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LIMITS OF RECORD SEARCH AND THEREFORE OF NOTICE

*Part I **

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It might appear that the above title puts the cart before the horse. Record notice and the precaution of searching are mutually dependent; the fields which they respectively cover are admittedly identical; any limitation of the one is therefore necessarily an equal restriction of the other; but since we search in order to learn whether any recorded instrument is already giving notice, it might seem that limitation of notice, which is the cause, should precede and determine limitation of search, which is the consequence. Nevertheless, such a suggestion is without merit. That notice is the cause is not questioned. It is contended that the policy of the recording acts calls for the limitation of notice. But record notice,¹ by which knowledge of a prior convey-

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1. The broad meaning of the phrase "constructive notice," as employed by Mr. Pomeroy and others, makes its employment undesirable. Instead, "record notice" is generally used to designate the absolute notice given by a prior conveyance that is properly recorded (docketed judgments being nowhere specifically in question), and "inquiry notice" is generally used to cover *all* cases in which the purchaser has actual or imputed knowledge of facts that should put him upon further inquiry. See 2 POMEROY, *EQUITY JURISPRUDENCE* (5th ed. 1941) §§ 606, n. 1, 607; and text at and following notecall 202 *infra*.

Mr. Pomeroy is constantly cited in these pages because his work has for two generations enjoyed great repute (too great), and has been constantly cited by the courts. Its influence is regrettable.

ance is attributed by conclusive presumption of law to a subsequent purchaser regardless of what the actual fact may be, is a pure fiction, and therefore no objective test can possibly be directly applied to it in order to restrain its operation; no more than the test of identity of litigants could be applied to the John Doe and Richard Roe of ejectment under the rule of *res judicata*. Whatever, therefore, may be the proper test that limits the common field of notice and search, which it is the purpose of this paper to consider, it must be one that limits search directly and only consequentially limits notice. The mutual dependence of the two conceptions underlies, of course, every case on recording, and is occasionally explicitly referred to; but any reference to them which even by implication recognizes search as operatively the determinative factor is extremely rare.²

The problem of record notice (and of inquiry notice by documents unauthorizedly recorded) is the central problem of the recording system. Nevertheless, it has received—even from those who, like Professor Pomeroy, have recognized its great significance³—virtually no critical and systematic discussion. In various situations presenting crucial problems of its application, the very existence of these has frequently been ignored; and when not ignored they have very often been disposed of by assumptions, or by question-begging and otherwise delusory reasoning. The present article attempts a general discussion of the problem. It may be said at once that the discussion can have little interest for those concerned only with the amassing of case citations. In several situations, particularly that discussed in section V of this article, which tests most decisively the choice and application of basic principles, an attempt has been made to discover all pertinent decisions, and as respects the problem considered in that section they are individually analyzed and evaluated. With these few exceptions, however, individual cases are only sparingly and incidentally considered, textbooks containing collections of cases being cited for whatever they may be worth. Necessity compels this procedure, for the scope of the discussion is so wide that the consideration

2. In 1 JONES, MORTGAGES OF REAL PROPERTY (8th ed. 1928) § 673, in earlier editions § 541, one finds such a passage: "As a general rule a purchaser is not bound to search the records for incumbrances as against a title that does not appear of record. Generally, therefore, the record of any mortgage prior to the conveyance by which the mortgagor took his title is no notice of the incumbrance to a subsequent purchaser." See also comments by Chief Justice Shaw at notecall 442 *infra*. In WEBB, A TREATISE ON THE LAW OF RECORD OF TITLE (1890) § 161 (at 255) the author reasons in the order that a purchaser, because of a rule of law (title by estoppel), "will take subject to the mortgage, and since this imposes . . . the duty of searching . . . , it follows that he is . . . charged with constructive notice by its record."

3. See text at notecall 61 *infra*, and note thereto.

of individual cases at each step would bury the general argument under a myriad of irrelevant details.

The discussion will deal necessarily with familiar matters. The most fundamental of these, however, are so trite as a matter of words that this triteness has made difficult any clarity of thought respecting them. Some novelty will be found in the viewpoint from which they are considered.

Let us assume for a moment that a recording system is initiated with the intent of forcing all title documents upon the record, in order that it may show a complete history of the title. It is obvious (1) that the statute should provide at least (for this would still leave great gaps as respects intestacy and other matters) that no instrument operating *inter vivos* and ostensibly affecting title should have *validity* unless and until recorded; (2) that, if that method of attaining the postulated end be not adopted, another means of attaining it would be by providing for the divestment of an unrecorded title in favor of a subsequent purchaser, who should therefore, *as respects all matters of substance and procedure*, be treated as the deliberately appointed favorite of the statute; (3) that to the utmost possible extent such purchaser should be protected in relying upon the record, and the burden of proof in litigation between him and the negligent non-recorder of the prior deed should invariably be upon the latter; and (4) that stultification of the postulated public policy should never be permitted through recognition in any manner or for any purpose of any recorded document unless its recording be authorized and unless the recording be in strict compliance with statutory requirements.

The public policy just assumed is generally supposed to be that of our actual recording system. It is proposed to show how very far we fall short, in practice, of applying the principles indicated as necessary for attainment of the end proposed. As regards statutes, Maryland has retained one of colonial origin⁴ that is essentially identical with that first suggested. But alongside it there also stands a provision that "the deed . . . first recorded . . . shall be preferred, if made *bona fide* and upon good and valuable consideration."⁵ The two provisions are, literally, poles apart. (If the "*made bona fide*" refers to the grantor the law would, also, be unique in that respect.⁶) North Carolina's statutes have always been construed likewise to mean that no conveyance is effective until properly recorded—requiring therefore a race to the record with priority to the first registered, re-

4. See note 39 *infra*.

5. MD. ANN. CODE (Flack, 1939) art. 21, §§ 1 and 17. Cf. *Nickel v. Brown*, 75 Md. 172, 186, 23 Atl. 736, 739 (1892).

6. See text at and following notecall 20 *infra*.

ardless, if that were the junior deed, of any notice of it by the taker of the subsequent conveyance. Since 1885 the subsequent purchase has been required to be one for value.⁷ This transformed a "pure" into a "qualified" race to the record law, but not into a notice-race statute. The utter unconsciousness of divergent principles implicit in statutes of variant wording is illustrated by the Maryland example. Sudden legislative changes of long continued prior policies are illustrated by that in North Carolina, but they have in various cases been greater, and prior and subsequent stability less.

To start, as Massachusetts did in 1640, by conceding to the unrecorded deed validity as between the parties and their heirs, was to begin with a policy much weaker than the postulated ideal. To recognize the deed as valid save as against a subsequent purchaser for value was a much greater weakening of policy. To give it validity save as against a subsequent purchaser for value and in good faith did not, as might at first sight appear, only slightly tighten prerequisites for divestment of the common law title. It vastly increased them, because of the looseness of the equitable doctrine of notice; the original English meaning of that doctrine—namely, actual knowledge of the prior conveyance and therefore fraud in attempting its divestment—having been steadily weakened in American decisions to an utter vagueness. Each of the above changes in the enactment carries the requirements farther from the ideal, making registry of the prior deed less necessary. The same cannot be said when the subsequent purchaser is also required to record first. He is, indeed, subjected to an additional burden, but the general policy of recording is strengthened by the race between him and the earlier grantee, and recording by him gives security for the future both to him and those who may claim under him. Inattention to statutory variations has characterized the entire history of our recording system. For example, the vagueness of the ideas still prevalent regarding the classification of race and notice jurisdictions, and as to the effects of that distinction, is almost incredible.⁸

In general, the history of the system has been one of the defeat of its original, and supposedly still general, purpose by the equitable doctrine of notice that was imposed upon it by early judicial legisla-

7. N. C. CODE ANN. (Michie, 1943) § 47-18. Cf. *White v. Holly*, 91 N. C. 67 (1884); N. C. Laws 1885, c. 147, § 1. Note, however, that the requirement of value is literally applied; it is not, as in various other states, made to mean "bona fide purchaser for value."

8. Compare remarks on Illinois legislation in text at notecall 292 *infra*, and in note thereto; on race and notice jurisdictions, see text following notecall 98 *infra*; on the idea of abeyance of title (which would imply a statute of the ideal type suggested just above as point (1) in the text, but which is never discussed with that in mind), see notes 21 and 87 *infra*.

tion. The recording statutes have in fact been made merely an extension of that doctrine. No matter how a statute was worded it came to be construed as protecting the common law priority of the first grantee against all later purchasers with notice, so that today in all save two states that is the law. Moreover, the language of the courts has gradually been incorporated into the statutes in nearly all states.⁹

There was nothing in the statutes for a very long time regarding the good faith of the subsequent purchaser.¹⁰ There was for a long time no incorporation into them of the requirement, made in the statutes of Elizabeth relating to fraudulent conveyances, that the protected subsequent purchaser or creditor must be one who had given valuable consideration, although the rapid displacement of other conveyances by the bargain and sale in our colonial period made that requirement one that normally existed in form, and also usually in fact.¹¹ The statute merely declared that the title passed by a first conveyance (and which was perfect under common law principles) should stand if recorded, but if not recorded should be invalid against (in other words, defeasible in favor of) a subsequent grantee. It is incredible that the Massachusetts judges, with whom the destruction of the original statutory policy began, should have seen no difference between saying that a subsequent acquisition of title was barred because the first conveyance was *simply recorded* and saying that it was barred because that deed, *being* recorded, gave notice, and therefore no subsequent buyer could take with good faith. Still, since it was undoubtedly widely understood that recording of a title took the place of the *publicity* of conveyance by feoffment,¹² the transition in thought was natural.

It is true that if the notice thus obtruded into the statute, whether unconsciously or covertly, had been confined to the constructive notice given by the record of the prior deed no great harm would have been done. In that case, that which defeats the subsequent purchaser is the *fact* of the existence of a prior superior title, retrospectively decided by a court to be such. His "notice" is merely knowledge, imputed to him, of that title's *existence and quality*. He is treated as if he knew the fact, and without regard to any question as to whether he *knew the law*. But search of the record, though a counsel of prudence if one would avoid a bad investment, is not required;

9. PATTON, LAND TITLES (1938) § 8, n. 90, cites statutes from forty-four states substantially so worded. See also *id.* § 19, n. 213.

10. See text at notecall 47 *et seq.*, *infra*.

11. *Ibid.*

12. See text and notes following notecall 28 *infra*.

and if it be made, an actual understanding by the purchaser or by his legal adviser that the title registered *is* superior is wholly immaterial.

Now, the introduction of notice opened the door to notice of all types; any notice to the purchaser, *accepted as equivalent to the knowledge just stated*, excused recordation of the common law title. Hence, in particular, no subsequent purchase can be made *bona fide* if the purchaser has inquiry notice. Of course, all forms of notice not only have the same effect but are also in some ways identical in their requirements. In all cases "bad faith" under the recording acts means solely knowledge of the existence of the prior and superior title. There is no "notice" unless the court holds that the prior title was superior, and no notice unless it holds that knowledge thereof was or could have been gained. So holding on both points, it makes no difference whether the record is searched or the inquiry off the record made.

But here the likeness ends, and it is perfectly plain from the cases that the differences that lie beyond these common principles are either unperceived or ignored.¹³ Reference is not made to the uncertainty of title necessarily introduced by the introduction of inquiry notice; that has, indeed, been objected to by Chancellor Kent and others.¹⁴ But only in seemingly rare cases have judges challenged the inherent injustice that its operation involves in certain classes of cases. To some extent rules of reasonableness supposedly govern inquiry notice—as respects the information that should incite inquiry, the sources from which further information should be sought, the extent to which investigation should reasonably be carried.¹⁵ The application of these rules, also, to some types of inquiry notice is relatively satisfactory, particularly to that given by inconsistent tenancy of the land. On the other hand they have been almost completely ignored in the large field of documents unauthorizedly or improperly recorded (where record notice is admittedly impossible), and in some other situations.

It is here that the operation of the doctrine results in the injustice above referred to. All types of notice attribute to the purchaser some legal knowledge. He searches the record because he knows that an earlier recorded deed from his vendor will invalidate that offered to him. A stranger's possession of the land puts him upon inquiry because he assumedly knows that it probably rests upon a hostile title. These are very simple cases. *How far may notice, as an equitable doctrine, go in assuming such knowledge?* When a better title is recorded the mere recording gives the knowledge that constitutes bad faith; and

13. For example, compare statements in PATTON, *op. cit. supra* note 9, § 14 at notecall 172.

14. See text at notecall 238 *et seq., infra*.

15. See text following notecall 252 *infra*.

the court decides the question whether it is the better title. When it is unrecorded the subsequent purchaser is held to have acted in bad faith if he did not himself acquire that knowledge. In scores of cases courts have said that he was put upon inquiry, and that reasonable diligence would have led him to "the facts," when no possible inquiry could have led him to anything other than a difficult legal problem. Can a failure to predict the court's ultimate decision be reasonably called bad faith? What if the problem is one never before decided in the jurisdiction, or one decided variantly in other states as the purchaser's legal adviser may inform him? In some cases involving difficult recording problems a court that only hesitantly recognized record notice has added in dictum that the purchaser was put upon inquiry, thus covering its own hesitancy by adding that, anyway, the purchaser would have been sacrificed to the doctrine just stated. Finally, in scores of cases involving records that admittedly gave no record notice the courts have said that at least the record put upon inquiry the purchaser who happened to see it, thus making a document unlawfully on the record the equivalent of a perfect instrument properly recorded, and so using the record itself to stultify the public policy the advancement of which is the record's sole reason for existence.

All this is more than a transformation. It is no mere change in form. It comes near to abandonment of one policy and substitution of its opposite. Instead of disfavoring the negligent first grantee, the courts revert in effect to the favor shown him by the common law which it was the very purpose of the statutes to deny him. Talking equities, despite sporadic declarations of the true policy, they minimize the initial inequity of his failure to record which is the origin of all difficulties.¹⁶ Instead of promoting the policy of compelling recordation, they have steadily in every way devitalized that policy. True, it can no longer be said that in so doing they flout the declared policy of the statutes of which they are the guardians, since the enactments have almost everywhere been so revised as to require a purchase in good faith. But though that leaves good faith to be defined by the courts, it is no legislative license for such restrictions upon the meaning of that phrase as thwart the plain policy of favoring the subsequent purchaser in order to force recordation. The courts still recognize that as the ultimate purpose of the statutes.

A reader might conclude by this time that the writer's intent is merely to denounce and lament "the law." It is much more limited and not so completely quixotic, although the frustration of the recording system's primary policy is certainly to be lamented. That system

16. See note 43 *infra*, and text at notecall 73 *et seq.*, *infra*.

suffers from two great defects. One is a matter of scattered and incomplete records, which could be cured in considerable measure by legislation that is perfectly feasible. The other is one of doctrinal complexity and uncertainty, which derives almost exclusively from these same characteristics of the doctrine of notice—for they are also the cause of uncertainty in the definition of a "chain of title."

Notice is an equity doctrine. As such it must rest on fairness and reasonableness. As respects whom? Manifestly, the subsequent purchaser. If this fact, often declared by the judges, were consistently kept in mind, it would terminate disagreement on most points now contested and give coherence to all recording theory. In section II of this article attention is given to the question, What was and what is the actual objective of the recording acts? and to a number of related matters such as their mode of operation, their relation to equity, and the distinction between "notice" and "race" jurisdictions. There is virtually no recognition in practice that reasonableness and fairness from the viewpoint of the subsequent purchaser should control the operation of record notice. The title to this article indicates that as the point principally to be considered. In section I other principles than reasonableness of search, which have been more or less definitely suggested as controlling record notice, are briefly considered. In section III various abnormal recording situations are discussed from the viewpoint of the test here urged. In section IV inquiry notice is considered in the same abnormal situations. In section V both record and inquiry notice are examined with reference to an additional problem, that of multiple conveyances by a record owner during the period of his ownership when one is recorded after he has parted with the record title.

The main contentions are two: that record notice should be limited by the search that can reasonably be required of a purchaser; and that no inquiry notice should be attributed to any instrument unlawfully recorded.

I

Of course, notice may be limited arbitrarily; and that is how courts have oftentimes restricted it, although under the guise of applying tests that are in fact only specious, because either subjective or indefinite or otherwise unsatisfactory. Some illustrations of such unacceptable tests may be given.

Not infrequently textwriters and judges have attributed to an imaginary grantor gradations of conscience in three periods of his possible dishonesty: before he owns the land ostensibly granted, while

he owns it, and after he has ceased to own it. For example, Mr. Tiffany, in justifying exclusion from the field of notice and search of deeds given in the third period, remarks of a subsequent purchaser: "He has the right to assume that A, having conveyed to B, would have made no further conveyance, and he is consequently under no obligation to search for such a conveyance."¹⁷ This reason is employed by Mr. Tiffany in disposing of problems of the third period only; and various judicial pronouncements to the same effect have similarly confined it. Obviously, however, the general principles of law¹⁸ would permit of no distinctions in the three situations; one can no more reconvey land already granted (2d and 3d periods) than convey land one has never owned (1st period); and certainly, as respects any distinction between the second and third periods, it is impossible to postulate that either an addition to or subtraction from honesty results from the rule of the recording system which allows a dishonest grantor to divest his first grantee in favor of a second. If, however, Mr. Tiffany's *ipse dixit* be extended to cover the second period it would compel him to repudiate the position taken by him, as we shall see, toward the decisions in that field.¹⁹ Were the dictum extended to cover all periods of possible dishonesty it would be patently a mere fiction, inconsistent with the truth concerning human nature that is spread in the law reports. When confined to one period, by dates or relationships to land that have no possible ethical relevance, it remains equally a fiction, employed merely to justify an arbitrary decision.

In itself, the matter just adverted to merits no further consideration. Nevertheless, because judges rather frequently assert that the purpose of the recording acts is to prevent fraud, the opinion may be ventured that such a view, besides being quite inaccurate, brings into the foreground an ethical element which clearly belongs in the background of any realistic discussion of the recording system. True, the basis of this is an assumption that dishonest conveyances may be made. In fact, too, it is set in operation solely by such conveyances. Nevertheless, the system is essentially amoral. Since the three possible periods, in relation to the record, during which a dishonest "grantor" may make pretended conveyances will frequently hereafter be referred to, it may be well to state them at once more exactly than in the above reference to them. He may make ostensible conveyances

17. 2 TIFFANY, THE LAW OF REAL PROPERTY (2d ed. 1920) 2191. See text preceding and following the quotation from *id.* at notecall 338 *infra*.

18. That is, the principles relating to conveyances operating by way of uses or analogously to such conveyances, all of which were "innocent" in the sense that they could convey no greater estate than the grantor held.

19. See text at notecall 439 *infra*.

of land to which he has never held even unrecorded, much less record, title; or may, while record owner, successively give to different persons deeds purporting to convey the same land, all of which deeds save the first are necessarily dishonest and possibly that also; or he may, after being but ceasing to be record owner, make ostensible conveyances. It does not follow, however, that the recording system covers the entire field of dishonest conveyances, and still less that its purpose is to discourage dishonesty. Neither of these statements would be accurate.

As respects the first proposition, it suffices to note (as has very rarely been done²⁰) that in the second situation, with which nearly all cases under the recording acts deal, *nothing whatever* is required by them respecting the prior conveyance. They merely provide that the right it passes—whatever right it passes—shall be divestible in favor of a subsequent purchaser in good faith and for value;²¹ if not *so* divested, it may still be voidable outside the recording acts for fraud or duress or other defects. Similarly, as respects the second grantee, although he may conceivably be guilty of various other species of chicanery, and even of a fraud that will render his title voidable, the only good faith required of him by the recording acts is that he have no notice of the prior conveyance. That this has not always or sufficiently been realized is suggested by the language of both statutes and judicial opinions, and is definitely indicated by the decisions of the courts.²² The recording system, therefore, is concerned with but a very small portion of the field of dishonesty in conveyancing.

20. It was noted by Chief Justice Dixon in *Fallass v. Pierce*, 30 Wis. 443, 471 (1872).

21. This is, of course, not common judicial language. Judges frequently speak as though the first conveyance were "suspended"—whether *in nubibus* not being stated. See notes 8 *supra* and 87 *infra*. Such a theory is inconsistent with the wording or construction of nearly every American statute since perhaps 1775. The statutes, save in two states, are held to pass immediately a title good as between the parties. The only theory that explains the cases is that of divestment; see Aigler, *The Operation of the Recording Acts* (1924) 22 MICH. L. REV. 405, on the estoppel and other theories; but see also the quotation at p. 152 *infra*. On divestment by the grantor's heir or other rightful successor (devisee, later grantee, administrator in some situations) see also Note in 23 ANN. CAS. 1912B, 1289. The point has been decided explicitly in favor of their divesting power in at least thirteen states, with the negative view perhaps prevailing in two. But in fact the disparity is much greater, for the former view amounts merely to holding (as is presumably everywhere conceded) that the "subsequent purchaser" protected by the statutes is not one who purchases from, literally, the "same grantor" but from any successor in interest to a grantor through whom the prior grantee likewise claims. "In one breath it is said that the title passes by the deed to the grantee and still so remains with the grantor, that in a contingency it may again pass from him to another grantee, but if the grantor dies it cannot descend"—in the two jurisdictions mentioned, and by some older decisions elsewhere that have been reversed—"like all his other titles, but goes back to the original grantee, with whom it has always remained." *Youngblood v. Vastine*, 46 Mo. 239, 242-3 (1870). See also *Powers v. McFarren*, 2 S. & R. 44 (Pa. 1815), one of the earliest of the majority holdings.

22. "The 'good faith' of the subsequent purchaser, spoken of by the statute, signifies no more than that he shall be ignorant, or shall purchase without any knowledge or in-

As regards the second proposition, one may confidently venture the antagonistic assertion that the recording system is neither directly nor intrinsically nor primarily concerned with fraud or dishonesty. It may possibly, to some extent, discourage dishonesty by lessening the number of those whose gullibility makes dishonesty profitable; but, waiving the enormity of that assumption, in its visible operation it *validates* the act of a dishonest grantor, as will appear below.²³ The introduction into the recording system of the doctrine of *bona fide* purchase has therefore resulted in virtually displacing the system's original policy by one to which that policy was essentially alien, and this without commensurate gain, since the scope of the substitute policy's operation within the recording system does little to advance the general end of promoting honesty in conveyancing.

Brief reference may be made to other principles seemingly enunciated by textwriters as definitions or delimitations of the field of notice and search. Mr. Tiffany states the search requirement as the exercise of "proper diligence": a subsequent purchaser is charged with notice only when, "if he exercised proper diligence, he would, by searching the records, discover the existence and terms of such instrument."²⁴ Wholly acceptable so far as it goes, this gives no aid on the question what *are* "the records" that must be searched, and leaves a purchaser to know the law on that point or suffer the consequences of ignorance. He must search for what would be dangerous to his title; but what instruments give notice, and are dangerous? Similarly incomplete generalizations abound in textbooks and judicial opinions. Mr. Pomeroy states that recording gives notice "to every person subsequently dealing with the subject-matter whose duty or interest it is to make a search of the records;" and, again, that a record gives notice "only to those persons who . . . are compelled to search the records

formation of the existence of the prior *conveyance*. . . . Bad faith in any other respect, or any other species of fraud or dishonesty, on account of which the conveyance of a purchaser may be set aside or annulled and his title taken away or avoided in favor of *some third person*, the party defrauded, whose claim or interest, legal or equitable, was prior and superior to that acquired by the purchaser, is not the kind of bad faith intended by this statute." Chief Justice Dixon in *Fallass v. Pierce*, 30 Wis. 443, 468-9 (1872). (Latter italics supplied.) See WEBB, *op. cit. supra* note 2, § 13, for quotations from an early enactment of Ohio containing the phrase "subsequent bona fide purchasers for valuable consideration, without notice of such deed"; and from an opinion in which the Alabama Supreme Court refers to an early statute of that state as giving priority to a "subsequent mortgage bona fide and upon valuable consideration, where such mortgage is contracted without notice of the prior incumbrance." Early statutory language tends, of course, to become permanent, but such language as the above is less common today than earlier. See also Mr. Rawle's words quoted in text as notecall 199 *infra*. The confusion remains, nevertheless, in the action of the courts; see text following notecall 73 *infra*.

23. See text following notecall 65 *infra*.

24. 2 TIFFANY, *op. cit. supra* note 17, at 2186.

in order to protect their own interests.”²⁵ But this is merely a recognition of the reciprocal dependence of notice and search, without indicating any limitations of either. His further statement that “Records are only constructive notice of a title of which they enable a party to obtain *actual* notice or knowledge by means of a search”²⁶ does indicate the limitations of notice given by the content of instruments that *can* be discovered, but offers no aid as to what need or need not be discovered.

Pronouncements in judicial opinions are read as restricted in meaning by the question in litigation, in order to avoid reading them as dicta; but generalizations in which a judge cannot properly indulge are precisely what is justifiably expected from authors such as those quoted. It is true that none of the quoted passages is taken from a context in which the problem of restricting notice or search was specifically in question, and that this doubtless, in part, explains their shortcomings. The important fact is that nothing better is anywhere offered; there is nothing further save opinions on special situations, the merits of which are considered below in connection with the issues which those situations present; in both textbooks and cases there appears to be not merely a dearth but a complete absence of discussion of the general problem.

II

At the very outset of an attempt to discover some rational principle regulative of search and notice it may be remarked that the loose language in which the requirements of the recording acts are habitually stated has given to the conceptions of notice and search a false color, diverting attention from the basic problem which they in fact involve.

25. 2 POMEROY, *op. cit. supra* note 1, §§ 649, 657. To the passage from which the second quotation is taken Professor Pomeroy appended in the first edition of his work a note citing Judge Sharswood's similar language in *Maul v. Rider*, 59 Pa. 167, 171 (1868), and himself pointed out that such language “is vicious reasoning in a circle.” But in four later editions his editors have made no improvements. The context of Judge Sharswood's language, however, limits it. Mr. Devlin likewise quotes Judge Sharswood, that the record is notice “only to those who are bound to search for it,” and then, passes (with a “hence”) from the situation to which Sharswood applied it, i. e., that of strangers to the title in question, to the different situation of no-notice-backward to a prior party. 2 DEVLIN, *REAL PROPERTY AND DEEDS* (3d ed. 1911) § 712. Here, the phrase is used as though it afforded an answer to the questions, When is there a duty to search, and why?

26. 2 POMEROY, *op. cit. supra* note 1, § 658, n. 1. To the same effect, 2 *id.* § 653. Various of the foregoing generalities presumably come from Kent, who wrote: “The general doctrine is that whatever puts a party upon 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”—on this last compare text at notecalls 195, 246 *et seq.*, *infra*—“by the exercise of ordinary diligence and understanding.” 4 KENT, *COMM.* *179. The foregoing was reproduced in *Jaques v. Weeks*, 7 Watts 261, 267 (Pa. 1838). This is, of course, all quite true, and so are the propositions quoted in the text; but they are of service only in normal and uncomplicated cases. They are of no value in the difficult problems discussed below, although not infrequently treated by the courts as though pertinent to and useful in the solution of these. Compare text following notecalls 146 and 174 *infra*.

No statute has ever mentioned search, much less indicated the time or records over which it must extend, yet we speak constantly of the "obligation" to search the record, as though it had a statutory basis comparable to that of notice. The truth is, indeed, known to all who so speak, but it nevertheless seems likely that such a habit of speech tends to divert attention from the all-important fact that constructive notice (and particularly record notice, with which we are here concerned) must, as Professor Pomeroy says, "find its ultimate foundation and only support in motives of policy and expediency."²⁷ A proposal to limit notice, or relax "requirements" of search, requires consideration of nothing except the extent to which it is reasonable and desirable to do so. Save in the very few jurisdictions where the courts are constrained by their own precedents in dealing with this question an answer to it should not be difficult, bearing in mind on one hand that it is the subsequent purchaser who is to be favored, and on the other hand that the reasonableness of any search required of him depends upon the manner in which conveyances are locally recorded and indexed.

But these last statements assume that it is the subsequent purchaser who is to be favored. This is not to be taken for granted, however readily many would concede it as another commonplace of the recording system. In dealing with recording problems as matters of public policy the courts have differed in opinion as to what requirements of search accord with "the spirit" of the statutes. That depends, obviously, upon their purpose or purposes, and a consideration of these is therefore not a digression from but an essential part of the subject under discussion. Even though the assumption stated be justifiable it is nevertheless important to establish its firm basis in the history of the recording system because the courts have, it is believed, not adequately heeded it as a reason for their judgments, and because it is therefore, secondarily, desirable to make clear the fact that certain statements in textbooks and judicial opinions that are *inconsistent* with the assumption in question have no comparable historical foundation.

Recording was originally and primarily designed to force deeds upon the record as a substitute for the publicital element of feoffment;²⁸ undoubtedly in order to guard against dangers to which that ancient mode of conveyancing was subject in lesser measure than were the

27. 2 POMEROY, *op. cit. supra* note 1 (4th ed. 1918) 1364.

28. Cf. HUEBNER, A HISTORY OF GERMANIC PRIVATE LAW (Philbrick transl. 1918) index s. v. "Publicity," especially 11 *et seq.*, 183 *et seq.*, 241 *et seq.* Also 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1898) 80 *et seq.* Cf. notes 29 and 30 *infra*.

deeds that displaced it. No double danger, *from past and future*, could arise under feoffments; the dispossessed owner could not convey; he must first recover possession, and being thus himself secure his feoffment gave publicity and safety to his grantee—so long as the latter watched his land. Under the system of conveyancing by deeds that was vastly promoted and widened by the Statute of Uses (1536), and which almost completely displaced feoffments during the 1600s, there has always existed the double danger mentioned. A prospective purchaser is exposed under the recording acts to the past danger of a prior deed—which, if unrecorded, he defeats in a “notice” jurisdiction by taking his own deed for value in good faith. He is likewise exposed to the future danger of being himself divested of title in favor of a purchaser subsequent to himself, which danger he can only escape by recording his deed. In “race” jurisdictions, both precautions are essential to his safety even as to the past alone. Satisfaction of both gives complete security to him; his successors face the same dangers with the same remedies.

Confining attention to the laws of the original states as their statutes stood in the early 1800s, at least in all save five it was provided either that recorded conveyances should be good without any other ceremony, or without livery of seisin (mentioning that) or other ceremony;²⁹ and although various ceremonies were presumably always in mind,³⁰ undoubtedly the one primarily in mind was feoffment. In three of these states and in three others the laws provided that at-

29. Citations may, for convenience, be made to the third volume of John Anthon's edition of SHEPPARD, TOUCHSTONE, entitled AN APPENDIX TO THE TOUCHSTONE OF COMMON ASSURANCES, CONTAINING THE LAWS OF THE SEVERAL STATES IN THE UNION REGULATING THE LEVYING OF FINES AND SUFFERING OF COMMON RECOVERIES, THE MAKING AND RECORDING OF DEEDS, THE FORCE AND EFFECT OF WARRANTIES, FEOFFMENTS, ATTORNMENTS," etc. (1810).

Various of the laws in question go back far into the 18th or even 17th centuries, but their age is here less important than their continued retention in the statute book. Included in the first group were Vermont, New Hampshire, and Massachusetts, at 2 (§ 5), 84, 114 (§ 4), respectively; in the second, Rhode Island, Maryland, North Carolina, South Carolina, and Georgia, at 56 (§ 8), 379 (§ 4), 499 (§ 5), 539 (§ 28), 595 (§ 4) and 596-7 (§ 1-2), respectively. As was said of bargains and sales in Massachusetts by Judge Trowbridge, *A Reading upon the Provincial Statute of Massachusetts Bay "for Registering of Deeds and Conveyances"* (c. 1772) 3 Mass. *573, *581 (1807): "The estate passed . . . without registering the deed, livery of seisin, entry, or any other act of notoriety."

30. The South Carolina law given in 3 ANTHON, *op. cit. supra* note 29, at 539 (§ 28) read, for example: "No grant, deed or feoffment, deed of bargain and sale, deeds of gift, or other conveyance . . . shall be impeached . . . for want of attornment, or of livery and seisin, or enrolment thereof, or for that such conveyance hath been made by way of assignment or endorsement on such deeds or grants, without other ceremony, nor for any other defect in the form or in the manner of the execution of such deeds or grants, or of the endorsements or assignments thereof, either by the first grant, or in any of the *mesne* conveyances derived therefrom, so that the right were or would have been in the person conveying, if such defects had not happened in the form," etc. The fourth section of the first of the two Georgia acts, that of Dec. 24, 1768, 3 *id.* at 594, 595, and the first section of the second, that of Feb. 22, 1785, 3 *id.* at 596, are similarly broad in scope.

tempted conveyances by livery of seisin should be effective to create no more than estates at will.³¹ Finally, in two of the states included, and in two not included, in preceding groups it was provided that all recorded conveyances should have the same effect "as deeds of feoffment, with livery of seisin, or deeds enrolled . . . at Westminster" had in Great Britain.³² That the primary object of the recording system was to rid conveyancing of livery of seisin but retain its publicital advantages was recognized in various early decisions in the original states.³³

Prior in time, higher in right was the original rule of both law and equity as regarded the interests in land which they respectively recognized. It is quite evident that "A provision that a deed shall be recorded, is not in terms or by necessary implication, a provision that compliance with the statute shall render the instrument more efficacious than it would have been at common law."³⁴ The recording of any instrument, prior or subsequent, might be required *merely in order to give it legal existence*. Registration was originally only an additional prerequisite, in equity and at law, to a deed's validity. Its effectiveness as a conveyance remained otherwise dependent upon its intrinsic merits; and if inherently good its registration had not the effect of increasing its efficacy against a subsequent conveyance. Such was in fact the interpretation given to the early English registry acts. So interpreted, any priority given by the statute to an instrument first recorded was nevertheless subject, as Lord Redesdale said, "to the nature of the conveyance, the title of the person conveying, and the rights to be affected by the conveyance;" so that, for example, registration of a deed for land held under a possession adverse to the grantor could not affect its complete invalidity. Let it be noted also that Lord Redesdale protested against "the common language of the court" which

31. The laws of Vermont, New Hampshire, and Massachusetts, given 3 *id.* at 1 (§ 1), 83, 113 (§ 1), respectively; New York, New Jersey, and Pennsylvania, 3 *id.* at 197 (§ 9), 244 (§ 9), 287, respectively. New Jersey had provided by an act of 1713, c. 19, § 8, that deeds to uses should transfer the seisin. 1 NEVILL, ACTS OF THE GENERAL ASSEMBLY, 1703-1751 (1752) 40.

32. The laws of Pennsylvania, Delaware, and Virginia, given in 3 ANTHON, *op. cit.* *supra* note 29, at 273 (§ 5), 319 (§ 4), 470 (§ 14), respectively. The Pennsylvania act, undated in Anthon, is that of May 28, 1715, cited in note 38 *infra*. The New Jersey act is cited in the preceding note.

33. "Whoever attentively examines this subject will find, that the object of this statute"—13 WM. 3, c. 12 (Prov. Laws 19)—"was to take away the necessity of livery and seisin, and to substitute a deed, executed in a particular manner, and acknowledged and recorded, in its place. Nothing more than this is believed to have been intended." French v. French, 3 N. H. 234, 263 (1825). "The ancient law on the subject of feoffments, which demanded livery of seizin to give them efficacy, we consider as having been abolished, and that *now*, enrollment takes the place of livery, and is equivalent to it." Matthews v. Ward's Lessee, 10 Gill. & J. 443, 448 (Md. 1839). The same is implicit in Thatcher v. Omans, 3 Pick. 521, 525, 532, 533 (Mass. 1792).

34. American notes by Hare & Wallace to 2 WHITE & TUDOR, LEADING CASES IN EQUITY (4th Am. ed. 1877) 202.

suggested that the statute operated on the principle of notice—the notion by which the Massachusetts judges began the ruin of their own recording system, and that of this country generally.³⁵

That the intent of the earliest American statutes was precisely that above stated seems to be plainly indicated by their statements of intention as limited to the elimination of mere ceremonies of matter of form. This also appears in the statements of the *effect* of a recorded deed as these appear in the statute books up to the beginning of the last century. The earliest enactment, that of Massachusetts of 1640, declared that no conveyance should “be of force against any other person except the graunter & his heires” unless recorded.³⁶ The Pennsylvania act of May 28, 1715, which was based on the Statute of Enrollments of 27 Hen. VIII,³⁷ declared that no deed, absolute or defeasible, should be “good or sufficient to convey or pass” any estate in land unless recorded within six months.³⁸ Such remained the literal provisions of the statute book in nearly all the states until after the Revolution.³⁹

35. See text preceding notecall 12 *supra*. On the general difference between the Irish and the English statutes according to Pomeroy, see 2 POMEROY, *op. cit. supra* note 1, § 645, n. 1. All the cases there cited are of 1839-1856.

The quotation in the text is from Underwood v. Courtown, 2 Sch. & Lef. *41, *64-5 (Ir. Ch. 1804). His remarks preceding the words quoted were: “It seems to me that nothing could be more mischievous than to hold that the putting anything on the registry is notice within the meaning of the word notice, as applied to courts of equity in such cases, and . . . Lord Killwarden I found . . . was impressed with the same opinion; though the common language of the Court led to an idea that it was notice. He considered that language as an inaccurate mode of expressing the effects of the statute which has its operation . . . without having recourse to the forced construction of the registry being notice. . . . These words [of the statute quoted] give priority to instruments whether they convey a legal or only an equitable title according to the priority of their registry, but still according to the rights, titles and interests of the persons conveying. The words must therefore apply according,” etc., as quoted in the text. (Italics supplied.)

Judge Trowbridge remarked of the Massachusetts act of 1640, quoted below: “The makers of this act surely did not intend thereby to enable any person to convey houses or lands, that neither had, nor appeared to have, good and lawful right or authority so to do. The act does not ascertain who has, or has not, such a right. The common law had long before settled that matter; and the provincial act leaves the rules and maxims of the common law in that respect to take place.” Trowbridge, *loc. cit. supra* note 29, at *574-5.

36. The act is quoted, with citation to the original in PATTON, *op. cit. supra* note 9, § 8, n. 83.

37. That is, 27 HEN. VIII, c. 16 (1535), for the enrollment of bargains and sales. It provided that no lands should thereby “pass, alter or change” unless recorded. Hence, this—like 7 ANNE, c. 20 (1709), and similar enactments in our colonies, see note 53 *infra*—was necessarily a race to the record enactment between successive grantees of the same land from a common grantor.

38. 3 PA. STAT. AT L. (1896) c. 208, § 3. This act provided for the optional recording of “all bargains and sales, deeds and conveyances of lands” (§ 2 *et seq.*), but only as regarded mortgages was it provided that “no deed of mortgage, or defeasible deed in the nature of mortgages . . . shall be good or sufficient to convey or pass any . . . estate . . . unless” acknowledged, or proved, and recorded within six months after its date (§ 7). On the construction of this compare text at notecall 52 *infra*; and on the change made in 1775 see text at notecall 53 *infra*.

39. Citing again the collection of 1810 in 3 ANTHON, *op. cit. supra* note 29, we find the original Massachusetts provision still in the books of Massachusetts, see 3 *id.* at 114 (§ 4) (1784), Vermont, at 2 (§ 5), New Hampshire, at 84 (1791), Rhode Island,

However, notwithstanding this long retention in American recording acts of *language* inconsistent with an attribution to their framers of any intention that registration should alter the relations between prior and subsequent conveyances under earlier rules of law and equity, the statutes were from the beginning so interpreted by the courts as to make such alteration the *essence* of their operation. It may be remarked parenthetically that the inability of a dispossessed owner to convey title, which gradually disappeared from American law during the 1800s,⁴⁰ also made the title of a first grantee, if in possession, indefeasible notwithstanding that he did not record his deed,⁴¹ thus potentially precluding any operation of the recording acts in favor of a subsequent purchaser. Many early cases illustrate these difficulties of seisin.⁴² The matter strikingly illustrates imperfections of legislation. For the mere publicital element of livery the register did con-

at 53 (§2), and Connecticut, at 159 (§9) (1708). Delaware, at 320 (§7) had the Pennsylvania enactment of 1715, quoted in the text at notecall 38 *supra*; Maryland retained an act, given 3 *id.* at 379-80 (§§ 5, 6, 7) (1715), which declared that no estates in land should "pass, alter or change, from one to another" by unrecorded deed, and declared void unrecorded conveyances executed while a similar provision of three earlier statutes of 1674, 1692, and 1699 had been in force, the repeal of said acts notwithstanding; North Carolina provided that no unrecorded conveyance should be "good and available in law," see 3 *id.* at 499 (§5); and Georgia had a provision (at least for the barring of dower, to which the context seemingly confined it, though general in expression) that all conveyances should thereafter be by recorded deeds of feoffment, bargain and sale, or lease and release, see 3 *id.* at 592 (§2).

Pennsylvania, New York, New Jersey, Virginia and South Carolina had altered their statutes before 1810, as indicated in note 53 *infra*.

40. See Costigan, *The Conveyance of Lands by One Whose Lands Are in the Adverse Possession of Another* (1906) 19 HARV. L. REV. 267; Bordwell, *Seisin and Disseisin* (1921) 34 *id.* 592, 734-6.

41. Judge Trowbridge referred to the difficulty thus: "*Objection.* 'But if the estate passes . . . and the land cannot be conveyed by the bargainor to a second purchaser, while the first is in possession of it, though he neglects or refuses to record his deed; the first conveyance will . . . enable the first purchaser to hold the land against other persons than the grantor and his heirs without recording the deed; against the express words of the province law, and the evident design of the makers of it. . . .'"

"*Answer.* An estate may pass to some purposes, and not to others. . . . The tortious possession of a disseisor would have the same effect." Trowbridge, *loc. cit. supra* note 29, at *581, *583.

42. Taking New York as an example, see Jackson *ex d.* Humphrey v. Given, 8 Johns. *137 (N. Y. 1811); Jackson *ex d.* Bonnell v. Sharp, 9 Johns. *163 (N. Y. 1812); Tuttle v. Jackson, 6 Wend. 213 (N. Y. 1830); Etheridge v. Cromwell, 8 Wend. 629 (N. Y. 1832). New York is chosen as an example because it has never rid itself of medieval law. One of perhaps only three states that re-enacted the pretended title act of 1540 (Costigan, *loc. cit. supra* note 40, at 279, n. 3), the Penal Code, §2032, still makes it a misdemeanor for the dispossessed owner to convey; the real property act, §260, makes his attempted conveyance "absolutely void;" but the civil practice act, §994, allows the attempted ostensible grantee to maintain ejectment under the grantor's name. In Dever v. Hagerty, 169 N. Y. 481, 62 N. E. 586 (1902), the established meaning of "title" in our law for perhaps six centuries (namely, a right of entry to gain or regain possession) was repudiated in order to do justice under this jumble of out-moded statutes. By holding in the civil action that the dispossessed owner can convey the right of entry as a chose in action enforceable in the assignor's name, but still retains a "title" independent thereof, which title can be released to the adverse possessor (with the implication that the penal enactment could not have been intended to penalize such conveyance), the result is to throw doubt over a small area of that enactment's possible purview, at the cost of repudiating legal history and doing what would in other jurisdictions be injunctive to the transferee of the right of entry. The case is probably one of the most extraordinary to be found in any field of law.

stitute a more than adequate substitute, and to that extent the objective of the recording acts, above referred to, of relieving conveyances by deed of the dangers to which they, unlike feoffments, were by their nature subject, was realized. But it was not enough to declare that recording should be *equivalent* to livery of seisin. It was not even sufficient to *abolish* livery. Complete realization of the objective was impossible without a further declaration that *lack* of seisin should not affect the right and capacity of a dispossessed owner (for a disseisee was clearly recognized to be such) to convey his title by deed. Our statute books never reached clarity on this subject. The courts were compelled to reach sound results by subtleties and artifices.

It is perhaps impossible to say just how the transition was made to the theory of divestment of the first granted title as one actually valid although unrecorded. Various ideas probably cooperated to that ultimate result. The original statutes themselves clearly suggested that the invalidity of the first unrecorded title was only provisional, and curable by a successful race to the record against the second deed. Then, too, "the common language of the court" in Ireland, to which Lord Redesdale referred, may very well have existed in the colonies, for the second half of the 1600s was full of fermenting ideas regarding equity, and the universally loose and untechnical procedure of the colonial courts was of course a kind of equity. There may well have gradually arisen a conscious desire to expand the operation of technical chancery doctrines. Formal differences in early enactments are seemingly of no significance. The many colonial acts that followed the phraseology of the Statute of Enrollments made the prior unrecorded deed, in effect, void, whereas the group based on the first Massachusetts act explicitly conceded to it a limited effectiveness; but this difference relates to the first grantee, not to the subsequent purchaser. On the other hand the Statute of Enrollments related solely to bargains and sales, involving the payment of valuable consideration by the bargainee; and although the provisions of the colonial statutes related to deeds generally, the bargain and sale became virtually universal in the colonial period, various statutes specifically declaring such deeds effective without prejudice to "the former" or "the old" mode of conveyance by lease and release. Thus, the subsequent purchaser who prevailed over a prior unrecorded deed came to be one who in fact paid value, and it only remained to add the requirement of good faith. How that came to be added seems fairly clear.

If a landowner made two ostensible conveyances of his land, at least one was necessarily dishonest. The first might be vitiated by the grantor's intent to defraud creditors. If on the other hand the

first conveyance was honest and valid, the grantor was necessarily dishonest in making the second. Both in equity and in statutory titles and preambles his act was constantly characterized as "fraud."⁴³ All, or nearly all, of the statutes of the eighteenth century are couched in that language. Indeed, the same idea—although applied not to the grantor but to the subsequent purchaser, as privy to his dishonesty—is still implicit in the many statutes that require the latter to be without "actual" notice of the prior conveyance (which alone could constitute fraud).⁴⁴ These statutes have never been construed and enforced on any such theory.⁴⁵ As for the old enactments, ignoring any inquiry as to how far an attempt may transiently have been attempted to apply them, as worded, against the grantor's "fraud," it seems clear that the law courts could not have accepted any such vague label, since to them fraud had the definite and technical meaning of deceit, aside from that involved under the statutes of Elizabeth for the protection of subsequent creditors and purchasers against conveyances made with intent to defraud them.⁴⁶ Both of those statutes and also the Middlesex recording act of 7 Anne (c. 20), though all were aimed against a grantor's dishonesty that was labeled fraud, protected only subsequent creditors and purchasers "for value."⁴⁷ In these statutes, then, as

43. The statutes being curative, the animus of their preambles is naturally directed primarily against the secrecy of conveyancing that made fraud possible. In the first two quoted below, the dishonesty is therefore attributed to the non-recording first grantee. See text at notecall 16 *supra*.

The preamble of 7 ANNE, c. 20 (1709) read: "Whereas by the different and secret ways of conveying lands . . . such as are ill disposed have it in their power to commit frauds and frequently do so, by means whereof several persons . . . have been undone in their purchases and mortgages by prior and secret conveyances and fraudulent incumbrances. . . ." The Pennsylvania act of 1775, cited note 53 *infra*, begins: "Whereas by the different and secret ways of conveying lands . . . such as are ill-disposed have it in their power to commit frauds whereof divers persons may be injured . . . by prior and secret conveyances and fraudulent encumbrances," etc. The Rhode Island statute expressed its purpose to be, "that it may better be known what right . . . persons have . . . to such estates as they offer for sale" (3 ANTHON, *op. cit. supra* note 29, at 53); that of Massachusetts, "to prevent uncertainty, fraud and perjury in the transferring real estate" (3 *id.* at 113); that of New York, "for the prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury" (3 *id.* at 197); that of South Carolina, "for the preventing frauds in conveyances, double mortgages and other collusions, in making over and conveying lands" (3 *id.* at 538); and that of Georgia (of Dec. 24, 1768), "to prevent fraudulent mortgages and conveyances" (3 *id.* at 594).

All the acts of the 1700s are in terms of "fraud."

44. See the analysis of statutes in 2 POMEROY, *op. cit. supra* note 1, § 646.

45. This received strong emphasis by Pomeroy. See 2 *id.* §§ 591, 660-65. See also Hare & Wallace, *loc. cit. supra* note 34, at 217 *et seq.*

46. Those acts carried penalties, which the courts were obliged to enforce. See 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1924) 480-482; 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES (rev. ed. 1940) c. V (A), "The fraudulent conveyances as a wrong," and § 61a. There were various similar colonial acts. For example, a Georgia statute of 1768 provided that if a grantor or mortgagor gave a second conveyance or mortgage without mentioning therein the former he should be "subject to the like forfeitures and penalties as the laws of . . . England have provided" in such case. WATKINS, DIGEST OF THE LAWS OF GEORGIA (1801) No. 8, of March 7, 1755.

47. See notes 43 and 46 *supra*.

well as in the acts regulating the recording of deeds (since the great majority were bargains and sales), the requirement of value was present as a merit of the person protected. But at least as respected the recording acts it would seem that the judges were reluctant to enforce, literally, the complete invalidity of the unrecorded deed. An excuse for not doing so could only be found in some special merit required of the subsequent purchaser, beyond the statutory requirement of the payment of value; and this additional merit was found in the equitable doctrine of *bona fides*.⁴⁸ Thus the change in the general rules of law and equity respecting priorities which was introduced by the statutes of Elizabeth⁴⁹ was extended over the vaster field of the recording acts, but under a different doctrine.

In England the law courts never accepted the equitable doctrine, and the Chancery applied it to unregistered deeds alone.⁵⁰ In this country, however, all courts adopted it, and without the English distinction, perhaps most easily where, as in Massachusetts and in Pennsylvania, no regular chancery system existed. The "any other person than the graunter & his heires" whom the original Massachusetts act protected against an unrecorded prior conveyance, was interpreted to mean a subsequent *bona fide* purchaser.⁵¹ The Pennsylvania court

48. Various statutes which today contain merely the value requirement are of course similarly construed. The explanation given in the text is that given in 2 POMEROY, *op. cit. supra* note 1, § 665. The New York court, in *Williamson v. Brown*, 15 N. Y. 354, 356-358 (1857), remarked (per Selden, J.), that the original scruples of the English judges influenced early decisions in New York.

49. 2 POMEROY, *op. cit. supra* note 1, §§ 678-680; 1 GLENN, *op. cit. supra* note 46, c. V (A) and (B).

50. See Bordwell, *Recording of Instruments Affecting Land* (1916) 2 IOWA L. BULL. 51-52. "The words of the statute are, that such deeds or conveyances shall be adjudged fraudulent and void against every subsequent purchaser for valuable consideration. It is to be observed, that the words 'bona fide purchaser' are not used. I think, therefore, that we are bound in a court of law to give effect to these words. That seems to have been the opinion of the Judges in the cases cited, although they thought that a court of equity would, in some cases, interfere to relieve the party. It is so laid down by Lord Hardwicke, in *Le Neve v. Le Neve*, and the words of Lord Mansfield, in *Doe v. Routledge*, are these: 'Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside, because he has that notice which the act of Parliament intended he should have.' He therefore puts it as a case in which equity would interfere; and the circumstances of this case shew the propriety of our adhering to the words of the act; for I am by no means clear that we should not work great injustice, if we were to decide in favour of the defendant." *Doe ex d. Robinson v. Allsop*, 5 B. & Ald. 142, 146 (K. B. 1821), per Bayley, J. In *Doe ex d. Watson v. Routledge*, Cowp. 705, 712 (K. B. 1777), Lord Mansfield actually said, "he has not that notice"; but later commentators have uniformly ignored the negative, as did Bayley, J., as manifestly an error. See also Hare & Wallace, *loc. cit. supra* note 34, at 213; argument by counsel in *Van Rensselaer v. Clark*, 17 Wend. 25, 27-8 (N. Y. 1837).

In *Le Neve v. Le Neve*, Amb. 436, 3 Atk. 646 (Ch. 1747), Lord Hardwicke attributed "fraud" to the subsequent purchaser on the ground that he sought priority despite knowledge of the prior deed, but in fact, as Professor Pomeroy pointed out, *op. cit. supra* note 1, § 665, he was charged with notice as principal because his agent had received information of which the purchaser had no actual knowledge.

51. This is evident from Judge Trowbridge's comments, although an explicit statement is lacking. "All persons in possession are *prima facie* capable of conveying and purchasing. . . . And, therefore, if the bargainee, without recording his deed, suffers the bargainor to remain in possession of the land, and he sells it to another, who

similarly construed the act of 1715.⁵² In both of those states, and in a few others, the statutes themselves were changed before 1800 to accord with their judicial application.⁵³ Today this has been done in nearly every state, with considerable variation of language but with virtually no difference in judicial interpretation.

Another aspect of the great change that has taken place between the early and later stages of the system must be emphasized. Consistently with the original view that recording did not of itself affect the relative merits of prior and subsequent conveyances, the record was once regarded as merely serving the ends of evidence. Judge Bronson commented as follows on the situation in New York:

has no notice of the first sale, and that deed is recorded *before the first*, he shall hold the land; because in such case the law supposes the first deed to have been fraudulently made, upon the same principle that it deems a bill of sale of goods, suffered to remain in the possession of the vendor, to be so.

"The bargainor is certainly guilty of a fraud in making the first or second deed. If the first was fraudulent, no injury is done to the first bargainee by the second sale. If the first was a *bona fide* sale, the bargainor is guilty of a fraud in making the second, and the first purchaser is in some measure accessory to it, by suffering the bargainor to remain in possession of the land, without recording the deed; . . ."—compare Lord Mansfield in *Worseley v. de Mattos*, 1 Burr. 467, 474 (K. B. 1758), and Lord Hardwicke in *Le Neve v. Le Neve*, Amb. 436, 446, 3 Atk. 646, 654 (Ch. 1747), or 2 WHITE & TUDOR, *LEADING CASES IN EQUITY* (9th Eng. ed. 1928) 157, 164—"And, therefore, the estate shall pass to one who has been guilty of no fault at all, rather than to an accessory to the fraud. And for that reason only doth it pass to him, where the first was a *bona fide* sale; for if the second purchaser had notice of the first conveyance before he purchased, no estate would pass to him by the second deed, though recorded before the first, because it is fraudulent." Trowbridge, *loc. cit. supra* note 29, at *575-6.

"About two years ago [1770] it was agreed by all the then justices of the Superior Court, that if, upon a *bona fide* sale of land for a valuable consideration, the purchaser enters and continues in possession, without recording his deed, the vendor cannot convey the land to a third person." *Id.* at *579.

52. Britton's Appeal, 45 Pa. 172, 175 (1863). For the act of May 28, 1715, see notes 32 and 38 *supra*.

53. The act of Pennsylvania of March 18, 1775, 8 PA. STAT. AT L. (1900) c. 706, 412, given in 3 ANTHON, *op. cit. supra* note 29, at 275 (§ 1), was based upon the English act of 7 ANNE, c. 20 (1709), quoted in notes 43 and 50 *supra*, which provided that every deed or conveyance should be "adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration"—good faith not being mentioned—"unless . . . registered . . . before the registering of the . . . deed or conveyance under which such subsequent purchaser or mortgagee shall claim." Similarly, the Pennsylvania act declared any unrecorded deed "fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration" who recorded his deed first. See text at notecall 106 *infra*. Virginia's act of 1785 declared unrecorded deeds invalid "against a purchaser, for valuable consideration, not having notice thereof, or any creditor." 12 LAWS OF VIRGINIA (Hening, 1823) 154. This indicated that its origin was one of the Rev. Bills of 1779; Anthon's print is the act of Dec. 13, 1792, 3 ANTHON, *op. cit. supra* note 29, at 466 (§ 1). South Carolina's act, likewise of 1785, made the unrecorded deed "void" against "persons claiming as creditors, or under subsequent purchase[r]s, recorded [i. e., whose deeds have been recorded] in the manner herein before prescribed." 3 *id.* at 542 (§ 45); PUBLIC LAWS OF SOUTH CAROLINA (Grimké, 1790) 381-2. New Jersey, by an act of June 7, 1799, pronounced the unrecorded deed "void and of no effect against a subsequent bona fide purchaser or mortgagee, for a valuable consideration." 3 ANTHON, *op. cit. supra* note 29, at 235 (§ 8), taken from PATTERSON, LAWS OF NEW JERSEY (1800) 398. I find no earlier appearance of this in collections of earlier New Jersey statutes. A New York act of April 6, 1801, providing for recording in seven counties, employed language identical with the Pennsylvania act with omission of the race-to-the-record addendum. See 3 ANTHON, *op. cit. supra* note 29, at 191 (§ 4), taken from KENT & RATCLIFFE, REVISED LAWS (1801) 478, with which it apparently originated.

"The early usage, and subsequent legislation on this subject in the colony, was probably suggested by the statute of 27 Hen. 8, Ch. 16 The object of this statute, and the colonial acts, were, however, different. Recording in the one case, was essential to the validity of the title; in the other, it was only designed to preserve the evidence of the grant.⁵⁴ The statute, 27 Hen. 8, was passed at the same session with the statute of uses; and the enrolment was intended to be a substitute for that public notoriety which attended the former method of alienation by feoffment with livery of seisin. It was therefore enacted, that the land should not pass by any bargain and sale, unless the deed should be enrolled within six months after its date. But the practice of recording deeds in the colony had nothing to do with the validity of the title. The purpose for which the record was made is clearly defined by the recital to the fourth section of the act of 1710: 'Whereas, by many *accidents*, the deeds and writings relating to estates, some time have been, and may hereafter be *destroyed, consumed and lost*, whereby the . . . owner . . . may be exposed to . . . expensive and vexatious suits, and other inconveniences.' It was not until the act of April 3, 1798, that deeds were in any case required to be recorded, under the penalty of being adjudged fraudulent and void against any subsequent bona fide purchaser or mortgagee. This act . . . now prevails over the whole state."⁵⁵

It is obvious that an abandonment of this evidential theory of the statute was necessary before the recording system could become what it now is. It is also clear that the question whether a recorded but erroneous copy gives notice only of what the record contains involves the question whether the record can be controlled (as respects the operation of the recording act) by the original; and this question is seemingly a hangover from the old view of the record as merely constituting evidence.⁵⁶

What, then, is the "spirit" of the statutes, implicit in their purposes? Mr. Patton remarks that "their purpose has been variously stated as being the original one of securing a prompt recordation . . . , the equitable one of protecting subsequent purchasers . . . , and the constructive one of preserving an accessible history of each

54. The act of 1710 can be conveniently consulted, with other statutes of colonial New York, in 3 N. Y. REV. STAT. APP. 5 (1829). It provided for recording, and explicitly made the record evidence. The mere wording of statutes does not indicate when and why the old theory was abandoned; it was presumably by judicial doctrine. I have not attempted to trace its development and do not know whether that has ever been done. This subject of evidence is further pursued in the opinion rendered in the same case on appeal. *Van Cortlandt v. Tozer*, 20 Wend. 423 (N. Y. 1838).

55. *Van Cortlandt v. Tozer*, 17 Wend. 338, 344-5 (N. Y. 1837). (Italics in original.)

56. See 1 JONES, *op. cit. supra* note 2, § 634 *et seq.*

title.”⁵⁷ Although the last is *realized* incidentally to and in proportion to the realization of the first, it was almost certainly the chief and independent objective of the statutes. A fourth purpose, notwithstanding that it has been stated as that of the acts by Professor Pomeroy⁵⁸ and in the Notes of Hare and Wallace,⁵⁹ may be regarded as only incidental and *also* partial, and therefore because of the latter fact necessarily secondary; namely, that the purpose was to protect those who might succeed to the rights of the *recording* grantee. The statutes, however, were explicitly directed to the case of a non-recorder. A fifth possibility, declared in the preambles of various early enactments,⁶⁰ was that of saving from improvident investments those subsequent purchasers who searched the record. This is subject to the same remark as just made on the fourth purpose. A sixth possible purpose, broader than the preceding, would be that of saving from loss a subsequent purchaser who either searches the record or makes due investigation when put upon inquiry. To this it may be answered, and as respects the fifth added, that surely the purpose was to give the subsequent grantee *a title* provisionally held by a non-recorder, and although the financial gain or loss of the parties was doubtless envisaged, it was a consequence of the end intended and not the end itself. Finally, Mr. Pomeroy has said that “Throughout the United States Whatever be the language of any state statute, this *result* of a registration—that it should be a constructive notice—is uniformly regarded as the most important object of the entire legislation—the final purpose for which the whole system of recording was established.”⁶¹ No passage could be more characteristic of Mr. Pomeroy’s work so far as it deals with the recording system, for the thinking is shallow and the exaggeration of the equitable element typical. Notice is only mechanism. Its result is two-fold. One is to defeat a subsequent purchaser who persists in buying; in other words, it protects the prior grantee by not permitting his divestment under the recording acts. Another result is that above mentioned of saving a subsequent purchaser from loss.

The mere enumeration of these seven suggestions as to what is the purpose of the recording acts reveals the absence of any agreement by the judges (for judicial opinions illustrate all of them) respecting the policy that they are called upon to enforce. This is their importance as a group. But when one suggestion is balanced against an-

57. PATTON, *op. cit. supra* note 9, at 15.

58. 2 POMEROY, *op. cit. supra* note 1, § 649.

59. “The object of the legislature in passing the registry acts was to enable every one who received a conveyance to place it on record for the benefit of those who might come after him.” Hare & Wallace, *loc. cit. supra* note 34, at 203.

60. See note 43 *supra*.

61. 2 POMEROY, *op. cit. supra* note 1, § 665. (Italics supplied.)

other, their complete inconsistency makes it even clearer that there cannot possibly exist a coherent recording system while such diversity in the understanding of its policy persists. In the absence of agreement regarding that, the protection of the subsequent purchaser may appear to be a hackneyed principle as a matter of words but it will certainly not be such in practice.

Let us assume that nearly all of the suggested objectives were probably present to the consciousness of our legislators from the beginning. Still, from a logical viewpoint it would seem clear that the primary and ultimate end was to record the general title; that the immediate end was therefore to force prompt recordation of each successive conveyance; that the instrumentality utilized for that purpose was divestment of an unrecorded conveyance in favor of a subsequent purchaser; and that by this instrumentality and through the registry of the title history all persons dealing with the land would be protected.

But what is most important and manifest is that it was no purpose whatever of the statutes to aid in any way the prior non-recording grantee. On the contrary it was their declared purpose to nullify his title, which at common law was perfect. It is equally evident that the person favored was the subsequent purchaser to whom priority was accorded in disregard of common law principles. The point would seem to be self-evident. As Mr. Wade wrote long ago:

"In order to arrive at a correct conclusion, upon principle, in regard to the conflicting rights of prior and subsequent purchasers, as affected by the registry laws, one of the most pertinent inquiries is, *For whose benefit was the statute enacted?* Or, in other words, whom does it protect, and upon whom does it impose additional burdens? A brief glance at the common law *status* of the parties will answer these questions at once. The prior grantee was secure without the aid of the statute, whether the subsequent purchaser knew of his deed or not. The [intended] purchaser had the most imperfect means of ascertaining the condition of the title. The statute was interposed for the purpose of furnishing him with the necessary information, and in doing so it was found necessary to impose an additional obligation on the prior grantee."⁶²

A hundred statements by judges and text writers could doubtless be compiled to emphasize these facts, beginning with one by Lord Hardwicke in *Le Neve v. Le Neve*.⁶³ The principle was emphasized by Mr. Webb and Judge Jones and Mr. Devlin.⁶⁴

62. WADE, A TREATISE ON NOTICE (1878, 2d ed. 1886) § 162.

63. Amb. 436, 3 Atk. 646 (Ch. 1747). See note 50 *supra*.

64. WEBB, *op. cit. supra* note 2, § 165; JONES, *op. cit. supra* note 2, § 673; 2 DEVLIN, *op. cit. supra* note 25, at 1264. A statement by Chancellor Walworth in *Stuyvesant v. Hall*, 2 Barb. Ch. 151, 158 (N. Y. 1847), has been particularly often quoted.

It would be laboring the obvious to dwell longer on the point. It is certain, however, that the primary principle of the statutes has been more and more lost sight of in the cases. Its operation has become increasingly difficult to establish.⁶⁵

It may be here pointed out that a very close analogy exists between the favor shown to the subsequent purchaser by the recording acts and that shown under limitation statutes to an adverse possessor. Neither is favored because of his own merits but for an ulterior purpose, for the attainment of which the statutes in both cases operate to divest one man, because of his inaction, of a higher right that he originally held, and to invest with such higher right another man who originally held either (in the case of adverse possession) only a weaker right or (in the case of the recording acts) no right at all. The limitation acts protect one who is always a wrongdoer, but their purpose is to prevent stale litigation, and as a means to that end they penalize the undue delay of an innocent party in seeking judicial confirmation of his title. Similarly, the recording acts penalize the delay of an innocent person in establishing a record title and validate a grantor's wrong, but this result is only incidental to the primary purpose of promoting the registration of deeds. The only difference, in general operation, between the two doctrines is that adverse possession favors innocent and willful wrongdoers equally, whereas the recording system, since the incorporation therein of the equitable doctrine of good faith, favors only those beneficiaries of wrong who prove themselves innocent of even remote or reflected participation therein;—that is, innocent of actual, inquiry, or constructive notice thereof. Indeed, broadly viewed, the recording acts have always, by clarifying titles, served to lessen litigation. The idea that they, like limitation acts, serve that end by "quieting possessions" must have been prevalent in men's minds, for it is abundantly illustrated in the titles and the preambles of colonial enactments.⁶⁶

65. In one of the very few cases notable for discussion of fundamental principles Chief Justice Dixon remarked some seventy years ago: "It is true . . . that the statute . . . seems to aim only at the protection of such a purchaser and not at the protection of a *prior* purchaser, whatsoever the character of his purchase may have been with respect to the exercise of good faith or the payment of value by him. Indeed, the object of the statute seems to be to protect the *subsequent* purchaser in good faith for value at the expense of the *prior* one, and to cut off and destroy the title of the latter, regardless of every other consideration, when his conveyance has not been recorded." *Fallass v. Pierce*, 30 Wis. 443, 466 (1872). This pronouncement is noteworthy; in part because it was made after long reflection in a case two years before the court and several times argued, but particularly because, although the conclusion is definite, its measured statement seems to reflect the difficulty with which the Chief Justice had discovered the true principle under the cover thrown over it by inconsistent or ambiguous judicial opinions. Anyone who reads today some hundreds of opinions on recording problems will encounter that difficulty.

66. One or two examples may be mentioned. The statute of limitations of 21 JAC. I, c. 16 (1623), which was the basis of all American legislation, began, "For quieting of mens estates, and avoiding of suits." A Maryland act of April 19, 1671, entitled

It is entirely in accord with this analogy to regard the purpose of the recording acts as essentially amoral.⁶⁷ The plain historical facts, too, show that the first statutes were pure race-to-the-record enactments, quite unconcerned with honesty in any general sense of either the first or the second grantee.⁶⁸

The introduction of the notice doctrine so changed all this that, as was pointed out at the beginning of this discussion, the judges have gone far toward reversing the two principles that the first grantee should in no way, and the second in every permissible way, be favored.⁶⁹ When one casts about for an explanation of this, the probability emerges that the frequent reiteration of only half the principle—that all presumptions favor the subsequent purchaser—has contributed to its own disregard. Triteness begets inattention. Moreover, favor to the subsequent grantee is only a means to an end, and if an end is not kept in sight one can readily forget the importance of the means. This is easily possible in the present case, for if one looks upon a first and a second grantee, *considering only ordinary equities* that one or the other may claim, *there are no special merits in the subsequent purchaser that call for special favor to him*. Save in rare cases the prior grantee is wholly innocent of wrongdoing; equally with the subsequent purchaser he gives value; and he is holding the legal title. The law courts could have seen no possible reason for displacing him; and the reluctance of chancery to do so is evidenced by the fact that they regarded the second grantee's claim to the title—that is, his mere willingness to take what the statute plainly said he should have—as a “fraud” if he knew of the earlier grant, and succeeded in imposing upon him (almost universally) the burden of proving the merit of good faith.⁷⁰ The mere statement of their position, in either form, is one of manifest hostility to the policy of the statute. They simply overrode it by judicial legislation. And when the courts today favor the first grantee, in effect they consider only the ordinary non-statutory equities of the two claimants.

Thus, Mr. Pomeroy wrote:

“A *subsequent* holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder

“An Act for Quieting Possessions” merely validated earlier conveyances, “any error in the form only, of such writings, to the contrary notwithstanding,” if made “by . . . persons . . . that right had to sell, give or grant such lands.” LAWS OF MARYLAND (Bacon, 1765), act of 1671, ch. 6. A statute of June 3, 1715, entitled “An Act for Quieting Possessions, enrolling Conveyances, and securing the Estates of Purchasers,” dealt solely with recording. *Id.*, acts of 1715, c. 47.

67. See pp. 133-5 *supra*.

68. See text at pp. 132-5, 140 *supra*.

69. See text at and following notecall 125 *infra*.

70. WEBB, *op. cit. supra* note 2, § 165; PATTON, *op. cit. supra* note 9, at 34.

*equally innocent and with an equally meritorious ownership When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a bona fide holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even bona fide purchaser."*⁷¹

This passage is in the opening section of the author's discussion of *bona fide* purchase. He speaks of "the principles of equity" only; and in case the fault of the prior grantee makes possible a later purchase in good faith that grantee's postponement, it is suggested, would be by estoppel, merely. The recording acts are not mentioned; the reference is to the purely equitable doctrine of *bona fide* purchase. Nevertheless, there is a good reason to quote the passage. Immediately following it the author, passing to the effects of the recording acts, remarks that "So far as the doctrine of *bona fide* purchase has been made a rule of law, either by the operation of the recording acts or by the independent action of the courts, it does not properly come within the scope of a treatise on equity jurisprudence."⁷² It is certainly a permissible inference that the author will either not discuss at all situations under the recording acts, or will make clear in discussing them the distinction between the pure equitable doctrine and the "rule of law" governing those situations. But the fact is that Mr. Pomeroy passes judgment on almost all the recording situations discussed in this article, and without any discernible attention to that distinction. For that reason, and because his work has been cited countless times in the courts, it has exercised, the writer believes, a pernicious influence upon recording decisions.

It is justifiable, then, though at the risk of boredom, to reiterate that the subsequent purchaser, regardless of equities other than notice, is entitled, the prior conveyance being unrecorded, to preference under the policy of the recording acts. From that viewpoint the holder of the prior deed, whether characterized as negligent or as holding title subject to a gross inequity, has no positive merit whatsoever. To this inequity of not recording, the courts, as already remarked, have been insufficiently attentive.⁷³ Although frequently both noted and prop-

71. 3 POMEROY, *op. cit. supra* note 1, § 735. (Italics supplied.)

72. 3 *id.* § 736.

73. Mr. Pomeroy does, indeed, discuss to some extent negligence as an equitable doctrine, and with some reference to the recording acts. 2 POMEROY, *op. cit. supra* note 1, §§ 610, 687, 698, 731-2. So do other textwriters: for example, 1 JONES, *op. cit.*

erly weighted, in the great majority of cases it seems to be treated as a mere fact.

If the statute is then literally applied, asking only whether notice existed, and keeping this within reasonable bounds, this would be the most desirable way of enforcing the statutes. They refer to the non-recording merely as a fact. There is no reference in them to any equity save the *bona fides* of the second purchaser. If the problem before the court is solely that of priority under a recording statute, any reference whatever to the conduct or moral merits of the parties other than the fact of non-record by one and the question of inquiry notice to the other is irrelevant and improper. If there be any inequitable conduct of the second grantee in relation to the first, that is a matter for which relief should be sought independently of the former's acquisition of the title. The two matters may, of course, be involved in one bill if the proceeding be in equity, if only through a prayer for general relief; but in their discussion should be kept wholly distinct. On the simple issue of statutory priority there is, then, no need to refer in equitable terms to the negligence of non-recording, but if it be so referred to—or if a court discusses equities in general—then the statute, so read, explicitly provides that this inequity is so gross that nothing, *save alone* the "fraud" of a subsequent purchaser in attempting to displace the unrecorded title with knowledge thereof, can save the unrecorded deed from nullity. This was impressively emphasized by Judge Sanborn in a federal case in which defendants contended that a bank in plaintiffs' title chain had, before conveyance of the title, been divested by a decree in favor of defendants' predecessor. This decree was unrecorded. Judge Sanborn said:

"It is true . . . that, in the absence of the estoppel of the registry statutes, a conveyance of what one owns carries nothing which he does not own. . . . But the question here is not what the bank owned when that deed was made. . . . It is what the bank appeared to own by the authorized records of the counties in which these lands were situated. The statute and the negligence of the defendants, or of their grantors, estop them from proving, or from successfully claiming, that the title to these lands

supra note 2, §§ 684, 712, 736; 2 JONES, LAW OF REAL PROPERTY IN MODERN CONVEYANCING (1896) § 1583 *et seq.* Many judicial opinions likewise emphasize it, as in the quotations in the text at notecall 74 and in note 77 *infra*. Nevertheless, the net impression on the writer of reading hundreds of cases is that stated in the text. Mr. Webb recognized that "by reason of the *laches*" of the first grantee, "one result growing out of . . . the registry system has been the creation, in favor of a subsequent purchaser, of an equity that did not before exist." WEBB, *op. cit.* *supra* note 2, § 166. There may be many such explicit statements in equity terminology, but the writer has noted very few. It may be said that everyone assumes the proposition that Mr. Webb explicitly states. A thing assumed is not usually a matter emphasized. If there be any such general assumption it leaves slight impress upon judicial action. See also text at notecall 186 *infra*, *et seq.* and at notecalls 228-234 *infra*.

was other than that which they permitted it to appear to be upon these records when . . . [plaintiffs' predecessors] bought. The contention that the grantor had nothing when this deed was made, and hence that the purchasers acquired nothing by it, proves too much. It applies with equal cogency to the purchaser under every deed subsequent to a prior unrecorded conveyance, and its adoption would annul every statute of registration, for it may be said with equal truth of every such subsequent conveyance that the grantor has nothing when he makes it, and therefore the subsequent purchaser can take nothing.

"The argument is fallacious, because it utterly ignores the purpose, the policy, and the effect of the statutes of registration. It is the purpose and the legal effect of these statutes to make the title that appears of record—the record title—superior in the hands of an innocent purchaser for value to the real title that is withheld from registration. Hence, while one who has parted with his title to land by an unrecorded deed or decree"—that is, even assuming the Bank to have done so—"has no title or interest remaining in himself, yet his deed to an innocent purchaser for value, by virtue of the registry statutes, avoids the effect of the prior unrecorded deed or decree, and vests the title to the land in the subsequent purchaser to the same extent as it would have done if the title of record had been the real title. The holders of unrecorded instruments are estopped by the statute and their negligence from denying that the record title is the real title." ⁷⁴

It makes no difference in immediate result as respects the simple issue of priority whether one uses Judge Sanborn's language of estoppel or regards the prior grantee's nonfeasance as participation in the common grantor's fraud.⁷⁵ One may say that "it is the equity arising from the payment of value under the false impression occasioned by the neglect of the prior purchaser, which the policy that dictated the registry acts should protect."⁷⁶ Some have even appealed to the equitable principle that when one of two innocent persons must suffer by the act of a third it shall be that one of the two whose fault made possible the situation;⁷⁷ but this is very unsatisfactory, since

74. *Boynton v. Haggart*, 120 Fed. 819, 823-4 (C. C. A. 8th, 1903).

75. See notes 43 and 51 *supra*.

76. Notes of Hare & Wallace, *loc. cit. supra* note 34, at 40. The same theory is stated in WEBB, *op. cit. supra* note 2, § 166. Its application is illustrated in *Brownback v. Ozias*, 117 Pa. 87, 93, 11 Atl. 301, 304 (1887).

77. Mr. Patton has referred to all these doctrines as follows: "A grantee who does not give notice by recording his conveyance negligently leaves the way open for his grantor to convey to another who has no notice of the prior transfer. Looking at the matter from this angle, it has been said that recording acts proceed upon the theory that, where one of two persons must suffer by the wrong or mistake of a third party, the one most at fault, or the one whose fault made it possible that there should be a loss, is guilty of a constructive fraud and is the one who must suffer; also that these acts are a legislative extension of the doctrine of estoppel, in that they prevent those grantees from successfully asserting title who are required by statute to record their muniments of title, but who fail to do so, to the detriment, otherwise, of a subsequent purchaser." PATTON, *op. cit. supra* note 9, § 19.

here, as in various other situations, a person is labeled "innocent" by Chancery only because his fault, gross as it may be, happens not to be recognized as a technical inequity. That is the very reasoning against which protest is here made. The other interpretations of the statute's operation are not open to this particular objection, but they are open to the objection that there is no need to read the statutory rule in terms of any equitable doctrine in order to explain its operation.⁷⁸

The common practice of thus reading it is the vice against which remonstrance is made. Mr. Webb's book on recording, for example, is underlain by the view that *bona fides* is the primary element in the recording acts and that decisions thereunder should be controlled by "the equities of the transaction."⁷⁹ It has been pointed out above, and there can be no doubt as to the fact, that the recording *statutes are not concerned at all* with the equitable or inequitable conduct of the first grantee aside from his not recording, nor with the equitable or inequitable conduct of the second grantee aside from his having or not having knowledge or notice of the prior deed. If only the *pertinent* equities are weighed, those of the subsequent purchaser in good faith will always prevail—no more by the literal provision of the statute than as a balance of equities, for, as Judge Campbell said, "there are no equities superior to those of such purchasers."⁸⁰ But if it were true that the statutes have become *merely* an extension of the notice theory, if it were true that since recordation gives notice and notice is equivalent to recordation therefore *nothing but* notice or *bona fides* is to be considered and there is no other or independent recording policy—which is the logical conclusion of such views as those of Mr. Webb—*still* it would be true that when a court discusses "the equities of the transaction" it should consider all the equities. And one of them, under the statutes, must be the *statutory* inequity of non-recording. That can rarely be held outweighed by anything in the conduct

78. As just contended in the text following notecall 73 *supra*.

79. He wrote: "There are but few, if any, decisions to be found, which, in the absence of a statute requiring it, hold that the subsequent deed must be first of record. A question may suggest itself here as to why so considerable a number of the statutes should contain a provision so clearly at variance with the equity and justice of the matter to which it relates . . ."—perhaps he means, when a subsequent purchaser, though without notice, fails to record first—" . . . The early English register acts were framed with the sole view of securing an early record of conveyances. . . . In that stage of the law there belonged to the bare fact of early record an importance to which, by reason of the changes that have since occurred, it is not now justly entitled. A too literal copying of the early statutes has, doubtless, occasioned that feature of the modern legislation which still renders the rights of the *bona fide* subsequent purchaser dependent upon priority of record; but since the equitable doctrine that actual notice shall supply the want of registration, and that the equities of the transaction shall"—he means, in his opinion should—"control the bare fact of priority of record, has been universally"—i. e., except in the many statutes he is criticizing—"assented to and adopted as part of the law of registration, it should have a consistent application," etc. WEBB, *op. cit. supra* note 2, at 15. See text at notecall 121 *infra*.

80. Loomis v. Brush, 36 Mich. 40, 47 (1877).

of the subsequent purchaser without consciously flouting the statutes. A moderate degree of attention to this element would of itself go far to check the extravagances of inquiry notice. The divestment of the prior grantee has been so hampered by the extravagances of the doctrine of notice, both by inquiry and by record, as to call for every effort to terminate their progressive enfeeblement of recording policy.

If, in dealing with the recording problem, the party to be favored is the subsequent purchaser, certain ineluctible conclusions follow. One is, that the courts should constantly and consistently put the burden of proving notice on the prior grantee, both in inquiry notice and in doubtful cases of record notice.⁸¹ "Where an owner neglects to record his title, every presumption is in favor of a subsequent purchaser."⁸² Another conclusion is that such purchaser should not be defeated by a doctrine of notice that is unreasonable in the burden it puts on him; and this either as respects the requirement of an unreasonable search of the record, or as respects what puts him on inquiry, or as respects the nature or the extent of the inquiry to be made. "As every presumption is in favour of the subsequent purchaser, when the former owner is guilty of neglect, his title"—that is, his right to the title—"cannot be postponed except by evidence which taints his conduct with fraud."⁸³

The vice lies in an exaltation of the element of notice over recording policy; in other words, in treating notice apart from the restrictions imposed by that policy in favor of the second grantee. In suggesting that what is notice to him should be determined by considering what is reasonable from his viewpoint, or with regard to his circumstances, the seeming heresy lies primarily in the idea that the equitable restriction upon his rights should itself be restricted in *any* way. How

81. Cases turning on burden of proof are not dealt with in the present discussion. See the new material introduced by the editor of Mr. Pomeroy's latest edition. Compare 3 POMEROY, *op. cit. supra* note 1, 4th edition (1919) § 759, n. 1, with 3 *id.*, 5th edition (1941) §§ 785a-785d; which, however, is a mere beginning. The difficulty in these cases is the same as that in decisions on the burden of proof in some other fields of law; confusion results from the absence of definite agreement on an underlying public policy. The question of policy involved as an "inarticulate premise" in the recording situation is that of choosing the person to be favored; and that involved in wills cases is the choice between upholding the will or defeating it because, as Judge Lumpkin said, "Ordinarily, our statute of distribution makes the fairest disposition of a dead man's property." *Reed v. Roberts*, 26 Ga. 294 (1858). The courts talk about procedural technicalities and are apparently unconscious of the issue of policy.

82. *Pyles v. Brown*, 189 Pa. 164, 169, 42 Atl. 11, 13 (1899).

83. *Boggs v. Varner*, 6 W. & S. 469, 474 (Pa. 1843), per Rogers, J. See text at notecalls 225 and 226 and note 226 *infra*.

In the passage partially quoted above at notecall 71, Mr. Pomeroy includes the remark that "American courts seem sometimes to have . . . assumed that a *subsequent* title was necessarily the better one." If the cases which he had in mind were those that give effect to the principles quoted in the above paragraph of the text, he overlooked or ignored their statutory basis. Note also that he clearly considered such cases to be few, as well as anomalous.

it should be restricted, if at all, is a secondary heterodoxy. In order that it may appear in its true proportions it is desirable, in the first place to comment upon certain excessive conceptions of the role of equity in the recording system.

One stupendous example of this, above referred to, is Mr. Pomeroy's idea that the giving of notice (thereby to defeat the subsequent purchaser) is "the final purpose for which the whole system of recording was established."⁸⁴ Another manifest exaggeration occurs in his remark on the recording acts that "in the practical operation of this legislation the right created by a prior unrecorded instrument is generally regarded as tantamount to an equitable interest, which may therefore be cut off by a subsequent purchaser or encumbrancer who is in all respects *bona fide*."⁸⁵ This must be dismissed as no better than an unreflective inadvertence, due to the writer's tendency to magnify the subject that he particularly loved. There is nothing in his own treatise to support the assertion quoted.⁸⁶ As already remarked, the relation between equal equitable interests, considered apart, and that between legal interests similarly considered, are alike governed by the principle "prior in time higher in right." It has also already been remarked that for three centuries the prior unrecorded deed has been recognized as a valid conveyance; that the recording system involves the displacement of that legal title, which under the common law was perfect;⁸⁷ that its rule of priority has been set aside by the statutes of Elizabeth in order to protect subsequent defrauded creditors and purchasers; and that the recording acts merely altered the rule similarly in a different field and in a larger way. As for the attitude of equity toward the prior legal title, its whole theory rested, as Mr. Pomeroy elsewhere stated, upon the sound premise "that the title of the [subsequent] purchaser is really defective," and that his protection in equity, when one for value in good faith, simply meant that equity would not aid the holder of the earlier legal title against such purchaser but left both parties to rely upon their legal rights in legal tribunals.⁸⁸ It was the courts of law, and statutes,

84. See text at notecall 61 *supra*.

85. 3 POMEROY, *op. cit. supra* note 1, § 758. The sentence ends: "and who has also obtained the first record." The confusion which this involved is taken up below.

86. Cf. 3 *id.* § 767.

87. One finds in some cases such statements as this: "The only rational solution . . . is that the absolute title rests with the grantor and his heirs in abeyance, to vest irrevocably only upon the filing of the deed for record." *Penrose v. Doherty*, 70 Ark. 256, 260, 67 S. W. 398, 399 (1902). Similarly, *Woods v. Garnett*, 72 Miss. 78, 87, 16 So. 390, 392 (1894). This theory is, of course, contrary to the actual interpretation of every statute, the original deed being perfectly effective, although unrecorded, against everybody save a subsequent buyer for value in good faith. See note 21 *supra*.

88. 3 POMEROY, *op. cit. supra* note 1, §§ 738, 739. "That this is the true rationale is shown by an overwhelming weight of authority." 3 *id.* § 738. "This truth, so fundamental, and yet so often overlooked, was well stated by Lord Eldon. . . . The

which—by extending the system to cover equitable interests—made it substantially a rule of property, contrary to the equitable theory.⁸⁹

Nor does it seem necessary or helpful to say that the operation of the statutes "is understandable only if the earlier created interest is treated as if it were an equity."⁹⁰ For if the prior and actually perfect legal title be so regarded, then the later "title" which is in fact a nullity until the statute operates in its favor must *a fortiori* be regarded as an equity. Under those circumstances, aside from equities or inequities created by the recording act the earlier "equity" would certainly be at least equal to the later,⁹¹ and being prior would always prevail, contrary to the operation of the statutes sought to be explained. If, on the other hand, the inequity of not recording the prior equity stand on one hand and on the other hand a subsequent purchaser who may not act *bona fide*, the equity of the latter would prevail when he did so act. But this is so when the true legal title of the prior grantee is recognized as such. It is impossible to see how the proposed fiction is of any service. It is of no service because, as Mr. Aigler has convincingly shown, the statutes actually operate by divestment of the first grantee's legal title.⁹² In applying the statutes, there was no need to resort either to the fiction of title in abeyance⁹³ or to the fiction of reducing the earlier legal title to an equity, since the conception of the *divestibility* of such a title was one that had been familiar in two fields of law for a century before our earliest recording act was passed, and notably so in the closely related field of fraudulent conveyances.⁹⁴ And as that idea has in later time been steadily extended in different fields of law⁹⁵ any resort to fictions has become increasingly undesirable.

We may now pass to another statement by Professor Pomeroy which seemingly represents another unjustifiable magnification of the equitable constituent in recording. In fact, however, it illustrates the slight attention that he (but not he alone nor in particular, when he

chancellor said: 'Is it not worth consideration, *whether every plea of purchase for a valuable consideration without notice does not admit that the defendant has no title?* . . . Every one who is familiar with Lord Eldon's judgments knows that it was his invariable practice to express his most settled opinions in the form of inquiries, or suggestion, or suppositions.' 3 *id.* § 739, n. 7.

89. 3 *id.* §§ 735-6.

90. 2 AIGLER, BIGELOW & POWELL, CASES AND MATERIALS ON THE LAW OF PROPERTY (1942) 857 n., reiterated at 910. (Italics in original.)

91. See text preceding notecall 70 *supra*.

92. Aigler, *The Operation of the Recording Acts* (1924) 22 MICH. L. REV. 405.

93. See notes 21 and 87 *supra*.

94. See text at notecall 46 *supra* as to the latter. It was also familiar in the field of executory limitations.

95. Mr. Hohfeld was seemingly the first to emphasize this fact. See Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) 26 YALE L. J. 710, 756. It is so important that it should be a part of any elementary text. Many instances are mentioned in PHILBRICK, PROPERTY (1939) 371 *et seq.*, also 68, 92.

wrote in 1881) had given to recording statutes. This inattention resulted in a misapprehension regarding them shared by many other writers down to the present day, and of which various examples, some of them far more surprising, will be noted here and in later pages. He wrote, namely, that "the total effect of the [recording] system is . . . twofold; it both enlarges the scope of the doctrine concerning *bona fide* purchase, by extending it to all . . . interests . . . required or permitted to be recorded, and it adds to the elements constituting a *bona fide* purchase the further requisite of a registration."⁹⁶ If literally read this is an assertion manifestly incorrect and inadvertent, merely to be disregarded.⁹⁷ On the other hand, if a "*bona fide* purchase" be understood, as was presumably intended, to include all that is necessary for displacement of the prior conveyance, then the statement would be correct as respects all states that require of the subsequent purchaser prior recording in addition to the requirement that he be without notice; that is, of all notice-race jurisdictions.

It was pointed out at the beginning of this article that conveyances by deed left any grantee insecure as respected both the past and the future.⁹⁸ In this discussion we are concerned with only a subsequent purchaser as such grantee, and, further, with his attainment of security as respects the past alone.

It is evident that under a statute making a conveyance invalid until recorded a mere race to the record would settle priority as between two successive grantees; and because no notice is involved, this would be a "pure" race-type of statute. Under such, the grantee who first records gains security in fact as respects both past and future. We have seen that of this type was the earliest English statute of 27 Hen. VIII,⁹⁹ and that it was long literally applied.¹⁰⁰ Likewise that such, also, were various of our early colonial statutes,¹⁰¹ including that of North Carolina which, uniquely, has always remained such,¹⁰² and including the two colonial statutes in Pennsylvania.¹⁰³

96. 3 POMEROY, *op. cit. supra* note 1, § 758. (Italics supplied.)

97. It is, for example, quite inconsistent with his statement elsewhere that "the subsequent purchaser or encumbrancer must be *bona fide* in order to claim the benefits of the first registration." 3 POMEROY, *op. cit. supra* note 1, § 759; similarly, § 757. In recently reading some hundreds of cases I have noted only one in which it was explicitly contended (by counsel) that prior registration is a part of a *bona fide* purchase: *Craig v. Osborne*, 134 Miss. 323, 328 (1923).

98. See text following notecall 28 *supra*.

99. See note 37 *supra*. See also 2 POMEROY, *op. cit. supra* note 1, § 645, n. 1.

100. See text following notecall 33 *supra*.

101. See note 39 *supra*.

102. That state, however, now requires that the subsequent purchase be for value. See N. C. CODE ANN. (Michie, 1935) §§ 3309, 3311, as to unconditional and conditional deeds, respectively.

103. See notes 32 and 38 *supra* as regards the act of 1715, § 7 of which established the rule for mortgages, and notes 43 and 53 *supra* as regards the act of 1775, § 2 of which extended the same rule to absolute deeds.

Perhaps it was the complete security attained by such a rule that motivated these enactments; perhaps we merely copied the English statute. If they represented a deliberate recording policy, it is strange that such could have been supplanted by an equitable doctrine at a time when equity was in this country little known and weak (and, as respects the late 1700s and early 1800s, in great disrepute). Nevertheless, the courts in some states with such statutes had long, in applying them, required the subsequent purchaser to act in good faith; that is, they made a race statute over into a notice-race enactment. This was true of Pennsylvania.¹⁰⁴ It has been noted, too, that most of such statutes had been changed to the notice-race form by the early 1800s.¹⁰⁵ Under the enactments of today, a subsequent purchaser in a notice state bears but one burden, that of taking his deed without knowledge of the prior conveyance; but he gains only partial security, that against the past. In a notice-race jurisdiction, where he must both take innocently and record first, he bears two burdens, but he gains security not only against past conveyances but against divestment in favor of a still later grantee.

It has perhaps never been easy to say just how many of our states should be classed as notice or as notice-race jurisdictions. Mr. Patton is the first to attempt such a complete listing, and likewise the first textwriter fully aware of the difficulties involved. The mere form of a statute is not alone to be considered. At least a dozen states have had, at different times, statutes of two or three types; sometimes transition from one to another has been remarkable not only for abruptness but for other reasons—as has been true, for example, in Pennsylvania;¹⁰⁶ an enactment of one type is sometimes interpreted as though it were of another type—possibly because the court lags behind legislative changes.

Many general statements by writers on the recording system, because of a loose emphasis upon the value of first recording, imply a priority by virtue of that act which it may not have; for example in notice states, if the subsequent purchaser takes his deed without notice of the prior deed, though this is later first recorded.¹⁰⁷ Indeed, standard texts contain a great number of other careless generalizations which

104. See text at notecalls 52 and 53 *supra*, and the notes thereto. Cf. *Keller v. Nutz*, 5 S. & R. 246, 252 (Pa. 1819) ("1715" a misprint for "1775"); *Maclay v. Work*, 5 Binn. 154 (Pa. 1812); and remark by Hare and Wallace on the act of March 25, 1820, *loc. cit. supra* note 34 (4th ed. 1877) 222.

105. See note 53 *supra*.

106. On the Pennsylvania statutes between 1893 and 1925 see 1 LADNER, *CONVEYANCING IN PENNSYLVANIA* (2d ed. 1941) § 125, and cases there cited. This was remarkable because of its occurring after so long a practice under a race requirement, and also for its prompt abandonment. On a remarkable and sudden change in basic recording policy (on a different point) in Illinois, see text at notecall 292 *infra*.

107. WEBB, *op. cit. supra* note 2, at 265.

in effect imply a universality of the race to the record requirement. Such are to be found in Kent, who wrote in a race jurisdiction,¹⁰⁸ and in Hilliard, who lived in a notice jurisdiction.¹⁰⁹ In many passages it was clearly assumed by Mr. Pomeroy,¹¹⁰ and in their notes his successive editors have explicitly included virtually all states in a list of jurisdictions.¹¹¹ If one reads the statement that our recording system "gives a legal priority to the grantee of the recorded deed"¹¹² thinking only of a recording made *in time* in a notice-race or pure-race jurisdiction, and of an instrument taken *without notice* in either a notice or a notice-race jurisdiction, it is true; but otherwise the generalization gives no light. Under the statement that "as between registered instruments . . . they will generally take precedence in the order in which they are recorded" there is likewise so much hidden as to deprive it of utility.¹¹³ It is very extraordinary that Judge Jones, who devoted his life to writing on land law and was educated and lived in Massachusetts, a pure notice state, should likewise, in passages of a wholly general character, more than once have implied that a recording by the subsequent purchaser is necessary in order to cut off the prior grantee's title.¹¹⁴ It is extraordinary, too, that Chief Justice Shaw, when discussing a point of notice in Massachusetts, should have done the same thing.¹¹⁵ These illustrations show how easily writers acquainted—even perfectly familiar—with the distinction between the two types of statutes could forget it (or else mistakenly assume a vast predominance of the race type) in generalizations on the recording system. It suggests that legislators might quite unconsciously shift from one to the other. Judges, too, might similarly slip—and have. It was a novelty when the Wisconsin court seventy years ago, in a case already cited, insisted that its statute, which was of the notice-race type, copied from New

108. 4 KENT, COMM. *456; unaltered in later editions, including the 12th (1873), edited by Holmes, which is the one consulted.

109. 2 HILLIARD, REAL PROPERTY (3d ed. 1855) 457.

110. For example, 3 POMEROY, *op. cit. supra* note 1, §§ 757-9, 2 *id.* § 659.

111. Mr. Pomeroy and his editors have never classified the statutes by the single notice or notice-race distinction. The 4th edition explicitly attributes the race requirement ("classes" 1, 2, 4) to 38 states, and the 5th edition ("classes" 1, 2) to 43, though it was seemingly intended to attribute it to all states. All the New England states, for example, appear as race jurisdictions. 2 POMEROY, *op. cit. supra* note 1, § 646. Cf. PATTON, *op. cit. supra* note 9, § 9, n. 102-4.

112. Beale, *The Origin of the System of Recording Deeds in America* (1907) 19 GREEN BAG 335.

113. WADE, *op. cit. supra* note 62, § 196.

114. 1 JONES, *op. cit. supra* note 2 (5th ed. 1894) § 540, (6th ed. 1904) § 559; 2 JONES, *op. cit. supra* note 73, § 1380.

115. "The rule which holds that a prior unregistered deed shall be set aside, in favor of a second deed first recorded, under which a purchaser obtains title without notice of the prior deed, supposes," etc. *Flynt v. Arnold*, 43 Mass. 619, 627 (1841). Shaw was criticizing the Massachusetts precedents and adopting the New York view. With the cases of New York, a notice-race state, before him he might easily slip into its terminology.

York's, must be literally applied.¹¹⁶ But the Mississippi court found it necessary in 1923 to contrast again the two types of enactment and the decisions thereunder in various states.¹¹⁷

Mr. Patton's citations would indicate only a very slight preponderance of notice over notice-race jurisdictions today. But in view of the difficulties of distinguishing form from actuality, already adverted to, all of which have been noted by him, we may accept as the best available opinion the statement in his text that "about two thirds" of the states have only the notice requirement.¹¹⁸

The distinction directly affects our problem to only a slight extent. But their connection cannot be disregarded, both because of the number of states involved and because of the importance of the relation actually existing. We have already quoted, only to disregard, Mr. Pomeroy's careless statement that prior recording is a part of a purchaser's good faith in a race jurisdiction. Were that so, no *decision* in such a state could be of any authority in a pure notice state, nor could the two groups of states possibly be contrasted in weighing authority on any aspect of the problem of good faith. But in truth the two requirements are totally independent requirements. This would seem to be self-evident. The statutes state two requirements, and there is no visible connection or possibility of connection between them except the public policy that is pleased to require each. Suppose that the purchaser has taken his deed without notice: he is still required to record first—but it is scarcely correct to say that performance of one prerequisite "qualifies" him to race for the record.¹¹⁹ There is no connection between the two burdens. So, too, if he has recorded first he must still prove, independently, that he took without notice. And if it appears that in either respect he has failed, a court must of course postpone him to the prior purchaser, so that it may ignore the other requirement if it will, or may proceed with it and on it also give an independent finding.¹²⁰

116. Chief Justice Dixon concluded the passage quoted in note 65 *supra*, thus: "before that of the former shall be." *Fallass v. Pierce*, 30 Wis. 443, 466 (1872). This is race terminology, omitted in note 65 *supra*, because its retention in a statement of general principles is undesirable.

117. *Craig v. Osborn*, 134 Miss. 323, 98 So. 598 (1923).

118. PATTON, *op. cit. supra* note 9, § 9 at end, and § 10 at notecall 119. In § 8, dealing with pure-race states he recognizes only two such, North Carolina and Louisiana. In his extremely carefully prepared notes to §§ 8, 9, 10, and 19, a great amount of information is available on the various points referred to in the brief comments in the text. Mr. Webb, in 1890, also estimated the notice-race jurisdictions as "about one-third of the states." WEBB, *op. cit. supra* note 2, § 166; and *cf.* § 13.

119. *Cf.* Note (1926) 14 CALIF. L. REV. 480.

120. See note 500 and text following notecalls 527 and 532 *infra*.

Some writers, however, have apparently hesitated to accept these obvious principles: Mr. Webb, for example, felt that "Where, through the neglect of the first grantor [grantee] to record his deed, a subsequent party has been led to part with a valuable consideration, a race for registry between the two does not afford a proper criterion by which their rights should be determined."¹²¹ Mr. Patton quotes Mr. Webb with approval, and finds it "disconcerting" that, in the case put by Mr. Webb, the subsequent purchaser in good faith might still be defeated by the first grantee's prior recording.¹²² These opinions seem obviously to rest on an assumption that *bona fides* is a prerequisite of superior desirability or that it is the primary requirement in the intention of the legislature. Since there can be no basis for the latter assumption, it seems that the opinions reflect merely a partiality for the notice doctrine. Manifestly, however, both requirements stand as equals in public policy under the statute. Either one being performed, there can be no question as to performance of the other's being a further "proper criterion" of the purchaser's fitness to displace the prior grantee. Certain misapprehensions respecting supposed effects of a prior recording, other than that of record notice, upon any claim of subsequent *bona fide* purchase will be considered in section V of this article.¹²³

If, then, the two requirements are independent, it is obvious that a judicial ruling on good faith in a notice-race state is strictly in point *everywhere* for both of the purposes above mentioned *provided* it is explicit. On the other hand a *decision* adverse to the subsequent purchaser in a race jurisdiction is manifestly meaningless on the issue of *bona fides* unless it is indicated in the opinion that he is lacking in both statutory prerequisites or in one or the other alone. These considerations become vital in weighing the authority for divergent views on the problem discussed in section V below. Moreover, some of the early cases there considered involved doubts concerning the relationship of the two requirements to each other, and present day reflections of those above referred to will there recur.

121. WEBB, *op. cit. supra* note 2, § 13; compare § 15. See also text at notecall 79 *supra*. Mr. Bordwell has stated that the addition of the race requirement is "out of harmony with the view generally accepted in America today that the recording acts are an extension of the equitable doctrine of notice." Mr. Bordwell agrees that it "undoubtedly . . . makes for promptness in recording." See Bordwell, *Recording of Instruments Affecting Land* (1916) 2 IOWA L. BULL. 52. His personal attitude, as to whether this disharmony is desirable or undesirable, is not apparent.

122. PATTON, *op. cit. supra* note 9, § 19, at note and notecall 239, citing Chief Justice Dixon's comments in *Fallass v. Pierce*, 30 Wis. 443, 446 (1872), and *Rathbone v. Groh*, 137 Mich. 373, 100 N. W. 588 (1904).

123. See text preceding and following notecalls 376 and 387 *infra*.

As a matter of fact it is not clear how widely even the existence of the problems that have been briefly mentioned is recognized.¹²⁴

Let us now return to the main line of the preceding exposition of basic principles. Since the views therein presented must be the basis of the discussion of concrete problems in succeeding pages, it seems desirable to summarize them. The objection most likely to persist in a reader's mind is that much has been said of the subsequent purchaser as the favorite of the recording acts, and much of fairness that is due to him, but that after all the statutes have long known no such person, but only a *bona fide* purchaser; and that since he must qualify as such, and *bona fides* is something readily determinable as present or not present, that settles the matter.

On the contrary, that misses both the problem and the answer that has been advanced as its solution.

First, as regards the subsequent purchaser. There is, of course, no need to protect a *bona fide* purchaser. Once one is that, he is the land law's first citizen. The suggestion is that equity should not place in the way of a purchaser unreasonable hindrances to his *becoming* a purchaser in good faith. It is extraordinary that equity should do so, and particularly strange that it should do so out of respect for an earlier legal title (which equity, for non-recording purposes, will readily enough override), when the destruction of that is the declared purpose of the statute. It has been submitted, with reasons, that the primary end of the recording acts is *still* to promote the registration of title.¹²⁵ That end, then, should be advanced by the courts, and no secondary purpose should be allowed to thwart it. The contest is between a prior and a subsequent purchaser. A benefit is conferred on the latter, divestment of the former's title, in order to force registration. It is true that the policy has been sensibly weakened by restricting that benefit to *bona fide* purchasers.¹²⁶ The question, then, is: Should the noun or the adjective be the primary concern of the courts in applying the statutes? It can certainly not be denied that these, in their general character, are, like the statutes of limitation that protect adverse possessors, amoral;¹²⁷ that their general end is *not* to promote honesty;¹²⁸ that they are wholly unconcerned with frauds, inequities, or dishonesty of whatsoever character, as respects either the first or the

124. Mr. Tiffany, in 1920, barely and seemingly hesitantly referred to it, remarking that in a notice-race jurisdiction "*it seems that the last purchaser might . . . be postponed, even though he purchased before the record of such first conveyance, unless he records his conveyance before the first conveyance is recorded.*" 2 TIFFANY, *op. cit.* *supra* note 17, at 2192. (Italics supplied.)

125. See pp. 146-8 *supra*.

126. See p. 128 *et seq.*, *supra*.

127. See pp. 133-5, 149 *supra*.

128. See pp. 132-5 *supra*.

second grantee, *save only* the former's inequity in not recording and the latter's inequity in taking his deed with knowledge of the earlier one.¹²⁹ Surely, in view of these indubitable facts, it is impossible to contend that the promotion of honesty in but one respect, and as regards only one party, is a primary objective to be sought by the courts. It is in fact a simple flouting of the statute to make that contention against the contestant who is its declared beneficiary, as the instrumentality through which its primary purpose is to be realized. To act on such a principle is to destroy the law. The writer will endeavor to show in later pages that in effect this is what the courts have been doing; that they are reverting to the common law's preference for the first grantee, and denying reasonable favor to the subsequent purchaser.

Secondly, as respects *bona fides*. This is by no means a simple matter. The *mala fides* resulting from a proper record is, indeed, simple and objectively determined. To that there is no objection. The difficulties spring from inquiry notice. More than a century ago Kent wrote: "The doctrine of notice . . . is very greatly surcharged with cases abounding in refinements."¹³⁰ It is so today, perhaps less so than then, but involving a vastly increased body of cases. The incorporation into the recording acts of the phrase "*bona fide*" *need not be held* to have involved the incorporation therein of all refinements of the equitable doctrine that have existed or may be evolved outside the field of recording. When the application of notice rules hampers the general policy of the statutes or general professional practice thereunder, the rules should be subordinated to that policy.

The recording situations discussed in the remaining sections of this article all involve, in the writer's opinion, a conflict between the postulated primary purpose of the statutes and undue distention of the notice doctrine.

III

We return, then, to the proposition that search and notice should be limited by considering what is fair or reasonable from the viewpoint of the subsequent purchaser. And in submitting that test it is not forgotten that Chief Justice Dixon, in a Wisconsin case already several times referred to which in some respects¹³¹ is a leading one on the recording system, expressed the opinion "that every consideration of the subject, and construction of the statute, founded upon the convenience or inconvenience, real or supposed, of searching the records

129. See pp. 151-5 *supra*.

130. 4 KENT, COMM. *179.

131. See text at notecall 513 *infra*, and citations in note thereto.

in the manner in which they are kept or indexed, is wholly impertinent, and therefore deceptive and liable to lead to error.”¹³² This is nothing better than an assertion that an equitable principle should be subject in its application to no equitable limitations, a view which necessarily leads to a monstrous exaggeration of the doctrine of *bona fides* and to a corresponding subordination of the primary purpose¹³³ of the recording acts. The reasonableness of this dictum excluding reasonableness, and of other similar pronouncements,¹³⁴ will be considered in specific situations, none of which were involved in the case in which Chief Justice Dixon spoke.

No novelty is claimed, of course, for this test in and of itself. It has been applied in judicial opinions to one or another recording problems; but it has been ignored in dealing with others. It has likewise been employed by textwriters in support of views regarding several problems; but only spasmodically. It has not been recognized as a test applicable throughout the recording system, and the absence of any realization that it should so serve is attested not only by resort to other supposed tests, sometimes obviously absurd,¹³⁵ but by failure to apply it consistently in various of the abnormal recording situations about to be discussed, where it alone, seemingly, would establish harmony.

It is quite apparent that variant decisions in cases involving limitations upon search may perfectly well be justified by differences in the forms of record maintained in different states; that is, by the difference between a tract system and one based upon grantor and grantee indexes. When there exists a tract registry, under which all claims to or against a definite piece of land can be readily ascertained by a purchaser without tracing each through a chain of deeds to its source, courts have held a search requirement to be reasonable which under a grantor-grantee index system has been held unreasonable, notwithstanding that the actual search required happened to be no greater in the second case than in the first.¹³⁶ Each of the two views was proper, in the writer's opinion, in the specific cases to which reference is made.

132. *Fallass v. Pierce*, 30 Wis. 443, 476 (1872).

133. See p. 148 *et seq.*, *supra*.

134. In *situations A, B, D, E, and F*, stated at p. 167 *infra*.

135. Discussed at p. 132 *et seq.*, *supra*.

136. For example (choosing cases from the situation that receives most attention in this article, in section V *infra*) in *Balch v. Arnold*, 9 Wyo. 17, 38, 59 Pac. 434, 439 (1899), there were available to the subsequent purchaser “a cross-index of all instruments affecting” the land and a book containing abstracts of all these under a *tract* arrangement. The purchaser was held bound by notice of all, he had only to “turn to the proper page of the abstract and find, almost at a glance, a description of every instrument” affecting the land in which he was interested, “whether anterior or subsequent to the vesting of the legal title in his grantor.” But in *Connecticut v. Bradish*, 14 Mass. 296, 303 (1817), the court, applying an ordinary system of grantor-grantee indexes, said: “Bradish had only to look to the registry for the next day, and perhaps

The test suggested is not intended to be one purely quantitative in nature, much less a quantitative test to be applied to successive cases *individually*.¹³⁷ No court has ever gone farther than to ask, as respects a few type problems that involve important issues of policy, whether the necessary search, if notice be attributed to the record in question, would be so great as to make its requirement unreasonable. As respects these problems, when the form of local registry is referred to, as in the cases above mentioned, the decisions have obviously not been based on the actual labor presented under the local registry in the case before the court but on a general estimate of the difficulties that would be presented in cases of the same type, generally. In other words, the test as actually applied is primarily qualitative, not quantitative. Although, within these limitations, judicial opinions as to what is reasonable may somewhat vary, there is nothing to prevent a relatively high standardization of judgment; far higher, seemingly, than in some other fields of law where "reasonableness" is the test applied. It would therefore seem clear that no sound objection can be made to the suggested test on the ground that its application would be indefinite.

Under tract recording, and in a community in which land transfers are infrequent, no restriction whatever upon search or notice is likely to result from such a test. Even under such a system, however, the problem would inevitably become important with regard to city lots in any great urban center.¹³⁸ It is probably not because of theoretical objections to the test, but because courts have attended little to the problem, that the form of the local registry (though it must be assumed always to have been borne in mind) is generally not even adverted to.

It is implied or stated in countless cases that the field of notice and search is that of the chain of title. It might seem, then, that here is the test desired—one that is objective, definite, and well understood. This is a delusion. The phrase "chain of title" has no definite meaning. Moreover, the most difficult problem of notice and search arises in a situation (that discussed in section V of this article) where the

only to the next page, to discover this prior conveyance to the demandants. But if he is required to look one day, or one page, beyond that which exhibits the title of his grantor, it will be impossible to say where the inquiry shall stop."

137. Although such might theoretically be possible. For example, it might be agreed that the search (notwithstanding it be desired to avoid this) should actually be made, and then notice be retrospectively held to have existed or not to have existed according as the time required fell under or exceeded the time-period adopted as the norm. Various objections could, obviously, be made to such a rule; nevertheless it would be wholly objective and definite, and results would be relatively uniform in different jurisdictions so far as the name norm might be adopted.

138. Mr. Hackman mentions that twenty years ago as many as 1800 instruments were daily recorded in Los Angeles county. Hackman, *Indexes to Title Records* (1924) 17 LAW. & BANK. 26, 27. New York City, since 1887, has had a modified tract system, conveyances affecting each city block being recorded in a special volume individually indexed. N. Y. Laws (1887) c. 718, cited in McCormick, *Possible Improvements in the Recording Acts* (1924) 31 W. VA. L. Q. 79, 83.

deed in question, if not in the "chain" of title (which, like a "chain" of causation, perhaps does not, in a strict sense, exist), is at least given by a record owner and within the period of his record ownership.

But assume agreement in defining the chain of title, and assume an agreement that no recorded instrument that does not fall within the definition can give constructive notice, so that no search is necessary for security against it;—this would amount merely to an application of the test of reasonable search. For, impliedly if not explicitly, it is held unreasonable to require that the purchaser shall investigate other claims than those by which he is endangered. The question is, then, what claims do endanger him, and the answer given in such cases is that they are those evidenced by deeds in the prospective buyer's chain of title.

The problem is presented, at least primarily, in six situations: (A) that of deeds given by persons who are either strangers to the actual title or strangers to, because unconnected with, the record title: (B) that of easements in Blackacre, the tract in which the prospective purchaser is interested, that are created by deeds conveying neighboring tracts and are unmentioned in the chain of deeds transferring Blackacre; (C) that of instruments unauthorizedly recorded because lacking in compliance with statutory formalities, particularly the requirement of acknowledgment; and, finally the three situations (D, E, and F) of dishonest deeds given in the three possible periods of the maker's relation to the record: before he holds any title, while he holds record title, and after he has parted with record title. These six situations will now be considered seriatim with two exceptions. The first and last of the group of three last mentioned will be discussed, as respects *record* notice, together. Before considering the second of those three, one problem that arises or may arise in all six situations—namely, the nature and effects of any *inquiry* to which a purchaser should be put by recorded instruments that admittedly give no record notice—will then be discussed at one time (in section IV) as respects all save the second of the three last mentioned. The rest of the article (section V) will be devoted to the various aspects of that exceptionally important problem.

All six of these situations are obviously abnormal. Countless generalizations respecting the recording system that are helpful or at the worst innocuous when applied to its operation in normal cases, are wholly misleading as regards these abnormal problems. Some of these generalizations have been referred to in the opening pages of this discussion; others will be noted in connection with the several situations just indicated.

It seems desirable, first of all, to place them in perspective. In the first place, one of them—that of cases involving inquiry notice—although utterly abnormal from the point of view of the original recording acts, is a wholly normal part, and as respects litigation probably the preponderant part, of the present recording system.¹³⁹ The other problems all lie on the periphery of the system, each of them posing the question of its proper delimitation, and this question involving in each case the purpose of the statutes and the question of restricting notice. Thus, although a proper solution of them, even of all together, might seem to be only a small part of the general problem of improving the recording system, yet their proper treatment is of vital importance because they involve variant opinions respecting its basic principles.

Situation A

A prospective purchaser of Blackacre normally finds one chain of deeds that have successively carried the title. It is agreed, however, by everybody that his safety requires a search for all deeds given by past owners which constitute claims to it conflicting with the one held by his vendor, provided such deeds have been recorded at such time and in such form as result in giving him constructive notice. This proviso is the matter to be here discussed.

In the first place, it is manifest that, as Lord Coke remarked, "none but effectual deeds ought to be inrolled."¹⁴⁰ Also, obviously, no record notice can arise from a deed ostensibly conveying land that is given by a stranger to the actual title, since record notice exists solely for the protection of persons who register instruments that affect the title either at law or in equity.¹⁴¹ Being nullities, no failure to search for them can prejudice the purchaser even if they could be found, which ordinarily they could not be; and if accidentally discovered, disregard of them would be equally unprejudicial.

Assume next two complete recorded titles derailing from A and B and with no connection between the two chains, and that B's begins with an invalid claim of title by adverse possession, or with an invalid

139. "A majority of the decisions thereunder are based upon the doctrine of notice." PATTON, *op. cit. supra* note 9, § 363. And it seems fair to assume that cases relating to inquiry would preponderate over those construing statutes with respect to the situations of abnormal record notice discussed in this section. The question of normal record notice is, of course, of relatively slight prominence.

140. "An Exposition upon the Statute of 27 H. 8. ca. 16 intitled, An Act concerning Inrolments of Bargaines, and Contracts of Lands and Tenements," in 2 COKE, INST. PART II, *671 at notecall 6. Many present-day statutes, in stating the recorder's duties, limit them to instruments "entitled to record," refer to "conveyances" (assuming validity as such), etc. Some provide for remedies in event of failure or refusal to record. Obviously, however, some discretion must be exercised.

141. On the peculiar situation in Illinois, see text at notecall 292 *infra*.

state land certificate, or the like. Such cases are those of hostile and distinct titles, and the question of "superiority between them depends, not upon their being recorded, but upon their intrinsic merits."¹⁴² The deeds in B's chain are nullities, and a purchaser claiming thereunder must fail because he cannot be a purchaser. But would the valid deeds in A's chain give B notice, so that—even could he be a purchaser—he could not be one in good faith?

At this point it may be remarked that in the present situation the recording acts do not affect the fact that a man who *has no title* can convey none, and that no would-be purchaser can be a purchaser merely because he gives value, whatever his innocence. Those statutes presuppose a *title holder* who gives title to a first grantee, but who, though left without title, retains a power to divest his first grantee and give title to a second under the conditions imposed by the statutes. This distinction, between the facts to which the general legal rule and the recording acts respectively apply, has occasionally seemingly been overlooked. The answer to the question just stated, regarding notice to B, is here irrelevant to the *fate* of one claiming under B, whereas it is vital to the rights of the subsequent purchaser in the broken-record situation next to be stated.

The answer to the question depends upon that given to two other questions. The first of these is, whether a recorded instrument affecting title "gives notice to all the world;" and the second is, what is the true meaning of the phrase "subsequent purchaser." It was in the cases dealing with the two problems now under consideration that the accepted answers to those questions were established. A "subsequent" purchaser is one who takes (or, in a race jurisdiction, takes and records) a deed either from the same grantor from whom the "prior" purchaser earlier took a deed covering the same land,¹⁴³ or from a person whose rights run back to and through a grantor common to the title-chains of the two purchasers but appearing of earlier date in the chain of the "prior" purchaser.¹⁴⁴ A recorded instrument, if it actually affects the title, gives record notice to persons whose claims run through it and depend upon the rights of its maker when he made it. The recording statutes have application only to conflicting claims

142. 2 POMEROY, *op. cit. supra* note 1, § 658.

143. Of course, the same quantity of land need not be covered by the two deeds. One may convey a portion of that conveyed by the other; but it is contended in the discussion of *situation B* that in this case the record title of the land conveyed by both must be in the same person when both such deeds are given. See text following notecall 152 *infra*.

144. Under a tract system such as is described at notecall 136 *supra*, "subsequent purchaser" means, in effect, subsequent purchaser of the same land; under the usual system of grantor-grantee indexes it means subsequent purchaser of the same land tracing title through a common grantor. See especially *Glorieux v. Lighthipe*, 88 N. J. L. 199, 96 Atl. 94 (1915).

running thus through a common record owner. The case of totally unconnected lines of record title is beyond their purview. Accordingly, between such lines notice is inoperative.¹⁴⁵

A situation distinguishable in form but not in substance from the foregoing is presented when a grantee from O, the true owner, fails to record his deed but conveys to another who does record; so that both are unconnected with, and in that sense strangers to, the record title. Does the recorded deed of the sub-grantee give constructive notice to purchasers who rely upon another chain through O? With substantial unanimity it is held that it does not.¹⁴⁶

As problems of record notice there is no distinction; the two situations involve the same principles. In both it is habitual with the courts to say that the recorded instruments in question "are not in the purchaser's chain of title," or that "there is a break in the hostile chain," or that the two chains embody "distinct and hostile titles." But these are merely *descriptions of situations* in which notice should be held non-existent. They are not in themselves statements of any reason for excluding notice. Obviously, the reason is that it would be utterly unreasonable to require a search which, logically, would require—in jurisdictions employing the usual grantor and grantee indexes—investigation of deeds given by every person entered in those indexes. This is recognized by Mr. Pomeroy and Mr. Tiffany as the reason in their comments upon broken record titles.¹⁴⁷ It is also so recognized in many judicial opinions. "In such cases, notice *in fact* by a record *could not* be given." Hence no constructive notice should exist. "No point of commencement for an examination of the records would be suggested to the party seeking information therein. The *indexes* . . . would give no aid in such an examination. It is, therefore, our conclusion that the term *subsequent purchaser* . . . is used to describe purchasers claiming under some common grantor."¹⁴⁸

145. For cases, see 2 POMEROY, *op. cit. supra* note 1, § 658; 2 TIFFANY, *op. cit. supra* note 17, at 2186 *et seq.* (see 3d ed. if text of 2186 is pieced); 2 DEVLIN, *op. cit. supra* note 25, § 713; 1 JONES, *op. cit. supra* note 2, §§ 673, 682.

146. The cases will be found through the citations in note 145 *supra*. Aliter under a tract recording system. Fullerton Lumber Co. v. Tinker, 22 S. D. 427, 118 N. W. 700 (1908). That case is also interesting for other points, as is likewise Pyles v. Brown, 189 Pa. 164, 42 Atl. 11 (1899). One point in the latter, which is obviously sound under the usual grantor and grantee index system, but rarely comes into view in the cases, is the fact that notice under the statutes requires search only for deeds given by former record owners, not for deeds given to them, nor therefore for recitals in the latter.

147. 2 TIFFANY, *op. cit. supra* note 17, at 2188; 2 POMEROY, *op. cit. supra* note 1, § 761. "The policy of the recording acts is that those persons who are affected with constructive notice should be able to obtain an actual notice, and even full knowledge,"—in the case of record notice, surely the latter—"by means of a search." 2 *id.* § 653. See text at notecall 26 *supra* and citations in the note thereto.

148. Rankin v. Miller, 43 Iowa 11, 19 (1876). (Italics added.) "When one link in the chain of title is wanting, there is no clue to guide the purchaser in his search to the next succeeding link by which the chain is continued. The title upon the record is

"If conveyances from one stranger to another, would be notice to all the world,"—or, in other words, to persons interested in any and all other lines of title—"miserable would be the situation of the purchaser."¹⁴⁹ Miserable because of the search thereby made necessary.

Up to this point the conclusion is that the deeds in questions give no record notice, that they therefore call for no search, and that in consequence they fall outside the recording system.

One question relating to both of the above situations is, however, here postponed. If a subsequent purchaser, without record notice of the hostile deeds in either situation, happens to have actual knowledge of those deeds, or information that could lead him to such knowledge, is he therefore "put upon inquiry"? Whether he can be put upon inquiry as to anything, and if as to anything then as to what, and what consequences could follow from his making no inquiry, will be discussed below.¹⁵⁰

A second case to be distinguished from the problem first above stated is that of a grantor who gives a warranty deed for land he has never owned and later acquires the true title. The relation of this to record notice will be considered below (*situation D*) in the present section, and its relation to inquiry notice in the following section,¹⁵¹ of this discussion.

Situation B

The second of the six situations above indicated is that of easements. Must a purchaser who is interested in Blackacre search the record titles surrounding tracts for evidence of easements held by their owners in Blackacre? The weight of authority, and of reason, support a negative answer.¹⁵²

However, when the "reason" given for this holding is that the "titles" are distinct, this is even more unsatisfactory than in the first situation. The question before a court is, should it be held that deeds to other tracts give notice, and therefore constitute a danger from

the purchaser's protection, and when he has traced the title down to an individual, out of whom the record does not carry it,"—except in the line upon which he relies—"the registry acts make that title the purchaser's protection. The registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed." *Losey v. Simpson*, 11 N. J. Eq. 246, 249 (1856). This was a case of a recorded mortgage given by a contract purchaser whose contract was by law not recordable. That the registration of the mortgage should in such case not give notice to a subsequent purchaser of the legal title is clearly the sound view. See cases cited (not all explicitly to this point) in 2 TIFFANY, *op. cit. supra* note 17, at 2187-8 at notecall 55 *et seq.*, 2211 at notecall 32, 2368, n. 1, and § 630 (b).

149. *Keller v. Nutz*, 5 S. & R. 246, 254 (Pa. 1819).

150. See text at and following notecall 335 *infra*.

151. See text at and following notecall 343 *infra*.

152. For cases, see 2 TIFFANY, *op. cit. supra* note 17, at 2188-90, who, however, inclined to the contrary opinion. Compare the views in 2 DEVLIN, *op. cit. supra* note 25, § 667 (*semble*).

which only search can save the purchaser of Blackacre; and, here again, merely to describe the circumstances out of which the question arises, by saying that transfers of Whiteacre are not part of the title evidence of Blackacre, would manifestly be no answer to that question. In fact, however, the statement is also unacceptable on another ground. Given various tracts of neighboring land, none held under an original patent, the conveyancing history of any one of them must be common, as a searcher goes farther back, to an increasing number of the others. The lines of record ownership of any two of them must therefore cross; if easements exist between them the titles of the dominant and servient tenements must run through a common grantor. It is only their subsequent separate conveyancing history that can justify one in saying that the two conveyances by that grantor do not relate to "the same piece of land or a part thereof." Nevertheless, the law does, under the majority view, regard the two tracts as independent from the date of division, including the deed by which separation was effected. Even the usual *description* of the situation presented by the problem is therefore to some extent inaccurate, in addition to being as a whole irrelevant.

There is a similar confusion implicit in reasons given for the majority and minority views. The minority view can claim in its support the indubitable fact that the owners of the dominant and servient tracts trace titles from a common course. The majority view has been defended on the ground that the deed for the dominant tract has the primary purpose of conveying title to it, and *only incidentally* creates the easement in Blackacre. This is not particularly satisfying. As a matter of legal analysis it must be admitted that a part of the "title" to Blackacre is held by the owner of the dominant tenement.¹⁵³ But the law has not in practice reached that refinement of theory. It is traditional to refer to the easement as a right "in another's land;" and—balancing the sliver of ownership in one part against the aggregate of liberties, powers, and claims that constitute "title" in the other—so it is, as a practical matter. This has the merit of simplicity, and the refusal to require a prospective purchaser of Blackacre to search the titles of all land around it¹⁵⁴ has the corresponding merit of convenience to him whose convenience should be preferred.

153. PHILBRICK, *PROPERTY* (1939) 8-II, 138-141, and index *s. v.* "Rights—in rem."

154. There is no reason in the principles of easements and profits why the dominant and servient tenements might not be considerably separated. However, because of the limited list of recognized easements, and the predominance among them of those which either presuppose adjoining tracts or (as in the case of ways and watercourses) ordinarily involve an easement over all intervening land, the problem is in actuality restricted to the land immediately adjoining.

It is true that Mr. Tiffany (writing when the view just stated was judicially a minority doctrine) has said:

"In such a case, at common law, the purchaser would take subject to the easement previously created, as being a legal interest, irrespective of whether he had notice thereof, and the rule . . . could not well be regarded as changed by the adoption of the recording law, as applied to a case in which the grant of the easement does appear of record, though in connection with the conveyance of *other land*, to which the easement is made appurtenant." ¹⁵⁵

Mr. Tiffany also stated that the purchaser was "ordinarily" charged with notice of the incumbrance shown in the title-chain of the dominant tenement; but his language ("could not well" and "it seems") would seem to suggest reluctance to accept that then slightly preponderant view. The reference to the rule at common law, being quite irrelevant, is interesting only as an illustration of the tendency of courts, already adverted to,¹⁵⁶ to revert to the common law principle which it was the quintessential purpose of the recording statutes to repudiate. The sole question, under them, is whether notice should be implied under the circumstances indicated. If the second grantee, as a *bona fide* purchaser, takes clear of an earlier grant of complete title, then *a fortiori* he should take clear of a legal easement or equitable restriction; although in the last case a court administering both law and equity might be expected to be particularly attentive to equitable considerations, since equitable restrictions, as distinguished from either positive or negative legal easements, were never subject to Mr. Tiffany's first proposition.¹⁵⁷ Mr. Tiffany's last proposition is, substantially, that a subsequent purchaser must, to save himself, read *in extenso* every earlier recorded deed (not merely the description of the land, which will show that it is not that which the searcher contemplates buying) given by every record owner in his chain of title. The only exception would be, seemingly, that of deeds to land beyond the county line; they never give notice—and that the county is the recording unit for public convenience, *including* that of purchasers, is obvious. In addition to the objection that the proposition totally ignores the test of reasonableness, it also overpasses even the broadest generally

155. 2 TIFFANY, *op. cit. supra* note 17, at 2189. (Italics supplied.) Mr. Tiffany wrote before 1920; the decisions in courts of last resort were then 2 to 1 in favor of his view. Compare dates of cases cited at note 167 *infra*.

156. At p. 148, and text at notecall 69 *supra* and following notecall 129 *supra*.

157. Ames, *Specific Performance For and Against Strangers to the Contract* (1904) 17 HARV. L. REV. 174, 182. This point was properly heeded in Hancock v. Gumm, 151 Ga. 667, 674-6, 107 S. E. 872, 875-6 (1921).

accepted conception of a chain-of-title.¹⁵⁸ A prior record owner of a large tract might be such in scores of such chains; and even after *risking*¹⁵⁹ the exclusion of tracts deemed unlikely, on the basis of geography, to be dangerous, there might remain many whose title chains, under Mr. Tiffany's view, a purchaser would be obligated to search. With reference to the general situation now in question Judge Clark has stated that

"The rule is well settled that a purchaser takes with notice from the record only of encumbrances in his direct chain of title. Hence in the absence of actual notice, before or at the time of his purchase, an owner of land in the neighborhood is only bound by the restrictions if they appear¹⁶⁰ in some deed of record in conveyances to himself and"—that is: or to some one of—"his direct predecessors in title."¹⁶¹

A recent Pennsylvania case, relying upon Mr. Tiffany, has held explicitly in accordance with his rather hesitant pronouncement.¹⁶² On the other hand the highest court of New Jersey has held that the subsequent purchaser protected by the statutes is one of the same *land* in the narrow sense already emphasized, and that absurd consequences

158. That is, not (1) of a particular chain of deeds purportedly carrying title, but (2) all deeds by prior record owners actually transferring or incumbering the title to the particular piece of land of which the searcher is a prospective purchaser. Compare text following notecall 175 *infra*.

159. See text at notecall 154 *supra*. This matter is explicitly commented upon in *Glorieux v. Lighthipe*, 88 N. J. L. 199, 201, 96 Atl. 94, 95 (1915), and in *Hancock v. Gumm*, 151 Ga. 667, 678, 107 S. E. 872, 877 (1921).

160. Including, of course, recitals leading to other chains of title.

161. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" (1929) 162.

162. *Finley v. Glenn*, 303 Pa. 131, 154 Atl. 299 (1931). The opinion cites no pertinent authorities save indirectly through the citation of Mr. Tiffany; but see note 155 *supra* and note 167 *infra*. It cites one Pennsylvania case, *Pyles v. Brown*, 189 Pa. 164, 42 Atl. 11 (1899), that *limited notice* in another situation; two other Pennsylvania cases that contain nothing whatever in support of the decision; two others for innocuous generalities (a deed gives notice "to those who are bound to search for it"—see text at notecalls 26, 146 *supra* and 174 *infra*; "notice of a deed is notice of its contents"); *Pomeroy* for a repetition of the last quoted platitude; Kent for generalities equally irrelevant—see note 26 *supra*.

But reliance was placed primarily upon the literal wording of our statute. The sole provision quoted is that which requires that all deeds whereby the title to "any lands . . . in this Commonwealth" may be in any way affected shall be recorded. And so they must if they are not to be void against subsequent purchasers, as the unquoted portion of the statute provides. But the court has never construed that portion to mean subsequent purchaser of "any land . . . in this Commonwealth," regardless of where the deed is recorded. A deed to "land in A county" (which is common language), there recorded, is of course held not to give notice to a purchaser of "land in B county;"—and that, unquestionably, rests upon reasonableness and convenience. See text following notecall 157 *supra*. And if the court, considering lots in Delaware County, is thus free to ignore the supposed implication in the words "any land . . . in this Commonwealth" for reasons of convenience and fairness, it must be free to set reasonable limits to notice within a county. And this, of course, it has often done, as, for example, in one case cited by it, as above noted.

Being thus entirely free to set such limits, only one remark need be added to the argument in the text against the view taken by the court in the instant case; namely, that all of Pennsylvania was once held under one title.

would, under many statutes, follow a contrary view.¹⁶³ The court further said:

"The reason of the legislation and the argument *ab inconvenienti* point to the same result. . . . A purchaser may well be held bound to examine or neglect at his peril, the record of the conveyances under which he claims, but it would impose an intolerable burden to compel him to examine all conveyances made by every one in his chain of title."¹⁶⁴

The highest court of New York has given to both of these points,¹⁶⁵ and that of Georgia to the second,¹⁶⁶ explicit approval. This view is indubitably dominant,¹⁶⁷ and preferable unless under special circumstances *involving other equitable principles* than the single one (notice) operative in the record acts.¹⁶⁸

Situation C

Next is the problem presented by instruments that are actually, although improperly, on the record. Assuming that these affect, either in equity or at law, the title to the land—since otherwise they should be wholly irrelevant as a matter of *record* notice (though not necessarily inquiry notice)—they may nevertheless be of a type not recog-

163. That is, when the statute—as in New Jersey and Pennsylvania (PA. STAT. ANN. (Purdon, 1930) tit. 21, § 444)—makes the unrecorded deed "void" against the subsequent purchaser. "If subsequent purchaser means a purchaser from the same grantor but of different land, then the owner of land by an unrecorded deed would be unable to sue for a trespass if the trespasser happened to be a subsequent purchaser from the same grantor." *Glorieux v. Lighthipe*, 88 N. J. L. 199, 202, 96 Atl. 94, 95 (1915).

164. *Glorieux v. Lighthipe*, 88 N. J. L. 199, 203, 96 Atl. 94, 95-6 (1915).

165. "This rule would seem to be implicit in the acts providing for the recording of conveyances. Recording constitutes notice only of instruments in the chain of title of the parcel granted. To have to search each chain of title from a common grantor lest notice be imputed would seem to negative the beneficent purposes of the recording acts." *Buffalo Acad. of Sacred Heart v. Boehm Bros.*, 267 N. Y. 242, 250, 196 N. E. 42, 45 (1935), embodying Judge Clark's statement, above quoted, in the opinion at 250, and following *Schermerhorn v. Bedell*, 163 App. Div. 445, 148 N. Y. Supp. 896 (4th Dep't 1914), *aff'd*, 221 N. Y. 536, 116 N. E. 1074 (1917).

166. *Hancock v. Gumm*, 151 Ga. 667, 678, 107 S. E. 872, 877 (1921).

167. In addition to the three cases cited in notes 157 (Georgia), 159 (New Jersey), and 165 (New York) *supra*, see *Beetchenow v. Arter*, 45 R. I. 133, 119 Atl. 758 (1923); *Yates v. Chandler*, 162 Tenn. 388, 38 S. W. (2d) 70 (1930); *Wichita Val. Ry. v. Marshall*, 37 S. W. (2d) 756 (Tex. Civ. App. 1931). *Contra*: *King v. Union Trust Co.*, 226 Mo. 351, 126 S. W. 415 (1909); *Lewes v. Carter*, 124 Md. 678, 93 Atl. 216 (1915); *Finley v. Glenn*, 303 Pa. 131, 154 Atl. 299 (1931).

168. The decision in the New York case of *Buffalo Acad. of Sacred Heart v. Boehm Bros.*, 267 N. Y. 242, 196 N. E. 42 (1935), cited in note 165 *supra*, was limited to situations "in the absence of exceptional circumstances, the consideration of which we may well leave until they arise." The court very probably had in mind the Pennsylvania case of *Finley v. Glenn*, 303 Pa. 131, 154 Atl. 299 (1931), discussed in note 162 *supra*. The latter case was in equity, a bill for an injunction to restrain violation of equitable building restrictions. Before the respondent (subsequent purchaser) began building he had acquired knowledge of the restrictions and had been warned by the owner of the alleged dominant tenement not to violate them. Under these circumstances, if the court was resolved to decide against the purchaser, its decision might better have been rested on the doctrines of "hardship" or "discretion."

nized by the local statute as recordable; for example, a contract for the purchase and conveyance of the land. In this case, record notice would of course likewise be denied. Finally, although of a nature to affect the title and of a type authorized to be recorded they may nevertheless be unauthorizedly recorded, because unacknowledged or improperly acknowledged or otherwise deficient in the formal prerequisites to registration under the local statute. The question whether either record notice (or inquiry notice—which will be discussed in the next section) should be recognized as given by papers of either of the last two classes is obviously one of public policy. The courts and authoritative textwriters almost unanimously agree that no unjustifiably recorded instrument, no matter for what reason unjustifiably recorded, can give constructive notice by the mere fact of its registration.¹⁶⁹ And this has probably been a settled principle from the infancy of the recording system.¹⁷⁰ In the case of deeds for land in one state that are acknowledged in another in a manner not satisfying the statute of the former, provision is sometimes made by this that the defective acknowledgment shall be taken *prima facie* as good in the state where made, and shall therefore have, as evidence, the force of an original.¹⁷¹

It seems clear that any concession beyond this could only be a stultification of the recording acts; not to be supported if the public policy underlying those enactments is to prove effectual.

Nevertheless, although that policy has been made effective in refusing *record* notice to instruments that are unauthorizedly registered, these have not been consistently treated as nullities for all purposes in connection with the recording system. The failure so to treat them—the attribution to them, on the contrary, of the power to give inquiry notice—is the most striking illustration of judicial failure uniformly and perseveringly to favor the subsequent purchaser. If, as has been contended, that is in fact the underlying and desirable policy, then many decisions have been wrong. But this will be considered below as part of the problem of inquiry notice.

Situations D and F

Next come the two cases of dishonest but recorded conveyances made, respectively, by one who has never held title and by one who has

169. See, for cases: 2 POMEROY, *op. cit. supra* note 1, §§ 651-3; 2 TIFFANY, *op. cit. supra* note 17, § 567, (b) and (c); Hare & Wallace, *loc. cit. supra* note 34, at 205; 2 DEVLIN, *op. cit. supra* note 25, §§ 656-8, 661-2; 1 JONES, *op. cit. supra* note 2, § 605.

170. See, for example, Judge Trowbridge, *loc. cit. supra* note 29, at *582.

171. Such a statute was involved in *Fallass v. Pierce*, 30 Wis. 443, 479-481 (1872), repeatedly cited *supra*. Compare the Pennsylvania act, PA. STAT. ANN. (Purdon, 1930) tit. 21, § 263. On the evidence aspect, compare 5 WIGMORE, EVIDENCE (3d ed. 1940) § 1676a.

been both the true and the record owner but gives the conveyance in question after parting, usually simultaneously, with both. Constructive notice is given only by deeds that embody a title hostile to the purchaser. These conveyances are obviously nullities, and should be governed by the general principles that prevail with respect to recorded deeds given by strangers to the title, discussed above under *situation A*. It is therefore obvious that they should not be on the record; and that, if there, they should not give constructive notice.¹⁷² It is true that the writers of various judicial opinions, and even some textwriters, have assumed or suggested that they might give "notice." This suggestion, taken when possible in the sense most favorable to those using it, may be read as meaning inquiry notice, and will be commented upon below in considering that problem.¹⁷³

It has nevertheless seemed best to consider these two groups of conveyances apart, and not as mere illustrations of *situation A*, for two reasons. One of these is that it is desirable to emphasize here the concept of a chain of title that is implicit in the decisions on these classes of dishonest deeds preliminary to consideration of that concept in connection with the more perplexing problem of the class discussed in section V of this article. Another reason is the necessity of discussing in *situation D* the applicability of the doctrine of title by estoppel, a problem irrelevant to any other deeds covered by *situation A*, for which reason its consideration above would have been inappropriate. Still another problem, which if not peculiar to *situation F*, has been raised by Mr. Tiffany in connection with that, will be noted, but since it involves inquiry notice only it will be further considered below in section IV.

The original meaning of the phrase chain of title antedates the recording system. An Englishman kept the deeds handed down from his predecessors, and they constituted literally his chain of title-deeds. Even under our recording system the record normally shows nothing more than that simple case. A purchaser's duty to search has there-

172. With special reference to deeds given before holding title, see 2 POMEROY, *op. cit. supra* note 1, § 658, and 3 *id.* § 761; 2 TIFFANY, *op. cit. supra* note 17, at 2131-3; 2 DEVLIN, *op. cit. supra* note 25, §§ 723-4; PATTON, *op. cit. supra* note 9, §§ 44-5. It is true that Mr. Pomeroy says only that the rule stated in the text is supported "by many decisions,—it seems by the weight of authority," 2 POMEROY, *op. cit. supra* note 1, § 658; and that Mr. Devlin states that it, "we believe, is sustained by the weight of authority." 2 DEVLIN, *op. cit. supra* note 25, § 724. But these are certainly great understatements. It should also be noted that the purchaser should search not merely back to the date of recording of a predecessor's deed, but back to the date of that deed, although the question has seemingly been very rarely adjudicated. *Higgins v. Dennis*, 104 Iowa 605, 74 N. W. 9 (1898).

There are no discussions of deeds given after parting with record title, for the reason indicated at p. 180 *infra*.

173. See on *situation F* text at notecall 335 *et seq.*, and on *situation D* text at notecall 350 *et seq.*, *infra*.

fore often been loosely stated as though nothing more is required of him than to find a deed to his prospective grantor, then one to that grantee's grantor, and so on backward to a title that is original or of supposedly dependable age; and such search does usually afford complete security.

The purchaser is concerned, however, not with a chain of deeds but with one of record owners; yet not necessarily with but a single chain thereof. The purpose of search is to discover any line or lines of deeds for the same land, senior in age to that through which he claims, originating with any of his record predecessors. As respects the two cases here in question the situations are obviously very different. In the one, though a deed from the ostensible grantor is on record he is not a record owner because he cannot be found as grantee—neither actually being such nor, by hypothesis, so recorded. In the other he is in the list of record owners, notwithstanding that his deed in question is given after ceasing to be such.

Going back to the simple fact, above stated, of the search ordinarily made by any purchaser—to which recording requirements should certainly approximate as nearly as possible—Judge Hare and Mr. Wallace in their *Notes*, Mr. Pomeroy closely following them, Mr. Rawle, and Mr. Tiffany all agree that the deeds given before acquiring title give no notice.¹⁷⁴ It is true that the reason often given or implied for this view is that the deeds in question are outside the chain of title. Through five editions of Mr. Pomeroy's work, for example, it has been stated that a record gives notice to "those who must trace their title from or *through the grantor*" who gives the instrument in question. Now, that is the case in the situations under discussion; yet Mr. Pomeroy, ignoring that fact, drew from that principle the conclusion, in referring to *situation D*, that no notice is there given.¹⁷⁵ He described it as one of "a break in the chain of title." It is obvious that he thereby assumed, and that in fact under the decisions in both situations it is held, that the chain of title is constituted by conveyances *not only made by successive holders of the record title but made by them while respectively holders thereof*. In no other sense could the deeds in question involve any break in or departure from the line of record title. That this definition is completely in accord with, and promotive of the purpose of, the recording system as already defined is manifest. It covers decisions in all ordinary situations under the statutes. It

174. Hare & Wallace, *loc. cit. supra* note 34, at 210; 2 POMEROY, *op. cit. supra* note 1, § 658; RAWLE, COVENANTS FOR TITLE (5th ed. 1887) 406; 2 TIFFANY, *op. cit. supra* note 17, § 545 (e).

175. 2 POMEROY, *op. cit. supra* note 1, § 658, and 3 *id.* § 761.

also covers those involving deeds given by strangers to the title, generally—that is, those dealt with in *situation A* above; and it alone rationalizes the two sub-situations of that group here discussed.

All this, however, still leaves open the question *why* there is no notice; for it may again be emphasized that merely to describe the circumstances in which notice is held not to exist is not to give an answer to that question. The definition of a chain of title, in itself, neither explains nor justifies anything. It is very significant that the four authorities above mentioned—even Mr. Pomeroy—all treat the question of notice as one of search. It is still more significant that the first two authorities impliedly, and the last two explicitly, exclude notice because excluding search, and exclude the latter because its requirement would be unreasonable.¹⁷⁶ As Mr. Rawle said, speaking as one perfectly informed regarding the practices of title searchers and the views of the profession: “No one would pretend that the search for conveyance by his”—a purchaser’s—“vendor should be made not only *since* he acquired the title, but also extend *to all time before* he had any title at all, and that the same search should be made *against every one in the line of title.*”¹⁷⁷ But even that does not state the requirement fully; for in theory the search must be made, as to all prior owners, *forward indefinitely*, since the deeds might be recorded at any time. The burden on the purchaser would be intolerable.

All the preceding applies equally to *situations D* and *F*. A comparison with the four other abnormal recording situations here becomes desirable. In the two here in question it is plausible to explain the exclusion of search, and therefore of notice, by saying that the deeds fall outside the chain of title, because such is the fact under the definition of that phrase here (and correctly) adopted. On the other hand, in *situations B* and *C* above examined, and in *situation E* to be later considered, the deeds all fall *within* this same definition of the chain of title. So far therefore, as the deeds involved in these three situations are held not to give notice, that definition cannot serve even as a simulated reason for such decisions, and their true basis must be found. In *situation C* this is obviously mere respect for the provisions of the recording act, which either explicitly declare or necessarily imply that only instruments satisfying its prerequisites for recordation shall give notice; in other words, public policy. But such decisions in *situations A, B, D, and F* can be rested upon the principles that search controls

176. See passages cited in note 174 *supra*.

177. RAWLE, *op. cit. supra* note 174, at 406. (Italics added.) “If he must look beyond the origin of the title under which he was ‘purchasing’ . . . there could be no limit short of the vendor’s life, and such requirement of purchasers would involve land titles in such uncertainty that it would be impracticable to rely upon any investigation.” Breen v. Morehead, 104 Tex. 254, 258, 136 S. W. 1047, 1048-9 (1911).

notice, and that search is required only when it must reveal the hostile claim without subjecting the purchaser to an unreasonable burden. And these will be found likewise to control such decisions in *situation E*, later considered. It is true that, in *all* cases, to hold that notice should be excluded is to hold that the situation is outside the recording system; and so it may be said that we use the recording principles of notice and search as a means of deciding that there is no recording problem and therefore no need to apply those principles. Save as respects *situation E* it should be quite sufficient to say simply that the instruments in question are nullities, and therefore outside the recording system; the resort to the test of unreasonable search is, in the other cases, a secondary or corroborative test. In *situation D*, however, the assertion that the deed is a nullity must be qualified by consideration of the doctrine of title by estoppel.

It is a curious fact that search and notice are commonly discussed in connection with *situation D*, but not in dealing with *situation F*. The ostensible conveyance given in either situation is no more and no less "outside the chain of title" or preceded by a "break in the chain of title" than in the other. This fact, if appreciated, and this *reference* to the records, would suggest such discussion in both cases if in either, notwithstanding that, as just said, the discussion is in both cases unnecessary, since the two classes of deeds are alike nullities (although here, for the reasons above indicated,¹⁷⁸ not discussed merely as such), and therefore outside the field of the recording acts. For the same reason the equitable doctrine of *bona fide* purchase cannot possibly operate in either situation, since that doctrine requires, first of all, a *purchaser*, by which is meant a taker of the legal title, who holds it in cases outside the recording system clear of prior equities, and holds it within and by operation of that system against an earlier grantee divested of that title in his favor. It has already been pointed out that there can be no such purchaser in the two situations now under consideration,¹⁷⁹ because there is no title that the intending purchaser can acquire (aside from the doctrine of title by estoppel operating in *situation D*). It follows that the recording acts do not apply, and also that they, not applying, cannot alter the consequences of the fact just stated. However, two reasons readily occur why discussions of *situation F* are ordinarily not, and those of *situation D* ordinarily are, in terms of notice and search—that is, in terms of the recording system. On one hand, the very statement of *situation F* calls attention to the recording statutes and excludes their operation; the grantor has parted

178. See text following notecall 173 *supra*.

179. See p. 169 *supra*.

with actual title by a recorded deed, therefore no subsequent would-be purchaser can buy in good faith nor the statutes operate in his favor. This is not true of cases in *situation D*, and, in addition, these have acquired prominence primarily in connection with the doctrine of title by estoppel. That doctrine, if allowed to operate, transforms an originally null record, incapable of barring a *bona fide* purchase, into a valid record that is effective for that purpose. The very statement of this situation, therefore, calls incidentally for discussion of the recording acts, since upon the decision depends the conclusion whether the first deed is to be treated as null or valid, whether the case falls without or within the statutes, and whether there can or cannot be a subsequent purchase in good faith.¹⁸⁰

The cases involved under the estoppel doctrine are those in which the non-owner's first and pretended conveyance is by a recorded warranty deed to B, and after subsequently becoming record owner of the land thereby ostensibly granted he gives a second deed to C. Under the estoppel doctrine, as applied in various states, B either acquires title instantaneously upon its acquisition by his grantor or can claim it, on principles of contract and specific performance, as a matter of personal rebutter¹⁸¹ against the grantor and his privies. In one or the other form the doctrine has been recognized in more than half of our states, and is by statute an unqualified rule of property in slightly more than a third.¹⁸² Mr. Rawle, a determined opponent of the theory, noted its spread in the law of the last century. There is, of course, no objection to the theory when applied solely between the original parties. As regards them, such a resort to a notional transfer of title, and also the fictional character of a "privity" which some cases attribute in words to the second grantee solely for the purpose of excluding *actual* privity by diverting title from him, would not merit even mention, since the end would be equitably justified. In truth, however, the decisions in this field illustrate the decadence of equity,¹⁸³ applying as they do mechanically, under circumstances manifestly little

180. Mr. Tiffany very rightly discusses *situation D* at length only under the problem of estoppel. 2 TIFFANY, *op. cit. supra* note 17, § 545 (c). It is, as he elsewhere says, "only by reason of that doctrine, that such a conveyance by one without title can in any case be effective." 2 *id.* § 567 (e). This clearly evidences his own opinion on the question of search, but he proceeds to say merely that the cases are not in harmony thereon.

181. RAWLE, *op. cit. supra* note 174, §§ 245-6, 255.

182. For cases and views see PATTON, *op. cit. supra* note 9, §§ 125-9 (citing in § 126, n. 199, statutes of 17 states which adopt the doctrine in the first form), also §§ 45, 46, n. 76, 44, n. 67; 2 TIFFANY, *op. cit. supra* note 17, §§ 545, 567 (e); RAWLE, *op. cit. supra* note 174, §§ 179-182, 255 *et seq.*; Hare & Wallace, *loc. cit. supra* note 34, at 211-2; 2 DEVLIN, *op. cit. supra* note 25, §§ 721-2; 2 POMEROV, *op. cit. supra* note 1, § 658. The line between the two forms of the doctrine is not sharply drawn in these citations.

183. Cf. Pound, *The Decadence of Equity* (1905) 5 COL. L. REV. 20.

considered, a principle of conscientious conduct for an end that does obvious injustice to third persons, the very persons who are entitled to special favor under the policy of the recording acts.

Since, as will be seen, the doctrine completely ignores the principles, and indeed the existence, of the recording acts, its basis should first be considered as a purely equitable problem. So considered, it must be conceded that it is one of some difficulty. The worthless deed is properly construed by equity as a covenant to convey the land, and puts that obligation on the conscience of the wrongdoer, but no equitable relief is possible, the only available remedy being the recovery of damages at law. The grantee does have an equity, however, to secure what he paid for.¹⁸⁴ When title is later acquired by the grantor it would be proper to compel its conveyance, provided this enforcement in his favor of one equity is not made in disregard of an intervening equity of higher rank held by the second grantee. As regards that, both give value. Both, too, are equally innocent unless, contrary to our momentary assumption, their relation to the recording acts is considered. The rights of the second grantee have been characterized above as "intervening," and the Supreme Court of Michigan has repudiated the estoppel doctrine on the ground that it applies the doctrine of relation back against an innocent third party.¹⁸⁵ Since by hypothesis the estopped grantor acquires title before giving the second deed, it might be replied to this objection that, as respects an instantaneous transfer of title, there is no possibility that the second grantee can be an intervening party; that even though the title passes when acquired, that moment is before the second grant, and no application is necessary of the doctrine of relation backward. But this answer leaves untouched the question whether title, when acquired, should pass by the "estoppel deed."

The answer to that should depend upon the principle that equity should always look through form to substance. Regarded substantively, the right of the first grantee cannot be higher than one for specific performance.¹⁸⁶ If the courts had put the problem on that basis it would have been impossible to overlook the refusal of that remedy in a host of cases where it would entail injustice, or to overlook

184. RAWLE, *op. cit. supra* note 174, §§ 245-6, 265.

185. A purchase money mortgage was given before the deed conveying title was delivered; then, when this was delivered, a second mortgage was given to a person present when delivery was made. Priority was given to the latter, on the ground that the circumstances constituted notice that until then the mortgagor had no encumberable title. *Heffron v. Flanigan*, 37 Mich. 274 (1877).

186. Cf. 2 TIFFANY, *op. cit. supra* note 17, § 545 at notecall 13; RAWLE, *op. cit. supra* note 174, §§ 255, 265.

the fact that estoppel is likewise often restrained by counter equities.¹⁸⁷ Moreover, it is the office of equity to grow. The first grantee's negligence will not deprive him of the right to have damages; but clearly those decisions are sound which hold that, even in jurisdictions recognizing automatic passage of title, he should not be deprived of his election to take either damages or the title by forcing the latter upon him.¹⁸⁸ However, it also seems clear that his "negligence" should bar him of that equitable relief even if he should prefer it. All "equities" are merely claims to judicial consideration on the basis of fair treatment; all have originated in distinctions between conscionable and unconscionable conduct. Courts of equity have freely denied specific performance on determinations of conduct under business conventions.¹⁸⁹ It would seem that similar determinations of conduct might not merely as well be based but positively should be based on regard or disregard for a declared public policy making priority of land titles depend upon consultation of a record; and if this be so, then the second grantee would have an equity, or claim for judicial protection, superior to that of the first grantee.

Such action, notwithstanding the fact, earlier noted, that negligence in general has not as a matter of traditional technical equity been recognized as inequitable conduct,¹⁹⁰ would seem to be in line with a strengthening tendency in equity's action in other fields of law.¹⁹¹ It has already been pointed out, that it is not only justifi-

187. Cf. 2 CHAFEE & SIMPSON, *CASES ON EQUITY* (1934) c. 10; 2 TIFFANY, *op. cit. supra* note 17, § 545 (e), in the text at notecall 58; RAWLE, *op. cit. supra* note 174, at 375, 382; BIGELOW, *A TREATISE ON THE LAW OF ESTOPPEL* (5th ed. 1890) 436, on certain Pennsylvania cases.

188. RAWLE, *op. cit. supra* note 174, §§ 179-182, 258; PATTON, *op. cit. supra* note 9, §§ 45 at notecall 77, 125-130, especially 129; 2 TIFFANY, *op. cit. supra* note 17, at 2119.

189. 2 CHAFEE & SIMPSON, *op. cit. supra* note 187, c. 10. The opinions talk in general of fraud or sharp practice.

190. See text at notecall 73 *et seq.*, *supra*.

191. Specific performance of contracts has often been refused against one who made a "mistake" in entering into it, and it is traditional to classify such cases under that heading. But the mistake is very often forgetfulness, inattention, carelessness, or recklessness—varying types of negligence. The true reason for refusing enforcement is the "hardship" that would result therefrom in view of the mistake, and some of the cases identical in facts with the others are so classed. For striking illustrations, see *Mason v. Armitage*, 13 Ves. 25 (Ch. 1806); *Webster v. Cecil*, 30 Beav. 62 (Ch. 1861); *Malins v. Freeman*, 2 Keen 25 (Ch. 1837); *Tamplin v. James*, 15 Ch. D. 215 (1880) (protection refused); *Sullivan v. Jennings*, 44 N. J. Eq. 11 (1888); *Kelley v. York Cliffs Improvement Co.*, 94 Me. 374, 47 Atl. 898 (1900). Cases are collected in 2 CHAFEE & SIMPSON, *op. cit. supra* note 187, c. 10, § 2.

It is certainly not explicit doctrine that such negligence is an inequity, merely overbalanced by the inequity of imposing hardship by ordering specific performance; or that, in rescission and reformation, where the complainant's "equity" must be greater, the equity there administered is merely a preponderance in his favor of the inequity of refusing relief over his inequity of negligence. But that would seem to be the truth. No equity is, finally, other than a claim upon chancery's aid under all the circumstances of a situation. Mr. Pomeroy thought that mistake could be distinguished from negligence. 3 POMEROY, *op. cit. supra* note 1, § 839. But that is clearly impossible in many cases, even if negligence be defined as in tort law. The word negligence is employed to some extent with reference to these situations of mistake; and there is a growing

able under, but seemingly positively required by, the recording acts.¹⁹² Equity's longtime tenderness for the inexperienced has prevented a sufficiently marked distinction between blameless and blameworthy mistakes. In England, where there has been no general recording system, a purchaser's failure to inquire regarding title-deeds, and all the more his proceeding with his purchase with knowledge that the vendor does not hold them, has been treated as "culpable neglect."¹⁹³ In this country, it is certainly negligence in the first grantee to purchase from one without record title; and, in view of statutory recording policy, why should not *that* negligence, coupled with failure to record after gaining title, be fatal as against a subsequent purchaser who, otherwise, admittedly acts *bona fide*?

But this carries us over the line into consideration of the recording acts. Under them, since they should bind all courts equally, there can be no doubt respecting the proper solution of the problem. The first deed is taken by one who is conclusively adjudged to have known that he dealt with one who was not record owner, and that the proffered deed might at least possibly be a nullity. In consequence, his "equity," though prior in time, is manifestly of a lower rank than that of the second grantee who consults and relies upon the record. The latter can have no constructive notice from the first deed while it is admittedly a nullity, and it has seemingly never been explicitly suggested that it should give record notice from the instant the later acquired title of the grantor passes into or through it, whereas there are some suggestions that it could do so only after a re-recording.¹⁹⁴ However, no matter when recorded the instrument itself cannot reveal the presence

body of dicta and holdings in favor of refusing equitable aid to one guilty of negligence or of "gross" negligence. Compare 5 WILLISTON, CONTRACTS (rev. ed. 1937) §§ 1427, 1496, which cites among other cases *Krieger v. Rizzo*, 105 Pa. Super. 429, 161 Atl. 483 (1932), *Bosler v. Sun Oil Co.*, 325 Pa. 411, 421, 190 Atl. 718, 722 (1937); 3 COOK, CASES ON EQUITY: REFORMATION, RESCISSION, AND RESTITUTION (2d ed. 1932) pt. 1, c. 5; notes in 2 CHAFEE & SIMPSON, *op. cit. supra* note 187, c. 10.

192. See text at pp. 151-5 *supra*.

193. 2 POMEROY, *op. cit. supra* note 1, § 612.

194. As in PATTON, *op. cit. supra* note 9, § 45. There are rare judicial statements which imply that it is an open question whether the void deed gives record notice. Mr. Aigler quotes one such passage in his CASES ON TITLES TO REAL PROPERTY (2d ed. 1932) 935, n. 31; reprinted in 2 AIGLER, BIGELOW & POWELL, CASES ON PROPERTY (1942) 890, n. 48. It is surprising that Mr. Aigler makes this suggestion elsewhere as his own: "Whether he shall prevail on the basis of the estoppel operative in his favor as against a subsequent purchaser from the same grantor may conceivably depend, in part at least, upon *whether such recording* prevents the later grantee from being a purchaser without notice." And again: "attention should be directed to the question whether the subsequent claimant may be deemed to take with notice *merely because the estoppel deed was placed on record*." AIGLER, *op. cit. supra*, at 866, n. 20, at 936, n. 32; reprinted in 2 AIGLER, BIGELOW & POWELL, *op. cit. supra*, at 827, n. 28, at 891, n. 90. (Italics supplied.) These references, as the italicized words show, can refer only to constructive notice by the mere recording, not to inquiry notice (on which see text following notecall 353 *infra*).

The necessity of a re-recording was suggested by Reynolds, J., dissenting in *Tefft v. Munson*, 57 N. Y. 97, 102 (1824).

and operation of a legal rule, and the general basis of record notice is admittedly the feasibility of discovering from a record the danger to the subsequent purchaser which it involves. "The policy of the recording acts is that those persons who are affected with constructive notice should be able to obtain an actual notice, and even full knowledge, by means of a search."¹⁹⁵ This is assumed in all decisions on independent and broken chains of title. That record notice by such an instrument is impossible, under the principles generally observed, must therefore be conceded. It will be shown below that, for the same reason, a subsequent purchaser cannot be "put upon inquiry" by the recording of such an instrument¹⁹⁶—notwithstanding that it may be fatal to his title quite aside from any question as to his good and bad faith. Consequently, the subsequent grantee can be held a *mala fide* purchaser only by the receipt of information off the record of the existence of the estoppel deed *and* of its possible or probable legal effect adversely to his claim.

It has been said that the definition of a chain of title is vital in the situations here in question. If the definition stated above were adhered to, no court could logically hold a subsequent purchaser bound to search for, nor therefore to be endangered by, the earlier and recorded estoppel deed. The courts which deny priority to that deed base their holdings on those principles.¹⁹⁷ But one cannot therefore say that where the contrary view prevails the phrase chain of title has a different meaning. Such decisions are more properly to be regarded as exceptions to, or made in disregard of, the ordinary rule that field of search and field of record title are identical. It would, it is believed, be as easy to compile from the Reports of any state giving precedence to the estoppel grantee as from those of one protecting the subsequent purchaser judicial pronouncements implying or explicitly declaring the same definition of chain of title.

The Supreme Court of Connecticut repudiated the estoppel doctrine with the following comments:

"It may be said that such estoppel by deed is not an equitable doctrine, but is a rule of the common law based upon the recitals or covenants of the deed. We reply, that as a rule of law it has been so far modified by the registry laws as to be no longer applicable to cases where its enforcement would work such an injus-

195. 2 POMEROY, *op. cit. supra* note 1, § 653. Compare text at notecall 26 and following notecalls 146, 174 *supra*.

196. See text at and following notecall 350 *infra*.

197. Mr. Patton's classification of cases seems to imply different meanings of chain of title, rather than attention to and disregard of a definition everywhere accepted. PATTON, *op. cit. supra* note 9, § 129 at notecall 222, and § 45. A number of the states that give priority to the estoppel grantee have a tract recording system, and in those the ordinary meaning of a title chain does not, of course, exist. *Id.* § 44, n. 67.

tice as to give priority to the title of one who negligently failed to examine the records before purchasing of a grantor having no title, or who purchased at the risk that his grantor might thereafter acquire title, over that of a subsequent purchaser in good faith and in reliance upon the title as it appeared of record. *'The whole system of registering deeds of land would become of no value if a purchaser could not rely upon the records as he finds them.'*"¹⁹⁸

Mr. Rawle said of the doctrine that its

"result . . ., when applied to the case of a *bona fide* purchaser without notice, cannot harmonize with the spirit of the registry acts in force in this country, and leads to the position, *which certainly cannot be considered as tenable*, that a purchaser must search the registry of deeds, not only from the time when his grantor acquired title, but . . . before that time, in order to discover whether he had previously made any conveyance (though without title) to any other person; . . . and if the property has passed through several hands, a similar search must be made with respect to every one through whose hands the title has thus passed." ¹⁹⁹

Finally, the Supreme Court of Rhode Island, referring to the views of the American annotators of Smith's Leading Cases,²⁰⁰ and of Mr. Rawle, has said:

"The argument in support of these views is certainly very strong, if not theoretically unanswerable; but the doctrine impugned has been so often and so fully recognized in the courts, and repeated in the text-books, that we feel bound, out of regard for the security of titles, to follow the precedents. . . . And it may be remarked that the doctrine, however much it may be at variance with the spirit, does not violate the letter of the recording acts . . . we think a statute is called for in view of this state of the law, in order to carry into full effect the policy of our recording act, and to prevent its operating, in cases of this kind, as a snare rather than as a protection to purchasers." ²⁰¹

198. *Wheeler v. Young*, 76 Conn. 44, 49, 55 Atl. 670, 672 (1903). (Italics supplied.) See also RAWLE, *op. cit. supra* note 174, at § 259 *et seq.*, and 2 TIFFANY, *op. cit. supra* note 17, at 2130-3.

199. RAWLE, *op. cit. supra* note 174, at 403-4. Such a search is also recognized as a "very serious burden" in 2 TIFFANY, *op. cit. supra* note 17, at 2132.

200. *Hare & Wallace*, *loc. cit. supra* note 34, at 211-2.

201. *McCusker v. McEvey*, 9 R. I. 528, 532-3 (1870).