

necessitate either: (1) abandoning the strike as a weapon—a course unthinkable to labor; (2) attempting to strike effectively without technical violations of the law—a feat well nigh impossible;¹⁵ (3) continuing to strike and to defy the law¹⁶—a choice intolerable to organized society; or, (4) working for amendment of the Sherman Act¹⁷ and for legislation exempting labor unions and officers from liability for tortious acts committed on their behalf during industrial disputes.¹⁸

* **Mortgages—Priorities—Purchaser without Notice under Recording Act—[Oregon].**—The defendant, a first mortgagee, released the mortgagor from liability in exchange for a conveyance of the fee. Before doing so, however, the defendant procured and had recorded a satisfaction of a junior mortgage upon part payment to the junior mortgagee, without requesting the production of the junior mortgage and note which had previously been transferred to the plaintiff under an unrecorded assignment. An Oregon statute provides, “. . . a satisfaction or release of said mortgage by the party appearing upon said record to be the owner and holder of said mortgage shall operate to free the land described in such mortgage from the lien of such mortgage, so far as regards all subsequent purchasers and incumbrances for value, and without notice.”¹⁹ The plaintiff commenced suit to enforce his lien, and a decree of foreclosure was rendered. On appeal, *held*, reversed. The defendant comes within the protection of the statute. *Willamette Collection & Credit Service v Gray*.²

The rule is well settled under recording acts that a bona fide purchaser of property from a mortgagor, who finds upon the record a satisfaction or release by the record mortgagee and relies thereupon, is given priority over one whose claim is based upon an unrecorded assignment from the mortgagee.³ The principle upon which this rule rests is that where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear it.⁴ The assignee may record his assignment and avert the loss, while there is nothing feasible the purchaser can do. Purchasers who fail to exert reasonable efforts in a practicable search for unrecorded conveyances and encumbrances, however, are not necessarily within the protection of the recording acts. Thus, a purchaser is deemed to have constructive notice of encumbrances referred to in instruments in his chain of title.⁵ In a purchase from one not in possession, a purchaser is put upon inquiry to determine the interest of one whose possession is inconsistent with the record title.⁶ And when the record shows an unsatisfied mortgage and the re-

¹⁵ See note 12 *supra*.

¹⁶ Garrison, Government and Labor—The Latest Phase, 37 Col. L.R. 897, 905 (1937); Sat. Eve. Post, October 2, 1937.

¹⁷ Woll, 147 Ann. Amer. Acad. 185 (1930).

¹⁸ Note British Trades Disputes Act of 1906, 6 Edw. VII, c. 47 (1906).

¹ Ore. Code 1930 § 54-109.

² 70 P. (2d) 39 (Ore. 1937).

³ Porter v. Ourada, 51 Neb. 510, 71 N.W. 52 (1897); Swasey v. Emerson, 168 Mass. 118, 46 N.E. 426 (1897); Newman v. Fidelity Sav. & Loan Ass'n., 14 Ariz. 354, 128 Pac. 53 (1912); Stetler v. Winegar, 75 Colo. 500, 226 Pac. 858 (1924).

⁴ See Porter v. Ourada, 51 Neb. 510, 71 N.W. 52 (1897).

⁵ Crawford v. C. B. & Q. R. Co., 112 Ill. 314 (1884); Sweet v. Henry, 175 N.Y. 268, 67 N.E. 574 (1903); Carter v. Leonard, 65 Neb. 679, 91 N.W. 574 (1902).

⁶ Kirby v. Tallmage, 160 U.S. 379 (1895); Phelan v. Brady, 119 N.Y. 587, 23 N.E. 1109 (1890); Rayburn v. Davison, 22 Ore. 242, 29 Pac. 738 (1892).

mainder of the title in the record mortgagee, it is generally held that a purchaser relies upon the apparent merger of record at his peril, for the subsisting mortgage might have been assigned, preventing an actual merger.⁷

Although the instant case is not the first to apply the general rule to the situation there presented,⁸ it would seem that a distinction should be drawn between the purchaser who relies upon the record as he *finds* it, and the one who relies upon the record as he *makes* it or *procures it to be made*.⁹ Ample authority for this distinction exists in other jurisdictions,¹⁰ and the problem was one of first impression in Oregon. When the purchaser knows only that the encumbrance is released of record, a request that the releasor produce the note and mortgage would be unavailing, for the instruments, shown by the record to be valueless, would have been destroyed. But in a case in which the purchaser procures the release it is only reasonable that a request for the valuable instruments be made. When the negotiations for the conveyance and release were begun in the instant case, the record disclosed an unsatisfied mortgage; and a request that the mortgagee produce the instruments would, through his inability, have revealed the unrecorded assignment. A failure to make that request should give constructive notice of the encumbrance that it would have revealed.¹¹ Should the releasor produce a forged or fraudulently procured note or mortgage at the request of the purchaser, or should he give a written release which is recorded in a jurisdiction where the first recorded instrument gains priority,¹² the suggested rule should not be applied, for the purchaser would have done all that a reasonable search required.

The instant case probably would never have arisen had the Oregon statutes required, as a prerequisite to recording the release of a mortgage, that the releasor submit evidence to the recording officer that he is at the time the owner of the mortgage. Such evidence is required in at least one jurisdiction,¹³ and the Oregon statute has been criticized for the omission.¹⁴

Sales—A.A.A. Tax Refunds—Rights of Purchaser against Processor—[Federal].—
In 1935 the plaintiffs entered into contracts for the purchase of the defendant's com-

⁷ Thauer v. Smith, 213 Wis. 91, 250 N.W. 842 (1933), noted in 29 Ill. L. Rev. 121 (1934), 82 U. of Pa. L. Rev. 547 (1934); Purdy v. Huntington, 42 N.Y. 334 (1870); Zorn v. Van Buskirk, 111 Okl. 211, 239 Pac. 151 (1925). *Contra*, Gregory v. Savage, 32 Conn. 250 (1864); Artz v. Yeager, 30 Ind. App. 677, 66 N.E. 917 (1903); Ames v. Miller, 65 Neb. 204, 91 N.W. 250 (1902).

⁸ Ladd v. Campbell, 56 Vt. 529 (1884); Conn. Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N.E. 586 (1887); Napieralski v. Simon, 198 Ill. 384, 64 N.E. 1042 (1902); Cadwallader v. Sprengle, 131 Wash. 16, 228 Pac. 834 (1924); Mf'rs. Trust Co. v. People's Holding Co., 110 Fla. 451, 149 So. 5 (1933).

⁹ See Windle v. Bonebrake, 23 Fed. 165, 167 (C.C. Kan. 1885).

¹⁰ Porter v. Ourada, 51 Neb. 510, 71 N.W. 52 (1897) (holding that the purchaser who procured the release took subject to the prior unrecorded assignment, but that a purchaser from him takes free); Windle v. Bonebrake, 23 Fed. 165 (C.C. Kan. 1885); Assets Realization Co. v. Clark, 205 N.Y. 105, 98 N.E. 457 (1912); Metropolitan Life Ins. Co. v. Guy, 223 Ala. 285, 135 So. 434 (1931).

¹¹ See cases cited in note 12 *supra*.

¹² See Bacon v. Van Schoonhoven, 87 N.Y. 446 (1882). ¹³ See Rev. Stat. Mo. 1929, § 3078.

¹⁴ See Oregon & Washington Trust Co. v. Shaw, 5 Sawy. (Fed.) 336, 340 (C. C. Ore. 1877).