *See City of Edinburg*, 328 S.W.3d at 88 (noting the defendants attached a copy of the 2003 Judgment showing it was recorded before API bought the property).

225. *Id.* at 89.

226. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 166 (Tex. 2013), *rev'g* *City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82 (Tex. App.—Corpus Christi 2010).

227. *See City of Edinburg*, 328 S.W.3d at 91–92, 94–95 (denying the plea of sovereign immunity because API had a sufficient property interest as a good faith purchaser of the land to maintain the action for inverse condemnation against the City and TxDOT).

228. *A.P.I.*, 397 S.W.3d at 163.

229. *Id.* at 168. In arriving at the conclusion that the judgment nunc pro tunc was void, the court stated:

A judgment nunc pro tunc can correct a clerical error in the original judgment, but not a judicial one. An attempted nunc pro tunc judgment entered after the trial court loses plenary jurisdiction is void if it corrects judicial rather than clerical errors. "A clerical error is one which does not result from judicial reasoning or determination." Even a significant alteration to the original judgment may be accomplished through a judgment nunc pro tunc so long as it merely corrects a clerical error. If "the signed judgment inaccurately reflects the true decision of the court," then "the error is clerical and may be corrected."

Here, the change was undeniably significant. The 2003 Judgment granted a fee simple to the City, while the 2004 Judgment purported to turn the City's outright ownership into a mere easement. Again, the fact that the change was significant is not fatal to the 2004 Judgment's

valid, the City held fee-simple title in the subject acreage, and API's grantor, having no interest in the land, could not sell—and API could not buy—any property interest from him.²³⁰

API raised two theories as to why, even in the face of the void judgment, it should prevail.²³¹ First, API claimed the defense of innocent purchaser for value.²³² The court rejected this theory for several reasons.²³³ First, the court said the innocent purchaser “doctrine does not protect a purchaser whose chain of title includes a void deed.”²³⁴ Furthermore, the court indicated the doctrine has been codified, and by the statute’s terms one cannot be an innocent purchaser for value of land when a recorded judgment is in one’s chain of title.²³⁵ Further, relying on the *Westland Oil* case, the court then concluded: “API, constructively and actually aware of the recorded 2003 Judgment, was responsible for

nunc pro tunc status. However, TxDOT and the City produced evidence showing that the 2003 Judgment correctly reflected the underlying judicial determination, and no party produced any evidence indicating that the 2004 Judgment was merely correcting a clerical error. That is, nothing suggests that the 2003 Judgment really meant to convey to the City an easement rather than a fee simple.

Further, the trial court in this case was by law required to adopt the award of the special commissioners, who in turn granted the fee-simple title the City sought in its condemnation petition. If parties do not timely object to a special commissioners’ report, the trial court is required to enter “the [special] commissioners’ findings as the judgment of the court.” Objection is timely only if raised within [twenty] days of the special commissioners’ award. Here, the parties point to no evidence of a timely objection. Indeed, the 2003 Judgment indicated that no party objected to the award. Therefore, the trial court could “only perform its ministerial function and render judgment based upon the commissioner[s]’ award.” The trial court did just that in the 2003 Judgment, awarding compensation for fee[-]simple title. Conversely, the 2004 Judgment exceeded the scope of this “ministerial function” by shrinking the interest awarded by the special commissioners from a fee simple to an easement. As the special commissioners’ award was not changed pursuant to timely objection, the 2004 Judgment was void.

One more timing issue cuts against API: the expiration of the trial court’s plenary power. Such power usually lasts [thirty] days. The 2004 Judgment, though labeled a [j]udgment [n]unc [p]ro [t]unc, was undeniably a substantive alteration to the 2003 Judgment. However, the trial court’s plenary power to make substantive alterations had expired 300-plus days before the 2004 Judgment was rendered.

Id. at 167–68 (first alteration in original) (footnotes omitted).

230. *Id.* at 168.

231. *See generally id.* at 168–70 (rejecting API’s innocent purchaser claim and equitable estoppel contention).

232. *Id.* at 168.

233. *See generally id.* at 168–69 (challenging API’s status as an innocent purchaser).

234. *Id.* at 168 (citing *Wall v. Lubbock*, 118 S.W. 886, 888 (Tex. Civ. App.—Austin 1908, writ *ref’d*)).

235. *See id.* (recognizing Texas Property Code section 13.001 codified the doctrine). API acknowledged it was aware of the 2003 Judgment before purchasing the property. *Id.*

squaring it with the contradictory 2004 Judgment.”²³⁶ In rejecting API’s bona fide purchaser argument, the court stated that *Slaughter* was “not to the contrary” of the language quoted above.²³⁷ Even so, the court strongly rejected *Slaughter*’s obiter dicta in the following words:

[T]he *Slaughter* dicta suggests that such purchasers merit protection under equitable estoppel principles (describing a contrary result as “inequitable”) and not under the innocent-purchaser doctrine codified in the Property Code. Section 13.001 defines the elements of innocent-purchaser status for all cases, and courts may not disregard or rewrite the statute when they believe straight-up application would be inequitable. The statute is categorical and makes no case-by-case exceptions: A purchaser with notice of an adverse interest cannot claim innocent-purchaser status.²³⁸

The second theory raised by API was based on the theory of equitable estoppel.²³⁹ As both defendants acquiesced to the 2004 Judgment, and because API relied on the facially valid judgment, API argued the defendants should be estopped from challenging its status as an innocent purchaser.²⁴⁰ While acknowledging this argument had “certain force,”²⁴¹ the court held the doctrine of equitable estoppel was inapplicable in this

236. *Id.* at 169. The court recognized its holding in *Westland Oil* from thirty years prior. *Id.* (quoting *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982), *rev’g* 620 S.W.2d 765 (Tex. Civ. App.—El Paso 1981)). It is interesting to note the concurring opinion recognized that at times it might be difficult, “depending on the state of the record, . . . for an *appellate court* to discern which of two conflicting judgments accurately ‘reflects the true decision of the [trial] court.’” *Id.* at 172 (Lehrmann, J., concurring) (alteration in original) (emphasis added) (quoting *Andrews v. Koch*, 702 S.W.2d 584, 586 (Tex. 1986) (per curiam)). Justice Lehrmann continued by stating “[a] *thorough* review of this record . . . conclusively shows that the true decision of the trial court, as reflected in the 2003 Judgment, was to award fee[-]simple title to the City.” *Id.* at 173 (emphasis added). From the tone of her opinion, one must assume a subsequent purchaser from an individual whose title is derived from a nunc pro tunc judgment must thoroughly review the trial court record to determine if the nunc pro tunc judgment is in fact a judgment merely correcting a clerical error and, thus, accurately reflects the true decision of the trial court. *See id.* (agreeing API was unable to acquire legal title from its grantor since the 2004 Judgment was void, and indicating a thorough review of the trial court’s record would have indicated the trial court’s true decision was to vest the City with fee-simple title).

237. *Id.* at 169 (majority opinion) (citing *Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942)). The court’s earlier pronouncement regarded the inapplicability of the innocent purchaser doctrine to “protect a purchaser whose chain of title includes a void deed.” *Id.* at 168 (citing *Wall*, 118 S.W. at 888).

238. *Id.* at 169 (footnotes omitted).

239. *See id.* at 170 (reiterating API’s argument that TxDOT is barred from objecting to the 2004 Judgment it previously acquiesced to).

240. *Id.*

241. *See id.* (responding to the argument that “purchasers should be able to rely upon facially valid judgments”).

case.²⁴² The court stated: “For estoppel to apply against the government, two requirements must exist: (1) ‘the circumstances [must] clearly demand [estoppel’s] application to prevent manifest injustice,’ and (2) no governmental function can be impaired.”²⁴³ The first requirement was not satisfied because the court found no evidence of deliberate inducement in the case but only evidence of mistaken acquiescence.²⁴⁴ The court also noted estoppel was not available since the governmental error was clearly discoverable in this case.²⁴⁵ As to the second requirement, the court held accommodating API’s ownership of the property would restrict TxDOT’s ability to successfully complete the drainage project.²⁴⁶ Having disposed of all of API’s arguments, the court determined there was no viable takings claim; therefore, the trial court did not have jurisdiction over the case.²⁴⁷ Consequently, the court reversed the court of appeals’ decision and dismissed the case.²⁴⁸

C. *Analysis and Critique of the A.P.I. Case*

Existing precedent indicates a purchaser is bound by the recitals set forth in the documents in his chain of title.²⁴⁹ In this light, one can attempt to follow the *A.P.I.* court’s rationale: actual notice of the 2003 Judgment and the later 2004 Judgment charged API with the responsibility for determining the legal effects of each of those judgments or, as the court said, to “squar[e]” the two contradictory judgments.²⁵⁰ To square

242. *See id.* (comparing this case to the only two cases where the court applied the doctrine of estoppel against a governmental entity (citations omitted)).

243. *Id.* (alteration in original) (emphasis omitted) (footnotes omitted).

244. *Id.*

245. *Id.* The court reasoned that “API could have examined the conflicting judgments” and discovered the following “[r]ed flags”: “(1) the 2004 Judgment was styled a nunc pro tunc even though it made a judicial change, not a clerical one; (2) it was issued long after the 2003 Judgment; [and] (3) it nowhere mentioned the unobjected-to special commissioners’ award.” *Id.* Earlier in its opinion, the court pointed out that under section 21.061 of the Texas Property Code, if no one objects to the special commissioners’ award, the court can only perform the “ministerial function” of entering “the [special] commissioners’ findings as the judgment of the court.” *Id.* at 167 (alteration in original) (citations omitted). There was no evidence in this case of timely objection. *Id.*

246. Since the property was purchased for the drainage ditch, the court reasoned that defendants’ inability “to freely dig on the land” would burden the undisputed governmental function. *Id.* at 171.

247. *Id.*

248. *Id.*

249. *See, e.g., Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 908 (Tex. 1982) (acknowledging established law that binds purchasers by every recital and reference in instruments in their chain of title (citations omitted)).

250. *See A.P.I.*, 397 S.W.3d at 169 (“API, constructively and actually aware of the recorded 2003 Judgment, was responsible for squaring it with the contradictory 2004 Judgment.”); *see also*

the 2003 Judgment with the 2004 Judgment, API would have needed to inquire into the legal bases of each decision to determine its validity.²⁵¹ API would be charged with notice of those facts that a prudent individual could have ascertained from such inquiry.²⁵² This inquiry would have included a thorough review of the trial court clerk's record to determine what the original petition for condemnation sought—a right of way or a fee-simple title.²⁵³ This review of the clerk's record would have also included an examination of the special commissioners' report to determine what interest was being conveyed.²⁵⁴ Finally, the clerk's record would contain the 2003 Judgment itself, which awarded fee-simple title to the City, recited that the 2003 Judgment was in conformity with the special commissioners' report, and disclosed no objections had been made to that report.²⁵⁵ With this knowledge gleaned from the trial court clerk's record, API would have determined the 2003 Judgment was in legal conformity with the Texas Property Code.²⁵⁶ The Property Code provides that if no objection is made to the special commissioners' report, the court is required to enter “the special commissioners' findings as the judgment of the court.”²⁵⁷ As such, the trial court could “only perform its ministerial function and render judgment based upon the commissioner[s]

Cherry v. Farmers Royalty Holding Co., 160 S.W.2d 908, 911 (Tex. 1942) (imputing purchasers with notice of the recorded instruments in their chain of title and with their legal effect (first citing Leonard v. Benford Lumber Co., 216 S.W. 382, 383 (Tex. 1919); and then citing Strong v. Strong, 98 S.W.2d 346, 348 (Tex. 1936))); Leonard, 216 S.W. at 383 (refusing to allow individuals to ignore the legal effects of documents duly recorded).

251. See Leonard, 216 S.W. at 383–84 (concluding the “inquiry for incumbrances should not have stopped with the date of the patent or its registry, but obviously it should have been carried back to the date of the original entry by the homesteader, as that marks the date and source of the title indicated by the patent.” (quoting Dickerson v. Bridges, 48 S.W. 825, 827 (Mo. 1898))); cf. A.P.I., 397 S.W.3d at 170 (reasoning equitable estoppel cannot apply as the governmental entities' error was discoverable since “API could have examined the conflicting judgments and seen that the 2004 Judgment was issued in error” given “[r]ed flags were plentiful”).

252. See, e.g., Flack v. First Nat'l Bank of Dalhart, 226 S.W.2d 628, 631–32 (Tex. 1950) (noting one is charged with notice of all facts that inquiry would lead one to ascertain with due diligence).

253. See A.P.I., 397 S.W.3d at 165 (indicating the original petition for condemnation sought “fee title”).

254. See *id.* (noting the special commissioners' report referred to the interest “conveyed as a ‘right of way’” but it incorporated the City's original petition “which described the interest sought as a ‘fee title’”).

255. *Id.*

256. See *id.* at 167–68 (“[T]he trial court in this case was by law required to adopt the award of the special commissioners, who in turn granted the fee-simple title the City sought in its condemnation petition.”); see also TEX. PROP. CODE § 21.061 (West 2016) (depriving a party of the ability to alter the commissioners' findings absent a timely filed objection).

257. PROP. § 21.061.

award,"²⁵⁸ which it did in the 2003 Judgment.²⁵⁹ Having completed this inquiry, API would then be faced with determining the validity of the agreed upon 2004 Judgment,²⁶⁰ which changed the interest conveyed to the City from fee-simple title to a mere easement.²⁶¹ While even the *A.P.I.* court acknowledged that a "significant alteration to the original judgment may be accomplished through a judgment nunc pro tunc so long as it merely corrects a clerical error,"²⁶² a review of the trial court clerk's record, as outlined above, would have established that the 2004 Judgment did not just make a clerical change to the earlier judgment; instead, it made a substantive judicial change to the earlier judgment.²⁶³ Therefore, upon proper inquiry notice, API would have determined that the 2004 Judgment was void since it was signed outside the trial court's plenary power;²⁶⁴ thus, API would have had actual knowledge of an adverse interest—the City's fee simple interest—and could not claim to be an innocent purchaser.²⁶⁵ Furthermore, the fact that the 2004 Judgment was an agreed judgment would not have changed this determination,²⁶⁶ as parties cannot confer subject matter jurisdiction on a court by agreement.²⁶⁷

258. *John v. State*, 826 S.W.2d 138, 141 n.5 (Tex. 1992) (per curiam) (citing *Pearson v. State*, 315 S.W.2d 935, 938 (Tex. 1958)).

259. *A.P.I.*, 397 S.W.3d at 167–68.

260. *See id.* at 165 n.2 (indicating it is unclear as to why the parties agreed to the 2004 Judgment).

261. *Id.* at 167.

262. *Id.* Indeed, if the trial court's signed judgment does not accurately reflect the court's true decision, the error is considered "clerical and may be corrected." *Id.* (quoting *Andrews v. Koch*, 702 S.W.2d 584, 586 (Tex. 1986) (per curiam)).

263. *See id.* at 168 (regarding the 2004 Judgment as one which "was undeniably a substantive alteration to the 2003 Judgment" despite its judgment nunc pro tunc label and the expiration of the court's plenary power).

264. *See id.* ("[T]he trial court's plenary power to make substantive alterations had expired 300-plus days before the 2004 Judgment was rendered."). The trial court's power to make any substantive changes to a judgment, under the best of circumstances, can never exceed 105 days after the date of signing the judgment. *See L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 444 (Tex. 1996) (per curiam) (referencing the seventy-five- and thirty-day rules for plenary power (first citing TEX. R. CIV. P. 329b(c); and then citing TEX. R. CIV. P. 329b(e))). However, when a judgment is modified in any respect by written order during the trial court's plenary jurisdiction, the trial court then has "plenary power to set aside or to further modify or reform that judgment within 30 days, absent another motion extending the time periods." *Bd. of Trs. v. Toungate*, 958 S.W.2d 365, 367 (Tex. 1997) (first citing TEX. R. CIV. P. 329b(h); and then citing TEX. R. CIV. P. 329b(d)).

265. *See A.P.I.*, 397 S.W.3d at 172–73 (Lehrmann, J., concurring) (arguing a thorough review of the record shows the 2004 Judgment was void and that the trial court's true decision was reflected in the 2003 Judgment awarding the City with fee-simple title).

266. *See id.* at 165 (majority opinion) (describing how the two judgments came to exist, and pointing out the 2004 Judgment was agreed to by the parties' attorneys).

267. *See, e.g., Morrow v. Corbin*, 62 S.W.2d 641, 649 (Tex. 1933) (indicating subject matter jurisdiction "cannot be conferred by agreement" since such "jurisdiction exists by reason of the authority vested in the court by the Constitution, or by statutes not in conflict therewith" (citations

Thus, by reviewing the trial court clerk's record, API would have been charged with the knowledge that the 2004 Judgment was void and that the 2003 Judgment, being valid, conveyed the fee-simple title to the property to the City, leaving nothing for API's grantor to convey to API.²⁶⁸

By applying the *A.P.I.* court's expanded notion of inquiry notice, one can attempt, once more, to follow the court's rejection of API's innocent purchaser argument.²⁶⁹ It is clear that one cannot claim the status of an innocent purchaser for value when one has *notice of an adverse claim*, as API clearly had, namely, actual knowledge of the 2003 Judgment.²⁷⁰ However, in attempting to distinguish its earlier *Slaughter* opinion,²⁷¹ the court created confusion concerning the validity of its earlier pronouncement that the innocent purchaser for value "doctrine does not protect a purchaser whose chain of title includes a void deed: 'One holding under a void title cannot claim protection as an innocent purchaser.'" ²⁷² The source of this confusion arises from the following language in the court's decision: "API, constructively and actually aware of the recorded 2003 Judgment, was responsible for squaring it with the contradictory 2004 Judgment. *Slaughter v. Qualls*, on which the court of appeals relied, is not to the contrary."²⁷³

In the *A.P.I.* case, the "squaring" of the two judgments, as shown above, would have led API to the determination that the 2003 Judgment was valid and the 2004 Judgment was void.²⁷⁴ Thus, under the court's analysis, API would have had notice of an adverse interest and, thus, could not claim the status of innocent purchaser.²⁷⁵ In *Slaughter*, the court of

omitted)).

268. *See A.P.I.*, 397 S.W.3d at 168–69 (rejecting API's claim since API should have squared the 2004 Judgment with the 2003 Judgment and upon doing so, would have discovered the 2004 Judgment failed to convey any interest to any party as it was void, thus, depriving API's grantor of any interest to transfer).

269. *See id.* at 166 (deciding API was not entitled to innocent purchaser status).

270. *See id.* at 168 ("[O]ne cannot be 'innocent' of a recorded judgment, and here, API concedes it knew of the recorded 2003 Judgment before it purchased the property.>").

271. *See id.* at 169 (equating the statements set forth by the *Slaughter* court with "dicta").

272. *Id.* at 168 (quoting *Wall v. Lubbock*, 118 S.W. 886, 888 (Tex. Civ. App.—Austin 1908, writ *ref'd*)). More recently, the court stated this principle less definitively. *See Wood v. HSBC Bank USA, N.A.*, No. 14–0714, 2016 WL 2993923, at *6 (Tex. May 20, 2016) ("Typically, a void deed in the chain of title would foreclose the bona-fide purchaser defense." (citations omitted)); *see also Hous. First Am. Sav. v. Musick*, 650 S.W.2d 764, 769 (Tex. 1983) (noting the mortgagor would be estopped from asserting that a nonjudicial foreclosure was void because the trustee's deed gave the "appearance of good title" in the purchaser at the foreclosure sale (citing *Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942))).

273. *A.P.I.*, 397 S.W.3d at 169 (citing *Slaughter*, 162 S.W.2d at 675).

274. *See id.* (charging API with notice of an adverse interest since API was responsible for squaring the judgments).

275. *See id.* (noting that under section 13.001 of the Texas Property Code, which defines the

appeals held there was no evidence the subsequent purchasers had notice the trustee's deed in their chain of title was void;²⁷⁶ and, by way of obiter dicta, the supreme court stated such subsequent purchasers acquired good title as against the mortgagor of the improperly foreclosed deed of trust.²⁷⁷ For *Slaughter* not to be contrary, as the *A.P.I.* court asserted, the *A.P.I.* court must have concluded the subsequent purchasers' inquiry notice in *Slaughter* would have resulted in a determination that the trustee's sale and deed were valid, and as a result, they had no notice of an adverse interest.²⁷⁸ Thus, the subsequent purchasers from the purchaser at the foreclosure sale in *Slaughter* apparently would not have been charged with going behind the trustee's deed or, at least, they would not have been charged with going behind the deed of trust that authorized the trustee to give apparent title to the purchaser at the foreclosure sale.²⁷⁹ Their inquiry would end there, and they would not have to inquire further to determine whether the actual substitute trustee conducted the foreclosure sale, whether the debt was in default, or whether the other recitals contained in the trustee's deed were correct.²⁸⁰ Such further inquiry

elements of innocent purchaser status in all cases, a "purchaser with notice of an adverse interest cannot claim innocent-purchaser status").

276. *Slaughter v. Qualls*, 149 S.W.2d 651, 656 (Tex. Civ. App.—Amarillo 1941), *aff'd*, 162 S.W.2d 671 (Tex. 1942).

277. *See Slaughter*, 162 S.W.2d at 675 (relying on principles of equity to provide innocent purchaser protection).

278. *Cf. A.P.I.*, 397 S.W.3d at 169 (Tex. 2013) (indicating *Slaughter* "is not to the contrary" while simultaneously holding API was not an innocent purchaser since API had notice of an adverse interest and had the responsibility to square the contradictory judgments in its chain of title).

279. *See Slaughter*, 162 S.W.2d at 675 (protecting the mortgagee and lessee who acquired their interests from the purchaser at a void foreclosure sale who held apparent title, and failing to impute upon them a requirement to ensure the sale was proper); *see also A.P.I.*, 397 S.W.3d at 169 ("[A]ny description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and he is bound to follow up on this inquiry . . ." (alteration in original) (quoting *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 903 (Tex. 1982), *rev'g* 620 S.W.2d 765 (Tex. Civ. App.—El Paso 1981))).

280. *Compare Slaughter*, 162 S.W.2d at 674–75 (establishing the trustee's deed appeared to contain all of the recitals necessary to show the sale was valid to subsequent purchasers and, thus, protecting those who purchased the property "in good faith in reliance thereon," in spite of the sale's deficiencies), *with A.P.I.*, 397 S.W.3d at 168 (asserting the innocent purchaser doctrine is inapplicable when the chain of title contains a recorded, void instrument, and putting subsequent purchasers on inquiry notice of such judgments). If this inquiry notice established the trustee's deed contained statements concerning the sale that were not authorized by the deed of trust, the purchaser would be placed on further inquiry to see if the facts recited were correct. *See, e.g.*, *Bowman v. Oakley*, 212 S.W. 549, 552 (Tex. Civ. App.—Fort Worth, 1919, writ *ref'd*) (concluding subsequent purchasers were not innocent purchasers where they incorrectly assumed the trustee had the power to conduct the sale due to recitals in the trustee's deed that the deed of trust did not authorize the trustee to include therein).

would have resulted in a determination that the foreclosure sale was void.²⁸¹ However, for *Slaughter* to be consistent with the *A.P.I.* case, the *A.P.I.* court must have concluded that the subsequent purchasers in *Slaughter* were not charged with such further inquiry and were innocent purchasers as they had no notice of an adverse interest in spite of a void deed being in their chain of title.²⁸² Yet such a conclusion would directly conflict with the *A.P.I.* court's bold assertion that one could not be an innocent purchaser when there was a void deed in one's chain of title, because, in *Slaughter*, there was a void deed in the subsequent purchasers' chain of title.²⁸³ Therefore, it is clear that *Slaughter* contradicts *A.P.I.*, in spite of the *A.P.I.* court's assertion to the contrary.²⁸⁴ This confusion created by the *A.P.I.* opinion needs to be clarified.

In addition, the *A.P.I.* court's treatment of the *Slaughter* obiter dicta and its discussion finding TxDOT and the City were not equitably estopped by their acquiescence to the 2004 Judgment leads to further confusion in regards to the state of the law governing the case of a void instrument in one's chain of title.²⁸⁵ As noted above, the *Slaughter* court considered it inequitable to allow a mortgagor to defeat subsequent purchasers when, through the execution of the deed of trust, the mortgagor "made it possible for the trustee to create the appearance of title" in the purchaser at the void foreclosure sale.²⁸⁶ In rejecting the obiter dicta from the

281. See *Slaughter*, 162 S.W.2d at 675 (determining the "foreclosure sale and trustee's deed were absolutely void" since the deed of trust specified a foreclosure sale was authorized only upon the debtor's default and once this condition was satisfied, the foreclosure sale could only be conducted by "the trustee[] or a duly appointed substitute trustee," and neither of these conditions were complied with).

282. See *id.* at 676 (classifying the purchase of the property as one made in good faith because the subsequent purchasers had no notice of the invalidity of the trustee's deed).

283. Compare *id.* at 675 (concluding "the foreclosure sale and trustee's deed were absolutely void" but extending innocent purchaser status to those who "purchased in good faith in reliance thereon"), with *A.P.I.*, 397 S.W.3d at 168 (rejecting the availability of innocent purchaser protection when there is a void deed in one's chain of title (citing *Wall v. Lubbock*, 118 S.W. 886, 888 (Tex. Civ. App.—Austin 1908, writ ref'd))).

284. See *A.P.I.*, 397 S.W.3d at 169 (expressing the view that *Slaughter* "is not to the contrary" (citing *Slaughter*, 162 S.W.2d at 675)).

285. See generally *id.* at 168–71 (relying upon Texas Property Code section 13.001 in refusing to recognize equitable estoppel principles that would deem API an innocent purchaser, yet then evaluating API's claim of equitable estoppel under a seemingly different standard).

286. *Slaughter*, 162 S.W.2d at 675. As was shown above in Part III.B of this Article, equity has consistently been used to protect creditors or subsequent purchasers when the individual seeking to defeat the rights of the subsequent purchasers is the very individual who clothed the grantor of the subsequent purchaser or creditor with apparent legal title. See *Hussey v. Moser*, 7 S.W. 606, 608 (Tex. 1888) (suggesting a married woman who concealed facts that her daughter signed and acknowledged her name to a deed giving it the appearance of a valid conveyance might be estopped

Slaughter case, the *A.P.I.* court held the “shall” statute “defines the elements of innocent-purchaser status for all cases, and courts may not disregard” the statute because its application would be inequitable.²⁸⁷ However, in the very next paragraph, the court intimated that principles of equitable estoppel might be used to protect innocent purchasers by stating: “API argues that TxDOT’s acquiescence to the 2004 Judgment bars it from objecting now to what it accepted then. While the argument has a certain force—purchasers should be able to rely upon facially valid judgments—this argument goes to equitable estoppel”²⁸⁸ This language creates ambiguity and confusion given the court’s earlier rejection of the obiter dicta of the *Slaughter* case.²⁸⁹

The *Slaughter* court applied equitable estoppel to protect innocent purchasers who had a void deed in their chain of title when they acquired their interests from one holding legal and apparent title.²⁹⁰ The *A.P.I.* court seemingly acknowledged the possible application of equitable estoppel to protect a purchaser who purchased from one whose title was derived from an agreed “facially valid judgment” in spite of the fact that such judgment was void.²⁹¹ In both situations, a subsequent purchaser acquired property from one who was clothed with apparent legal title by the very person who later argued the subsequent purchaser was not an innocent purchaser.²⁹² If equity can possibly assist one, why can it not come to the aid of the other? Given the inconsistencies and confusion generated by the *A.P.I.* opinion as it relates to subsequent purchasers with a void instrument in their chain of title²⁹³ this Article now proposes to

for the protection of innocent third parties); *Randolph v. Citizens Nat’l Bank of Lubbock*, 141 S.W.2d 1030, 1034 (Tex. Civ. App.—Amarillo 1940, writ dism’d judgm’t cor.) (stating equity will protect an innocent purchaser from one who clothed another with “authority to bind him” (citations omitted)).

287. *A.P.I.*, 397 S.W.3d at 169 (citing TEX. PROP. CODE § 13.001 (West 2012)).

288. *Id.* at 170.

289. *See id.* at 169 (refuting the suggestion set forth in the *Slaughter* opinion that equitable principles can apply to protect innocent purchasers (citing *Slaughter*, 162 S.W.2d at 675)).

290. *Slaughter*, 162 S.W.2d at 675.

291. *A.P.I.*, 397 S.W.3d at 170.

292. *See id.* at 166, 168 (reiterating API’s argument that it should be protected as an innocent purchaser because when purchasing the property from its grantor, it relied upon the agreed to 2004 Judgment, which purported to reduce the City’s ownership to a mere easement and clothed its grantor with apparent title); *Slaughter*, 162 S.W.2d at 675 (basing its application of equitable principles on the mortgagor’s “execution of the deed of trust [that] made it possible for the trustee to create the appearance of good title in” the purchaser at the foreclosure sale).

293. *Compare A.P.I.*, 397 S.W.3d at 168–69 (declaring the innocent purchaser statute and equitable estoppel principles inapplicable in cases where the purchaser’s chain of title contains a void deed), *with Slaughter*, 162 S.W.2d at 675 (noting it would be inequitable to allow the mortgagor to undermine the innocent purchaser’s title when his actions created the appearance of good title in the

suggest ways to resolve these inconsistencies and clear up the confusion.

V. RECOMMENDATIONS FOR CHANGE TO REPAIR A CHAIN OF TITLE CONTAINING A VOID INSTRUMENT

This Article pointed out that in several situations Texas courts applied equitable principles to protect a subsequent purchaser in spite of the existence of a void deed in her chain of title. However, the *A.P.I.* court did not acknowledge these equitable exceptions.²⁹⁴ Instead, it reiterated the rule of law that one cannot be an innocent purchaser if there is a void deed in the chain of title.²⁹⁵ Furthermore, the court rejected any equitable exceptions to the “shall” recording statute.²⁹⁶ This Article proposes legislation to clearly and unequivocally reinstate the equitable doctrine of the innocent purchaser for value in Texas jurisprudence. Furthermore, as previously noted in this Article, it is unclear from the *A.P.I.* court’s opinion whether the mere existence of a void deed in one’s chain of title is sufficient to charge one with notice of an adverse interest or whether one can be an innocent purchaser if one has no knowledge of the existence of a void instrument in the chain of title and the corresponding adverse interest after sufficient inquiry.²⁹⁷ This unsettled area of the law needs clarification, and legislation is necessary to correct the present imbalance existing between a creditor or a subsequent purchaser for valuable consideration without notice of a void instrument in the chain of title and the individual who clothed the creditor’s or subsequent purchaser’s grantor with apparent title. Additionally, the legislature should overrule the court’s expansion of the doctrine of implied actual notice that has imposed an unrealistic burden upon creditors and subsequent purchasers.²⁹⁸ In that light, the author proposes the following amendments to the Texas Property Code to read as follows:

trustee).

294. See generally *A.P.I.*, 397 S.W.3d at 168–69 (limiting innocent purchaser status to that conferred by Texas Property Code section 13.001 and broadly stating, without qualification, that one cannot be an innocent purchaser with a void deed in one’s chain of title).

295. *Id.* at 168.

296. See *id.* at 169 (“Section 13.001 [of the Texas Property Code] defines the elements of innocent-purchaser status for all cases, and courts may not disregard or rewrite the statute when they believe straight-up application would be inequitable. The statute is categorical and makes no case-by-case exceptions . . .”).

297. See *supra* Part IV.C.

298. Cf. McSwain, *supra* note 200, at 650 (“[T]he ‘chain of title rule’ does not impute to a purchaser notice of *all* facts . . . rather, only of those which reasonably refer to and serve to excite his interest in title matters.”).

§ 13.000 Definitions (New)

(a) In this Chapter:

(1) "Apparent title" means such written evidence as under the laws of the state confers upon the vendor the legal estate in the land.

(2) "Notice" means knowledge or facts that can be ascertained by reasonable inquiry and that would appear to be title related to an ordinary prudent creditor or subsequent purchaser.²⁹⁹

§ 13.002 Effect of Recorded Instruments (Revised)

(a) An instrument, other than a forged instrument, that is "recorded in the proper county is:"

(1) "notice to all persons of the existence of the instrument;"

(2) not notice that the recorded instrument is void; and

(3) "subject to inspection by the public."³⁰⁰

§ 13.006 Creditors and Subsequent Purchasers and Void Instruments (New)

(a) Creditors of and subsequent purchasers for a valuable consideration from one having apparent title and without notice, take free and clear of all titles, equities, and adverse interests.

(b) The existence of a void instrument in one's chain of title does not prevent a creditor or subsequent purchaser for a valuable consideration without notice of the corresponding adverse interest from being an innocent purchaser for value.³⁰¹

299. This section represents a proposed addition to the Texas Property Code formulated by the author to assist in clarifying the confusion currently associated with innocent purchaser status and to remedy the notice stringencies imposed by the *A.P.I.* decision. See *A.P.I.*, 397 S.W.3d at 169 (imputing notice of an adverse interest and requiring the subsequent purchaser to square conflicting instruments where the purchaser believed the subsequent instrument superseded the conflicting, previous judgment).

300. For comparison purposes, the statute regarding the effects of recorded instruments, as it currently exists in the Texas Property Code, provides: "An instrument that is property recorded in the proper county is: (1) notice to all persons of the existence of the instrument; and (2) subject to inspection by the public." TEX. PROP. CODE § 13.002 (West 2016).

301. *Contra A.P.I.*, 397 S.W.3d at 168 (indicating the innocent purchaser doctrine "does not protect a purchaser whose chain of title includes a void deed," and extinguishing the applicability of equitable principles in light of the doctrine's codification in the Property Code). The statutory provision relied upon by the *A.P.I.* court only extends its protection to creditors and subsequent purchasers for a valuable consideration and without notice of unrecorded instruments reflecting a conveyance of, interest in, or mortgage or deed of trust on real property. PROP. § 13.001(a)-(b).

These proposed changes will return equitable considerations into the analysis of innocent purchaser status. In doing so, several significant changes are made to the law of notice. First, the proposed amended statute (proposed section 13.002 Effect of Recorded Instruments) provides for constructive notice of all recorded instruments, even those that are void, other than forgeries.³⁰² However, under proposed sections 13.002 and 13.006, creditors and subsequent purchasers will not be charged with constructive notice that a recorded instrument in their chain of title is in fact void.³⁰³ The statutory changes will clarify that the mere existence of a recorded void instrument in one's chain of title will not deprive a creditor or subsequent purchaser of innocent purchaser status.³⁰⁴ Finally, the proposed statute curtails the growth of implied

302. Currently, the statute merely provides that a properly recorded instrument is notice to all of its existence and open to public inspection. PROP. § 13.002.

303. *Contra A.P.I.*, 397 S.W.3d at 169 (depriving the subsequent purchaser of innocent purchaser status since the purchaser could have discovered the invalidity of the instrument on which they relied, thus, charging them with notice of an adverse interest). The Texas Property Code, in its current state, is silent as to whether one is on notice of the effect of properly recorded instruments and instead, merely provides that a properly recorded instrument is notice of its existence. PROP. § 13.002.

304. It should be noted that, effective September 1, 2015, the Texas Property Code was amended to provide a procedure for the rescission of certain nonjudicial foreclosure sales of residential real property. PROP. § 51.016. The statute states that the trustee, substitute trustee, or mortgagee may rescind a nonjudicial foreclosure sale if:

- (1) the statutory requirements for the sale were not satisfied;
- (2) the default leading to the sale was cured before the sale;
- (3) a receivership or dependent probate administration involving the property was pending at the time of sale;
- (4) a condition specified in the conditions of sale prescribed by the trustee or substitute trustee before the sale and made available in writing to prospective bidders at the sale was not met;
- (5) the mortgagee or mortgage servicer and the debtor agreed before the sale to cancel the sale based on an enforceable written agreement by the debtor to cure the default; or
- (6) at the time of the sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the property was in effect.

Id. § 51.016(b). In each of these instances, the nonjudicial foreclosure sale would be considered void under existing law regardless of the rescission. *See* Cont'l Casing Corp. v. Samedan Oil Corp., 751 S.W.2d 499, 501 (Tex. 1988) (per curiam) (citing the United States Supreme Court for the proposition that “[a]n action taken in violation of the automatic stay is void, not merely voidable” (citations omitted)); *Hous. First Am. Sav. v. Musick*, 650 S.W.2d 764, 769 (Tex. 1983) (holding a foreclosure sale invalid because the notice of sale did not comply with the requirements of the deed of trust and the statute); *First S. Props., Inc. v. Vallone*, 533 S.W.2d 339, 341–42 (Tex. 1976) (affirming the lower courts’ holdings that the substitute trustee’s deed was void because there was no authorization by a court to conduct the foreclosure sale of “property held *in custodia legis* by a duly appointed receiver”); *Pearce v. Stokes*, 291 S.W.2d 309, 310–11 (Tex. 1956) (indicating a nonjudicial foreclosure sale made during the pendency of an administration is void); *Slaughter v. Qualls*, 162 S.W.2d 671, 675 (Tex. 1942) (deeming the foreclosure void as the note was not in default and the

actual notice, by limiting the scope of implied actual notice to title related matters.³⁰⁵ It is time to repair the broken chain to protect creditors and subsequent purchasers from being deprived of innocent purchaser status due to the mere existence of a void instrument in their chain of title.³⁰⁶

substitute trustee did not personally conduct the foreclosure sale); *Henke v. First S. Props., Inc.*, 586 S.W.2d 617, 620 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (determining the foreclosure was void as the default had been cured).

However, interestingly enough, the statute also states:

A rescission of a foreclosure sale under this section is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless notice of the rescission has been acknowledged, sworn to, or proved and filed for recording as required by law. A rescission of a foreclosure sale under this section evidenced by an unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

PROP. § 51.016(i). This provision starts with a void foreclosure sale that, under the statute, may be rescinded. *Id.* § 51.016(b), (i). However, even though the rescission was conducted, it was never properly recorded, which would have given constructive notice to the world, and thus, the creditor or subsequent purchaser had no actual notice of the rescission. *Id.* § 51.016(i); *see also id.* § 13.002 (declaring a properly recorded instrument provides notice to all persons that the instrument exists). Thus, under the statute, the intervening creditor or subsequent purchaser of the property that was sold at a void foreclosure sale apparently takes the property as an innocent purchaser despite the void foreclosure deed in the chain of title. *Id.* § 51.016(i). The statutory changes suggested in this Article go substantially further and make it clear and unambiguous that a creditor or subsequent purchaser for value and without notice can be an innocent purchaser in every situation where a void deed or instrument is in her chain of title.

305. *Contra A.P.I.*, 397 S.W.3d at 169 (extending inquiry notice to facts contained within a trial court's judgments and clerk's record).

306. The statutory changes proposed in this Article to protect innocent purchasers are analogous to the Texas Constitution's provisions that protect innocent purchasers in the case of a foreclosure of a lien securing a noncompliant home-equity loan. TEX. CONST. art. XVI, § 50(a)(6). The Texas Constitution protects homesteads from foreclosure for the payment of debts except in eight specific situations—one of which is home-equity loans. *Id.* § 50(a). Under the Constitution, there are a set of terms and conditions that home-equity loans must include to be a compliant home-equity loan and, thus, foreclosure eligible. *Id.* § 50(a)(6)(A)–(Q). A home-equity loan can have other terms and conditions, but failure to follow the constitutional terms and conditions will make the loan noncompliant, thus, eliminating the option to foreclose on the homestead in the event of the borrower's default. *See Garofolo v. Ocwen Loan Servicing, LLC*, No. 15–0437, 2016 WL 2986237, at *3 (Tex. May 20, 2016) (recognizing the Constitution does not prohibit home-equity loans made on other terms, but “describes what a home-equity loan must look like if a lender wants the option to foreclose on a homestead upon borrower default”). Furthermore, the Constitution specifically states that no “lien on the homestead shall ever be valid unless it secures a debt described” in Section 50 of the Constitution. TEX. CONST. art. XVI, § 50(c). Thus, liens securing noncompliant home-equity loans are not valid. *See Wood v. HSBC Bank USA, N.A.*, No. 14–0741, 2016 WL 2993923, at *5 (Tex. May 20, 2016) (clarifying the common law categorization of void and voidable liens is not applicable to the interpretation of the constitutional terminology of a valid lien). However, the Constitution provides that noncompliant home-equity loans can be validated. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x); *see also Doody v. Ameriquet Mortg. Co.*, 49 S.W.3d 342, 346–47 (Tex. 2001) (agreeing a noncompliant home-equity loan is invalid until it is made valid by complying with the

cure provisions contained in the Constitution (citing TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)). The constitutional “cure provisions are the sole mechanism to bring a loan [that is noncompliant] into constitutional compliance.” *HSBC Bank USA*, 2016 WL 2993923, at *5. Until the cure provisions are complied with, the “lien that was invalid from origination remains invalid.” *Id.* The Constitution gives the lender sixty days to cure after receiving notice that the loan is noncompliant. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x).

However, notwithstanding the invalidity of a lien securing a noncompliant home-equity loan, the Constitution protects innocent purchasers and provides that:

A purchaser for value without actual knowledge may conclusively presume that a lien securing an extension of credit described by Subsection (a)(6) of this section was a valid lien securing the extension of credit with homestead property if:

- (1) the security instruments securing the extension of credit contain a disclosure that the extension of credit secured by the lien was the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution;
- (2) the purchaser acquires the title to the property pursuant to or after the foreclosure of the voluntary lien; and
- (3) the purchaser is not the lender or assignee under the extension of credit.

Id. § 50(i). Thus, this constitutional protection of an innocent purchaser applies not only to subsequent purchasers, but also to the initial purchaser at the foreclosure of the lien securing a noncompliant loan. *Id.* Furthermore, the good faith purchaser is not charged with constructive notice that the lien is invalid if the lien has the appearance of validity by containing a minimum disclosure that the loan “secured by the lien was the type of credit defined” by the Constitution as a home-equity loan. *Id.* In distinguishing the concept of an invalid lien under this constitutional provision and the common law category of a void lien, the supreme court stated:

Typically, a void deed in the chain of title would foreclose the bona-fide purchaser defense. . . . However, section 50(i) provides such protection to home-equity foreclosure purchasers without actual knowledge of a constitutional defect. This deviation from the common-law treatment of void liens evinces an understanding that home-equity liens securing constitutionally noncompliant loans do not neatly fit into a common-law category. By including a bona-fide purchaser provision, section 50(i) effectively sets its own cut-off. Once a third-party buys without actual knowledge of the invalid lien, that transaction will not be undone notwithstanding the invalid lien.

HSBC Bank USA, 2016 WL 2993923, at *5–6. The changes to the Texas Property Code concerning innocent purchasers proposed in this Article would, in effect, establish its own cut off. Once a third party without actual notice of a void instrument in her chain of title purchases real property from a seller who has apparent title, that conveyance will not be avoided notwithstanding the void instrument in the chain of title.

