LIMITS OF RECORD SEARCH AND THEREFORE OF NOTICE

PART III *

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V

We come now to a situation that tests as does no other the fundamental principles of the recording system. Ostensible conveyances made by one who has never been record owner, and conveyances ostensibly made by one who has held but has already parted with record ownership, have already been discussed. In the present section of this article the problem for consideration (*Situation E* of the six abnormal situations earlier listed) is that of multiple conveyances by a record owner while he remains such.³⁶³ A, who is such an owner, conveys to B by deed that is not recorded at all, properly or improperly. A then makes an ostensible second conveyance to C, who takes with actual or inquiry notice of B's deed, but records. (It matters not whether in a pure-notice or in a notice-race jurisdiction.) Then C gives a deed to D, but only after B has recorded his deed. The question is whether a purchase in good faith by D is barred by B's recording. That is, is D thereby given record notice of B's deed, so that he must search for it *no matter how soon or how tardily it be recorded after A has parted with the record title by the recording of C's deed?* If not so, can he be given inquiry notice by it if he accidentally discovers it or otherwise receives information of its existence?

Since by hypothesis B's deed is recorded before D's deed is taken, the latter can never satisfy a requirement of prior recording, and so D must, in a notice-race jurisdiction, always fail. As earlier pointed out, a mere decision in B's favor when the fact appears that he recorded before D can, therefore, never in such a jurisdiction carry by implication a holding on the issue of D's good or bad faith.³⁶⁴ On the other hand, a court in a notice-race jurisdiction, if it wishes to show that D fails for two reasons, may perfectly well pass on the issue of good faith

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363. See p. 167 *supra*.

364. See p. 162 *supra*.

explicitly. It will later appear that a majority of the decisions on this problem have come from notice-race jurisdictions, and it must be remembered that such decisions, unless expressly rested on one or the other basis (notice or prior recording) are of little value on our problem, which is solely one of notice.

It is obvious that, since B's deed is unrecorded, C is not called upon to satisfy the condition of search; but it is equally obvious that, having knowledge of B's deed, he cannot satisfy the equitable requisite of good faith. The distinction between these two matters becomes important in subsequent discussion.

The problem presented is crucial because, both deeds being given within but one recorded outside the period of record ownership, a solution of it requires a delimitation of the field of notice and search, and likewise requires the attribution of some definite meaning to the phrase "chain of title." Since consideration of these issues is inescapable, conclusions respecting them are necessarily implicit in every decision in a "notice" (i. e. pure-notice) jurisdiction upon the problem under examination. There are, however, very few discussions or even explicit references in judicial opinions to the basic issues involved, and those few have been of the most summary nature. To say, as everybody agrees, that no record notice is given by, and no search required for, instruments "outside the chain under which a purchaser or incumbrancer claims title or lien" is helpful only to the extent of agreement as to what is "the chain." As already indicated, in normal cases under the recording acts there *seems* to be involved a simple chain of title deeds; but, as regards search and notice, the chain may be conceived of as one of a series of "fields" which represent the time and labor required to examine the records in successive periods of record ownership.

In accord with the metaphor that title "descends," the normal case can be visualized by imagining a vertical column of rectangles, one below the other, the upper and lower sides of each representing the moments, respectively, of receiving and parting with title, and its area representing, as just suggested, the labor necessary to search for *deeds of the then record owner* during that period. Some quantitative conception of this labor is essential. It has, however, already been made clear that what is proposed is not a comparison of the labor actually involved in individual cases: they vary infinitely, and the cure would be worse than the disease.³⁶⁵ Nothing more is necessary than a com-

365. See p. 166 *supra*. The search would never, of course, be precisely the same even for two holdings of identical duration, since the number of deeds and their individual characteristics would vary.

parative estimate of a search in each record period for all deeds possibly given by the then owner as against a search for all deeds possibly given both by him and all earlier owners. The test is rather qualitative than in any strict sense quantitative.³⁶⁶ A search of the former type is that normally sufficient—and, seemingly, that which alone is everywhere and always made.³⁶⁷ A search of the latter type is that theoretically required by those decisions on the problem now under consideration which are criticized in the following pages.

If one should seek to depict, by additions to such a diagram as above suggested, the peculiar circumstance of the instant problem, the area of search in the record-period of each owner must be increased to allow for the possible recording in that period of his predecessors' deeds; and since this burden would progressively increase, the result might be visualized as one great triangular field of search, steadily broadening downward. The matter is perhaps better illustrated if one imagines the original column of rectangular fields to be placed horizontally and then bent into a descending stairway. The backcasing of each step then indicates the moment of title transfer; the treads are the successive fields of search *in the restricted sense* above indicated. But when each purchaser searches for deeds given by any owner up the stairway and recorded in the holding period of any lower owner (outside, but within the length, of any lower tread), down to the moment when the searcher takes his own deed, it is clear that the field of search becomes the entire triangular space below the stairway, which is the hypotenuse thereof.

These attempts to objectify the situation may or may not be useful. Decisions in various recording situations seem to indicate an agreement that variations in the extent of time intervals will not affect the rigid application of an established recording principle. This is strikingly illustrated in the general rule, statutory or judicial, that priorities will be graduated by the hour and minute when instruments are filed for recording.³⁶⁸ If, then, D must search at all for a deed from a former record owner (A) in his chain of title that was given (to B) before, but recorded after, the recording of another deed (to C) by which A had seemingly first parted with title, there is *no limit* to the search that must be made for such deeds; for D may be any prospective purchaser subsequent to an unrecorded deed given by any record owner of the past. Each purchaser must search for *all* such deeds

366. *Ibid.*

367. See pp. 415, 432 *infra*.

368. For example, *cf.* *Sigourney v. Larned*, 10 Pick. 72 (Mass. 1830); *Higgins v. Dennis*, 104 Iowa 605, 74 N. W. 9 (1898); *Wheeler v. Young*, 76 Conn. 44, 55 Atl. 670 (1903). See notes 493, 533 *infra*.

possibly recorded up to the moment when he takes his own.³⁶⁹ It is therefore manifest, first, that *under this view nothing resembling a "chain" of title can exist*; secondly, that search by his predecessors lessens not at all the search required of a later prospective purchaser, but that on the contrary *the burden of search covers at each title transfer the entire preceding history of the title* in the most literal sense, and constantly increases. The questions are whether such a search requirement is reasonable and whether it can be reconciled with "the spirit" of the recording acts.

The problem has given rise to two lines of authority. That is, the factual problem stated at the outset of this section has done so—the question just stated; if the courts that made the earliest decisions had been conscious of *that* issue there could hardly have arisen a division of opinion on the problem. The implications and effects of the two views may be stated in general terms (though not of course in phraseology common in the cases, for the opinions are both piecemeal and inarticulate).

First view. (1) The subsequent "purchasers"³⁷⁰ referred to by writers on the recording acts, and sometimes so referred to in the statutes, are not limited in number or time. They are all persons who take ostensible conveyances subsequently to the giving of the prior actual conveyance whose divestment or non-divestment is the question for decision. D was such a would-be purchaser. (2) The chain of title is that of all deeds given by successive record owners. Every such deed, if recorded, gives record notice to all prospective purchasers. Both of the deeds here in question, that to B and that to C (under which last D would claim), satisfy that requirement—though notice to anybody by C's is not here in question (and there should be no record notice,

369. Leonard Jones remarked (and the remark has been preserved down into the 8th edition of his work) that Hare and Wallace in their Notes disapproved of the New York decisions on the instant problem "because they make it requisite to search for conveyances from two persons during the same period." 1 JONES, MORTGAGES OF REAL PROPERTY (8th ed. 1928) § 672 n. 38, (6th ed. 1904) § 540 n. 23.

It is true that Hare and Wallace used those words. Hare & Wallace, 2 WHITE & TUDOR, LEADING CASES IN EQUITY (4th Am. ed. 1877) 212. But on the same page they indicated that search was required "against everyone who has at any time held the estate." Judge Jones also made plain through the years that "the limit of inquiry necessary in any case," before record notice is given, "is that required by the use of reasonable diligence." 1 JONES, *op cit. supra* (5th ed. 1894) § 580, (6th ed. 1904) § 580. It seems fair to assume that he never seriously considered the fact that not "two" but an indefinite number of persons are involved, nor the conflict between the two views stated.

370. The impropriety of the plural is obvious. There can be only one such purchaser—he who acquires title by satisfying the statutory prerequisites for divestment of the first grantee. Cf. pp. 169, 180 *supra*. It is, however, inveterate usage to refer to all would-be purchasers, held barred from taking title because of non-compliance with those prerequisites, as purchasers. Cf. notes 372 *infra* and 65 *supra*. The usage is inexpugnable; nevertheless it seems likely that here, as in other fields of law, it lessens the clarity with which the question is presented whether a particular claimant shall acquire and become a purchaser.

since it is a nullity ³⁷¹); therefore B's deed, when recorded, gives notice to D and bars a purchase in good faith.

Second view. (1) As respects the first point above, it is fully conceded.³⁷² (2) As respects the second point, the definition of title-chain is not accepted, and the conclusion that D has record notice is likewise rejected. It is rejected, first, on the ground repeatedly insisted upon in the foregoing discussion ³⁷³ that "nothing should operate as notice, which does not indicate"—or need not *necessarily* lead by reasonable inquiry to knowledge of—"the existence of a better right than that which the vendor [of the intending purchaser] apparently has, and professes to be able to convey." ³⁷⁴ The view that D has record notice of B's deed is rejected, secondly, on the ground that the burden of search required under that view is unreasonable, and not to be considered as within the intent of the statutes.³⁷⁵

An immediate consequence of adoption of the second view would be that each prospective purchaser would search the period of record holding by his immediate grantor for the latter's deeds, but for no others; and he would rely upon his predecessors similarly to search the record fields of their respective grantors. And this, in fact, is presumably all that actual purchasers do, or that professional abstractors do for them, in any part of the country.

Before proceeding to consider authorities on the problem stated, it is desirable to refer to two subsidiary matters. One relates to inquiry notice in its relations to the problem before us. The other has to do with the circumstances that could enter into the question of D's good faith. They have been so run together in judicial opinions and textbooks that they cannot be completely separated.

371. See pp. 169, 177 *supra*. Nor should there be inquiry notice. See pp. 279, 286 *et seq.*, 297 *supra*.

372. Chief Justice Dixon rightly insisted that the local statute must be literally applied. Said he: "The operation of the statute . . . is not limited and does not stop or cease with the first, second, third, or any specified number of *first* recorded subsequent conveyances to subsequent purchasers, or from one such purchaser to another, and consequently the right of the first purchaser to save himself by the recording of his deed continues, or may continue after any number of subsequent conveyances have been recorded; for, if the facts exist, that such subsequent purchasers, one and all, bought either not in good faith or not for a valuable consideration, then his prior deed will hold, and the title conveyed by it be preferred." *Fallass v. Pierce*, 30 Wis. 443, 475 (1872). However, the Chief Justice's contention that the statutory word "purchaser" *must* be literally applied was originally another arguable point. Many courts, without the aid of statutes, did not read "purchaser" literally; they made it include creditors.

373. See pp. 130-1, 260, 271, 293, 304 *supra*.

374. The quotation is from the notes of Hare & Wallace, *loc. cit. supra* note 369, at 41.

375. The question whether search in every case should go back beyond the date of recording to that of the execution (and presumptive delivery) of the recorded instrument has already been casually mentioned. See note 172 *supra*. Such a requirement is wholly logical; and also reasonable, because it is definitely limited and falls within the period of record ownership.

It is everywhere law today that although *mala fides* is a personal disability that bars one from taking title, *bona fides* acts under the recording acts *in rem* upon the title, clearing it of all incumbrances; likewise that although one be barred by notice from taking title for himself, he has power by giving a deed to a *bona fide* grantee to divest for the latter's benefit an earlier legal title.³⁷⁶ When perfect title is taken by D it is because he is or C was a purchaser in good faith. But the state of C's mind is as immaterial to the determination of D's good faith as is (necessarily) that of D's in determining C's; D's rights, when he purchases in good faith can be neither increased nor diminished by inquiries respecting C's good or bad faith. True, D's own bad faith might result from his receiving information (from a proper source) that when C took his deed he had knowledge of an earlier unrecorded deed to B, because proof of this is necessarily proof of D's own knowledge or actual notice of the existence of such deed. It would, however, be his own knowledge of that deed, or notice which would lead him to knowledge thereof, that would bar him from taking title—if anything could bar him.³⁷⁷ But assume that for any *other* reason he fails to qualify as a purchaser in good faith, and then inquires regarding the good or bad faith with which C acted in order to learn whether he can be saved by the merits of his grantor. In this case the inquiry has nothing to do with notice to D of a *hostile title*; it is therefore not "inquiry notice" in the true sense, but merely an investigation as to safety under an equitable principle.

In order completely to dispose of inquiry notice in the present connection, assume again that D is either led by proper information to, or accidentally discovers, B's deed. What, then, can and does he discover? *Nothing else than a legal problem—that which is under examination.* Once more: *nothing is notice unless reasonable inquiry must lead from it to the fact, apparent to a reasonable purchaser, that there exists a hostile title earlier and presumably superior to that which his vendor offers.* The posited situation is one in which, once B's deed is discovered, notice should play no part. In earlier pages it has been pointed out that any recourse to inquiry notice, in even the simplest cases, either assumes that the subsequent purchaser has some knowledge of law or involves treating him as though he had, and had acted reasonably upon such knowledge. Chief Justice Dixon, in a case frequently referred to herein, carried this assumption to an extreme in applying it as follows. "Now, the reason," he said, "why the pur-

376. 3 POMEROY, *EQUITABLE JURISPRUDENCE* (5th ed. 1941) §754; PATTON, *LAND TITLES* (1938) §15; 2 TIFFANY, *THE LAW OF REAL PROPERTY* (2d ed. 1920) §575; 2 DEVLIN, *REAL PROPERTY AND DEEDS* (3d ed. 1911) §747.

377. See note 401 *infra*.

chaser from C . . . *is bound to take notice of B's deed*, or of the fact that the true title is or may be in B, is that such purchaser in *looking upon the statute* sees that *B's prior and paramount title* at common law, is not to be divested or his deed avoided, except upon the happening of three distinct events or contingencies, the absence of either of which will save the title of B, or prove fatal to that claimed by C, or which may be acquired by a purchaser from him;"—namely, C's payment of value, good faith, and priority in recording.³⁷⁸ Now this supposed "reason" is for two actual reasons obviously worthless. In the first place it assumes, by implication, actual knowledge of B's prior and paramount title, although the reason is offered as one for holding D to have *constructive* knowledge, only, thereof; but of this inconsistency—still more plainly expressed in another passage—more will be said elsewhere. In the second place, it likewise assumes actual knowledge of the statute, although the true question is whether we should impute to D a knowledge of its existence, a correct understanding of it, and a duty to act upon it. To so hold would be both a manifest absurdity and an injustice. To be sure, the fate of the purchaser will depend upon a court's retrospective application of the law to the situation in which the purchaser stood. But surely he should not be held to be defeated *by his own bad faith* because he does not know enough law to realize that he should investigate the legal problem which that situation presented, or because, if he made such investigation, he did not reach the conclusion which the court later reaches. It may be answered that the Chief Justice was merely explaining why no injustice is done to the subsequent purchaser by the rule stated (although in fact there is); but the reply is that even were it necessary to excuse the law it cannot be done by stating what a purchaser should read in the statute book, or understand therefrom, or do in consequence. The only possible greater absurdity would lie in suggesting that the supposed reading should "put him on inquiry" respecting its probable consequences.

Assume, then, that B's deed has come to D's attention. Certainly one cannot say, as in simple cases one might, that D discovers an older deed, therefore one almost certainly superior. *He sees that his vendor's deed is junior in date but senior of record to that of B.* The facts call for prediction of judicial action; and in truth the variant decisions rendered upon it might suggest to a lawyer that the problem is insoluble. To attribute bad faith to D merely because he is confronted with such a problem, or takes a risk in not then desisting from his intended purchase, would be both fatuous and unfair. Under the fundamental principle stated (and italicized) in the preceding paragraph notice cannot

378. *Fallass v. Pierce*, 30 Wis. 443, 473-4 (1872). (Italics supplied.)

properly exist in such a situation. As regards any cause for inquiry in addition to or beyond the legal problem in question, there cannot possibly be any. The mere *deed* can put D upon no further inquiry—in particular, as to C's good or bad faith in purchasing. Only legal knowledge could do that; there is nothing in the deed to do it. The situation is in that respect similar to various other matters of fact already referred to (mental competence, delivery, etc.)³⁷⁹ which may prove fatal to a purchaser but as to which nothing can put him upon inquiry. However, it is hardly necessary to say that inquiry language can be found in the cases.³⁸⁰

Let us now continue, assuming the independence of D's and C's good faith.

C's notice is likewise wholly independent of his recording or not recording; and the two are not only independent as respects C but also as respects any other persons whose rights C's could affect. As earlier stated, the prior recording required of a subsequent purchaser in a notice-race jurisdiction is merely one in addition to the requirement of good faith; therefore independent of and incapable of affecting the latter.³⁸¹ Whether either C or D has first recorded has no more to do with his own good or bad faith than with the good or bad faith of the other. If C has no title, it makes no difference whether this is due to his lack of one or the other or of both of the requisites therefor as respects his power to divest B in favor of D if the latter be a *bona fide* purchaser.³⁸² If, on the other hand, D is not himself a purchaser in good faith and must be saved if at all by the merits of his grantor as the holder of a perfect title, it is true that C will not hold such in a notice-race jurisdiction unless he has both recorded before B and taken without notice of B's rights. But it must again be repeated that those are two wholly distinct and independent facts. The question as to notice is the same in notice-race and in pure-notice jurisdictions. In a notice-

379. See p. 264 *supra*.

380. For example: "The record of respondent's [B's] deed was sufficient to put the mortgagees [D] upon inquiry as to whether Mahany [C] was a purchaser in good faith, and for a valuable consideration." *Parish v. Mahany*, 10 S. D. 276, 285, 73 N. W. 97, 99 (1897).

381. See pp. 161-2 *supra*.

382. "There is but one advantage he [C] can gain by recording his conveyance in advance of the others [other's, B's], and that is to be able to pass a good title to one [D] purchasing without notice of the former conveyance. And even such innocent purchaser, in order to obtain the benefit of his position as such, must file his conveyance for record in advance of the filing of that of the first grantee." *WADE, A TREATISE ON NOTICE* (2d ed. 1886) § 231a. This assumes a race jurisdiction. In a notice state, of course the *mala fide* purchaser need not record in order to be able to divest the prior non-recording grantee in favor of a subsequent *bona fide* purchaser. There would seem to be no reason why he must do so in a race jurisdiction (for if admittedly he had no title, how can it matter that he partly satisfies the prerequisites for gaining it?), and there seems to be no authority for such a requirement. But of course the grantee must satisfy the requirements of the jurisdiction involved.

race jurisdiction the fact that C has satisfied the requirement of first recording can neither increase nor diminish the likelihood that he has satisfied the other requirement of *bona fides*. However, let us recur to the fundamental requirement as to all notice as stated in the *Notes* of Hare and Wallace: "Nothing should give notice which does not indicate the existence of a better right than that which the vendor apparently has," and offers to the purchaser. To the words already quoted they added this statement: "This cannot be said of a deed which, though prior in date, is subsequent as regards the time of registry. One who buys under these circumstances should not be affected by a latent fact"—by which, it is understood, they referred to C's notice or lack of notice—"which is not brought to his knowledge"³⁸³—that is, either by the deed or by information off the record. (In which last case, as above stated, he would be merely led indirectly to the record, with no difference in the result.)

The first of these propositions supports the view that no record notice to a purchaser, and hence no attribution to him of bad faith, can be based upon his mere confrontation by a recording problem. The second supports the view that the mere recorded deed cannot put him upon inquiry respecting anything beyond or outside that problem. The authors were discussing cases from a notice-race jurisdiction, but the principles applicable to the problem are not so limited; they apply everywhere save in pure-race jurisdictions (of which there are only two in the country). Exactly the same facts might arise in a pure-notice state—as in fact they did in one of the most important cases dealing with our problem.³⁸⁴ If, however, in a jurisdiction of the latter type C's deed should remain unrecorded after the recording of B's, D would, of course, still be saved if C had taken his deed while B's was unrecorded and without actual or inquiry notice thereof; for after B's divestment in favor of C, the former's recorded "deed" would have no conveyancing content, could no longer affect the title in law or equity, and could give no record notice to D. Whether D took from C before or after B's recording could make no difference. And, for the same reason, if in a notice-race jurisdiction B records his deed before C's, the latter's deed cannot, after it is recorded, give any notice to a subsequent purchaser from B. But in none of these situations could there be anything in

383. Hare & Wallace, *loc. cit. supra* note 369, at 41.

384. *Morse v. Curtis*, 140 Mass. 112, 2 N. E. 929 (1885). In that case it is said: "It was held in *Connecticut v. Bradish* [14 Mass. 296 (1817)], that such record"—of B's deed—"was evidence of actual notice"—thereof, by D—"but was not of itself enough to show actual notice, and to charge the assignee of the second deed [D] with a fraud upon the holder [B] of the first unrecorded deed." *Id.* at 114, 2 N. E. at 931. The same view was expressed in *Carter v. Champion*, 8 Conn. *549, *556 (1831), but there was no suggestion of any presumption of such notice. See text following notecall 311 *supra*.

either party's mere deed (whether valid or a nullity, discovered independently or as a result of information off the record, whensoever recorded, and in either a pure-notice or a notice-race jurisdiction) to put D on inquiry as to anything except the legal problem that the facts present.

We may now examine various passages from textbooks and judicial opinions in the light of the preceding consideration of inquiry notice, good faith, and the distinction between notice-race and pure-notice jurisdictions.

Mr. Patton opens his discussion of our problem with the question

- (1) "whether *the record of an earlier deed* [to B] from a common grantor after the record of a deed [to C] upon which a vendor's [C's] title is based places a purchaser [D] upon *inquiry as to whether the later grantee [C] purchased with knowledge*
- (2) *of the earlier conveyance . . .* [that is,] is a purchaser from C *on notice* of any rights B may have against C? Though some
- (3) courts hold that he is *thus placed upon inquiry and charged with notice* of any facts which the inquiry would reveal, other
- (4) courts hold that a purchaser is under no obligation to *search the records* for conveyances from any particular grantor recorded subsequent to that from which the purchaser's vendor derails title; that any such subsequently recorded conveyance is outside the chain of title and does not afford *constructive notice*." ³⁸⁵

No inclusion was made in the general statement of the problem under consideration,³⁸⁶ and none is made by Mr. Patton in the above statement of it, *of any actual notice given by seeing B's deed or given by receiving information of it off the record* that could put C "on inquiry" in the technical sense respecting either B's rights or C's rights. The problem is one of the effect of the *recording* of B's deed, solely. The language of the foregoing quotation, and the propositions explicit and implicit therein, are open to so many objections that it is difficult to disentangle them sufficiently to state them clearly.

As regards question (1), the mere "record of an earlier deed" can never have the effect of calling for any investigation unless (and this would beg the question) it be assumed to be giving constructive notice, and although in that case one who would avoid a bad investment must search the record he is never said to be "put upon inquiry" by the recording.³⁸⁷ The mere recording could never call, moreover, for the investigation of C's faith. That "inquiry" is potentially called for in every case when a subsequent purchaser fails on his own demerits

385. PATTON, LAND TITLES (1938) § 46. (Italics supplied.)

386. See p. 391 *supra*.

387. See p. 264 *supra*.

and might find salvation through the merits of his vendor. It has, therefore, *no particular* relevance to the special problem under discussion, notwithstanding that Leonard Jones and others likewise refer to it as though it had.³⁸⁸ In fact, for three reasons it has *no relevance whatever* to the problem. The first is that the *issue* in that problem is whether D has constructive notice of B's deed, so that he must fail on his own demerits; whereas the "inquiry" referred to *assumes* that he so fails and must turn to his vendor's merits for relief. The second reason is that when a purchaser is "put on inquiry," in the technical and proper sense of that phrase, the nature and performance of the inquiry serve as a basis for *judicially* determining whether *he* is to be charged with, or relieved from a charge of, bad faith; whereas by the "inquiry" here indicated the *purchaser* is to determine, as a fact, not merely what was *another* man's past knowledge of B's deed, but also (though the quoted passage does not so indicate) the effect of that knowledge upon C's legal status. This last, as has been seen,³⁸⁹ is not just to the purchaser. The third reason is implied in the second: that the problem is one as to D's good faith, and any inquiry as to C's is irrelevant.

As regards question (2), this is quite correct in itself but is for two reasons misleading in connection with (1). The first is that it purports merely to restate the latter, whereas this related only to C's good faith and the second question relates to D's. The second is that "notice," in the second question, is broad enough to cover constructive notice, to which there is no reference whatever in the first question.

In statement (3) the word "thus" carries the erroneous implication that the mere recording of B's deed can put D upon inquiry. Presumably, too, the subject of the inquiry is to be that specified under (1); therefore it is totally irrelevant to the issue. Also, although D's fate may ultimately depend, simply as a rule of law, upon C's good or bad faith, it is preposterous to say that bad faith defeats him because he is "charged with notice" of a legal rule with respect to a matter that has nothing to do with his own good faith (or with the words "notice" and "inquiry" as properly used). But if one goes outside the facts in our problem as set and assumes that D is put on notice of B's deed by seeing it, or by receiving such information regarding it as would truly put him upon notice, his inquiry can lead him only to the facts of the problem under discussion. Here again his fate will ultimately depend on a judicial pronouncement upon that problem, but to put his failure,

388. D "is chargeable with constructive notice from such record [of B's deed], and is put upon inquiry as to whether his grantor [C] took a good title." 1 JONES, *op. cit.* *supra* note 369, § 673 at 969.

389. See pp. 130-1, 271 *supra*.

if he fails, upon his own "bad faith" unless he correctly predicts the judgment a court will later render (for the question if settled at all, is settled in very few states and with no more than one or two decisions in any one) is the extremity of unreasonableness.

In statement (4) we reach the true and single issue presented in the problem, i. e. that of constructive notice, with the practical problems of chain-of-title and limits of search therewith connected.

It is hardly necessary to say that one would not find in our best work on the recording system, the merits of which have been several times recognized in this article,³⁹⁰ such confusion of terms and theory if judicial opinions did not present a like confusion. Mr. Patton's statements are a fair example of the obscurity that covers the concepts of notice and inquiry in the reports, and a fair reflection of judicial reasoning.

As respects the unnecessary coupling of the issue of D's good faith with the fact of C's past good or bad faith, the explanation is that this practice has been handed down from old cases.³⁹¹ The opinion rendered in *Van Rensselaer v. Clark*,³⁹² a case decided in New York in 1836, illustrates this and other later confusions above pointed out; although, as regards the coupling of the two matters specified, both were in fact issues in that case. It is to be noted that in an earlier case, *Jackson v. Post*,³⁹³ it had appeared that not only C but D had had actual notice of B's earlier deed.³⁹⁴ On the appeal of the latter case the court said:

"That evidence is not in this case; but enough appears to put the subsequent purchasers upon inquiry. . . . It is a conceded fact . . . that [C] had notice of the present plaintiff's [B's] title. . . . It may be said, however, that the defendant had no notice of [B's] deed except the record, and that the same record informed him that . . . [C's] deed was first recorded, and therefore took precedence.³⁹⁵ It is true that [C's] deed was first re-

390. See pp. 159, 277 *supra*.

391. In the early cases courts were still dealing with the questions whether a statutory requirement of prior recording by a subsequent purchaser was a caution directed to his own protection in the future or a prerequisite to his priority over an earlier unrecorded conveyance; whether a prior mortgage, although recorded, must be subordinated to a subsequent unconditional conveyance; what effect must be given in a race jurisdiction to a race-statute regulating mortgages in a contest between security and absolute conveyances; whether the assignment of a mortgage is the assignment of a chose in action or the conveyance of an interest in land; whether creditors should be treated as purchasers under a "subsequent purchaser" statute; whether, under a race-statute respecting mortgages, a prior unrecorded mortgage had priority over a later judgment docketed before recording of the mortgage; etc.

392. 17 Wend. 25 (N. Y. 1837).

393. *Jackson ex d. Merrick v. Post*, 9 Cow. 120 (N. Y. 1828).

394. *Id.* at 121.

395. In the original trial of the case, the trial court had charged to this effect—*id.* at 122; the appellate court had reversed for this reason. The same view was unsuccessfully urged by counsel when the case again came before the Supreme Court after a retrial—15 Wend. 588, 591 (1836). Cf. text at notecall 380 *supra*.

corded, but it is also true that [B's] *deed was recorded before [C] conveyed the premises*. The act requiring deeds to be recorded does not say (as the act requiring mortgages to be registered does)³⁹⁶ that the deed first recorded shall have preference, but that the unrecorded deed shall be considered void as against a subsequent *bona fide* purchaser. When, therefore, the present defendant [D] *saw by the record* that [B's] date was anterior in date to [C's], he was bound to inquire whether [C] was a *bona fide* purchaser. . . . If the defendant had made such inquiry, he could not have failed to have ascertained that . . . [C] had in fact"—because of his actual notice—"no title as against [B] the present plaintiff. . . . And surely *the record of [B's] deed was sufficient to make it the duty of all subsequent purchasers to inquire as to the rights of [B]*. The fact that his deed was recorded subsequent to [C's] conveyed an intimation that he intended to assert his title"³⁹⁷—that is, notwithstanding its later record, and therefore presumably under a contention that C lacked good faith.

The single issue before the court was whether D had constructive notice of B's deed. It is obvious, however, that the court was set upon subordinating D by resort to inquiry notice. *Record notice was disposed of by simply five times assuming its existence*. In the second and fourth italicized passages it is plainly assumed; in the third, only faintly. It is a fourth time assumed in the proposition that D was "bound to inquire" whether C was a *bona fide* purchaser, which is wholly immaterial except on an assumption that D was not, himself, a purchaser in good faith. Finally, it is a fifth time assumed in saying that the record of B's deed "was sufficient to make it the duty" of D "to inquire as to the rights of B." There was no "duty" unless the instrument was giving constructive notice, since actual knowledge or actual notice were alike confessedly to be taken as excluded. The idea that D "saw by the record" B's deed is a confusion which, unfortunately, has had pernicious repetition in later opinions and in textbooks.³⁹⁸ If D had constructive notice, then of course, legally speaking, he "saw" the record, knew its content and legal effect, and ignored it at his peril. If it was not giving constructive notice, he "saw" nothing.

There was a special reason why the court resorted to inquiry notice in order to prevent D from succeeding—namely, that it knew, off the record, of his actual knowledge. This reason has been lacking in later cases where resort to inquiry notice has been a mere inexcusable eva-

396. This was changed in 1828. See note 391 *supra*.

397. *Jackson ex d. Merrick v. Post*, 15 Wend. 588, 594-5 (N. Y. 1836). (Italics supplied.) D was in fact a subsequent purchaser at four removes from the common grantor, A.

398. See text at notecall 556 *infra*.

sion of the question whether D has constructive notice. Such cases employ an illogical means to accomplish by indirection what the declaration of constructive notice would directly accomplish. Moreover, when inquiry notice has been relied upon in these cases—and this is their cardinal fault—the courts have overlooked the fact that inquiry can reveal nothing save the existence of a difficult legal problem. *Jackson ex d. Merrick v. Post* required a purchaser to predict accurately the judicial solution of that problem although it had never been passed upon in the jurisdiction. The court, doubtless, was hesitant to declare outright that record notice existed. But whatever its words, the decision, given the issue, could have only that meaning. The next year, therefore, the New York court declared in what is recognized as the leading case of that jurisdiction: “In *Jackson ex d. Merrick v. Post* . . . it was held that the registry of a deed is notice”—meaning, as the text shows, constructive notice—“. . . even to a purchaser standing a second or farther remove from the common source of title.” The same case held that, having such notice, the purchaser takes at the peril of his immediate grantor’s title being impeached by actual notice, though his deed was recorded previous to the adverse one.³⁹⁹ Now, in the case quoted it was contended that, contrary to the decision in the *Post* case, D was outside the statutory provisions because these related only to conveyances from the same immediate grantor, not to remoter parties; and that, anyway, since the act under which the case arose referred only to subsequent purchasers for value (not, like the general registry act, to subsequent *bona fide* purchasers for value), no *bona fides* was required of C to perfect his title, and therefore D’s. It was also contended for D that, in a notice-race jurisdiction such as New York, C’s prior recording alone gave priority over B.⁴⁰⁰ All these contentions were ruled upon adversely. It thus appears that in these old cases the issues of C’s faith and of D’s, and the question whether D must perhaps ultimately rely on C’s merit were all actually before the court. But there has long been no reason to commingle such wholly independent matters, as is still done in judicial opinions and in textbooks.⁴⁰¹

399. *Van Rensselaer v. Clark*, 17 Wend. 25 (N. Y. 1837).

400. *Id.* at 26, 28. The arguments also involved the questions whether a distinction was to be made between actions at law (the instant case was ejectment) and suits in equity, the doctrine of notice being confined to the latter, and whether even in equity anything less than actual fraud could prejudice a subsequent purchaser. *Ibid.*

401. Hare and Wallace say, for example: “A purchaser with actual or constructive notice [D] cannot stand on the validity of the title as deduced of record if the vendor [C] bought with notice, although this was unknown to the purchaser, and he had every reason to rely on the good faith of his immediate vendor [C]. It has been held to follow that if the same premises are conveyed successively to different persons, and the first conveyance is registered, although not until after the registration of the second, a subsequent purchaser from the second grantee will run the risk of his good

Judge Cowen remarked in his opinion in *Van Rensselaer v. Clark*, *supra*: "But it is said that [D] bought of [C] on the faith of finding that *his deed* was first recorded, and that he shall not be holden to look farther, and run the hazard of actual notice to [C]." ⁴⁰² Such an argument might well, at that early day, have rested on more than one idea. ⁴⁰³ It seems most likely, in view of the doubt whether prior recording alone sufficed in a notice-race jurisdiction to give priority, that the underlying idea was that expressed in the passage above quoted from Hare and Wallace respecting notice to D of B's record in such a jurisdiction. ⁴⁰⁴ It has, however, also been pointed out that the view those writers expressed is equally sound as respects pure-notice jurisdictions. It is based on the limitation of a purchaser's chain of title, and of the consequent necessity of search.

In preceding pages an attempt has been made to clarify the requirements of good faith in D by disentangling them from irrelevant matters with which they happened to be coupled in early cases. As a last example of these perplexities it seems well to discuss here a Vermont case of 1853 ⁴⁰⁵ which is difficult to interpret because of the obscurity of the opinion but which under no acceptable interpretation seems in fact to be relevant to the problem under discussion, although always cited as pertinent.

In this case A, after giving to B a *mortgage* that was not promptly recorded, made an ostensibly *absolute* conveyance to C, who had knowledge of the mortgage and could therefore take only the equity of redemption, and who himself gave back purchase money notes and a mortgage. These instruments were recorded, and thereafter the B mortgage likewise. C's notes and mortgage were later assigned by A to X, and still later C *quitclaimed* "the premises" to D. The court held

faith, and may be postponed by proof that he knew or ought to have known of the prior grant." Hare and Wallace, *loc. cit. supra* note 369 at 40. (Italics supplied.) Now, of course, the second proposition does not follow consequentially from the first. They both illustrate the principle that if D fails on his own merits he may still be saved by C if the latter was a *bona fide* purchaser, and will otherwise be lost. But the failure of D on his own merits, which in the first proposition is explicitly stated, is in the second simply assumed. The question in that situation is whether B's recording (actual notice by D being admittedly absent) *does* bar *bona fides* in D. Cf. text at notecall 370 *supra*.

402. 17 Wend. 25, 31 (N. Y. 1837).

403. Particularly (aside from that stated in the text) the idea might have been that since C had done all that the statute required in the matter of search (although in fact nothing, B's deed being unrecorded), and since his *mala fides* was a purely personal disability, his record title should be treated as perfect. As a matter of recording policy the view would have had merit, but it was too late for its recognition; C had notice, was not a *bona fide* purchaser, and the view suggested would have made him, substantially, precisely that.

404. See pp. 396, 399 *supra*. Cf. Trull v. Bigelow, 16 Mass. 406, 418 (1820) (a pure notice jurisdiction); Clark v. Sawyer, 48 Cal. 133, 142 (1874) (a notice-race jurisdiction); comments on Day v. Clark, 25 Vt. 397, 403-4 (1853), as to which see text just below, in Ely v. Wilcox, 20 Wis. 523, 530 (1866) (a notice-race jurisdiction).

405. Day v. Clark, 25 Vt. 397 (1853).

that D took clear of the B mortgage. The reasons were stated as follows:

- (1) "Unless [D] is to be affected with notice, he has a paramount title"—a title paramount—"to the [B] mortgage,
- (2) *and we do not see that he can be.* When the [B] deed was recorded, it is true, that was notice to all subsequent
- (3) claimants, that there was such a mortgage; but the record of that mortgage was no notice to [D], that when [C] bought of [A], they⁴⁰⁶ had notice of the [B] mortgage; and without such notice [to D], the title to [D] derived from [C] must override the [B] mortgage.
- (4) "It has long been settled, that if a fraudulent conveyance is made,"—here, by A to C—"and the fraudulent grantee [C] conveys to a *bona fide* purchaser, without notice,"—that is, one who aside from the record is admittedly such—"his grantee
- (5) takes a valid title; and if the grantee [the original grantee, C], has notice, at the time he purchases, of an outstanding unrecorded deed [to B], it will not do to affect his grantee [D] with such notice, *unless he [D] knew that his grantor [C] had such notice at the time he [C] purchased.* Unless this is shown, he [D] has a right to rely on the legal title. . . .
- (6) "Those who took title under the mortgage from [A] must have been apprised that he [A] knew of the unrecorded deed to [B], when he took the mortgage from [C], as he [A] was the person who executed it. *But this does not apply to the title derived by the conveyance of their [C's] equity of redemption.*"⁴⁰⁷

No one can be certain, perhaps, regarding the meaning of what is so very poorly expressed. It seems clear, however, that all the propositions should be taken together, and so construed as to give a consistent meaning, if possible, to all. Some writers, taking propositions (2) and (3) together, and alone, have caustically criticized the court's reasoning—justly enough on that basis.⁴⁰⁸ But they should not be so taken. It seems fairly clear that the court meant proposition (1) literally, i. e. that D had no notice of any kind. The claimants

406. The actual names of the parties were as follows: of A, Adam Kimball; of B, the Peaslee heirs; of C, Adam and Theron Miles; of D, Gale; of X, Luther and Allen Martin, and John Kimball.

407. *Id.* at 403-4. The C-A notes and mortgages are not referred to in the text. D later conveyed to Clark, who also acquired X's rights under the C-A notes and mortgage, and likewise the notes of A in favor of B, and indorsed by Day, which were secured by the A-B mortgage. It was held that Clark could stand on D's title, to which the discussion in the text is therefore confined. Hence, Clark having recovered judgment against Day on the A-B notes, it was held that the latter could not maintain a bill to secure an injunction against enforcement of the judgment and an order applying the mortgaged property to the payment of those notes.

408. 1 JONES, *op. cit. supra* note 369 (2d ed. 1879) § 575 n. 1, (5th ed. 1894) § 540 n. 5, (6th ed. 1904) § 540 n. 23, (8th ed. 1928) § 672 n. 38. Woods v. Garnett, 72 Miss. 78, 86, 16 So. 390, 392 (1894). TIFFANY, *op. cit. supra* note 376, at 2193 n. 74 (1st ed. 1912) § 45 n. 77; PATTON, LAND TITLES (1938) § 646 n. 80.

referred to under proposition (2) were not grantees by ostensibly absolute conveyances, but transferees of the A-B mortgage, bound, as assignees of a chose in action, by equities existing against their assignor, A.⁴⁰⁹ D, then, was without notice under that rule of B's rights. Besides, he had no information, received either directly or, as stated in propositions (3) and (5), through knowledge that C's title was invalidated by knowledge of *some* prior right, that put him upon inquiry as to B's claim. (Moreover, it has been shown above that, even if put "on inquiry," he could be led only to a problem, non-solution of which should not constitute bad faith, so that inquiry notice cannot with sense or justice be involved.)⁴¹⁰ The only other possibility would be constructive notice by the recording of B's deed. If the language of proposition (2) be interpreted as here suggested, there is no explicit statement on that point, but such notice would be impliedly denied by the language of propositions (3) and (5), which merely deny *other* notice by such recording. This seems to be the true meaning of the case in its relation to our problem.⁴¹¹

We may now consider the views of text-writers and certain judicial pronouncements on the problem under examination.

The second view⁴¹² was explicitly approved by Hare and Wallace as preferable to the first.⁴¹³ Justice Story cited the early Massachusetts cases supporting the second view as illustrations of the rule that a *mala fide* purchaser can pass perfect title to a *bona fide* purchaser, thus possibly implying approval of the holding that D takes in good faith, but not discussing that question.⁴¹⁴ Mr. Devlin did the same—in no other way dealing with or recognizing the problem.⁴¹⁵ Leonard Jones, in his *Mortgages*, ultimately, somewhat more clearly implied in a like manner the same preference,⁴¹⁶ although his later editors have

409. 2 POMEROY, *op. cit. supra* note 376, § 733.

410. See pp. 130-1, 270-1, 397-8, 403 *supra*.

411. Mr. Patton, however, explains it otherwise, believing that it rests "not on the ground that the purchaser himself [D] is without notice of earlier deed, but because he claims through a grantor who could have had no constructive notice from the records and as to whom there is no presumption that he had other notice." PATTON, LAND TITLES (1938) § 46 n. 80. If this were the true explanation of the case it would have nothing to do with our problem; and the decision in basing D's rights to claim through a *bona fide* purchaser depends upon D's knowledge of C's bad faith, and not upon the actual facts as to C's good or bad faith, would be at variance with all other authority on that point. The explanation is a possible one. It seems to be the interpretation adopted by Judge Downer in the opinion in *Ely v. Wilcox*, 20 Wis. 523, 530 (1866).

412. See p. 155 *supra*.

413. Hare & Wallace, *loc. cit. supra* note 369, at 40-2, 212-3.

414. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (4th ed. 1846) § 434.

415. 2 DEVLIN, *op. cit. supra* note 376, § 746.

416. 1 JONES, *op. cit. supra* note 369 (6th ed. 1904) § 559. In earlier editions his views had apparently fluctuated. In the second edition (1879) § 574, he stated the recording problem and gave the first-view solution, relying on Chief Justice Shaw's argument discussed in the text at pp. 412-3 *infra*. In the fifth edition (1904) § 540,

shifted to acceptance of the first view;⁴¹⁷ and in his *Real Property* he definitely stated as law the second view, basing his opinion on the definition of a chain of title as excluding the first deed.⁴¹⁸

Professor Washburn long ago stated the first view⁴¹⁹ as the rule of American law.⁴²⁰ Shortly thereafter, Mr. Pomeroy stated (his words have stood unchanged since 1882) that the law was so "settled by an overwhelming weight of authority."⁴²¹ An examination of the cases will show that this pronouncement is a very great exaggeration. He conceded the existence of early decisions supporting the contrary view, but these, he said, "have been overruled in the same states in which they were given."⁴²² They have been questioned, even, in only one such state, Massachusetts; and although Mr. Pomeroy merely erred, with others, in construing an opinion by Chief Justice Shaw as overruling certain decisions of that state, despite his explicit statement to the contrary,⁴²³ its Supreme Court has pointed out that his words were only dictum, and has added modern support to the early decisions.⁴²⁴ Mr. Pomeroy's grounds for preferring the first view were even weaker than his citations of authority. He gave only two, which we must assume to be the best he could draw from the cases or from reason. "It is plain," he wrote, "that C got no title by his first recording, because he had actual notice. When C conveyed to D, if B's deed had not been on record, and D had put his own deed on record before B's deed was recorded, D would have obtained the title. But the record of B's deed

he merely cited the cases as pertinent to the proposition that the right of the first grantee to save his title by recording "continues after any number of conveyances in the same chain of title," and until some one "in the chain of title under the second conveyance purchases in good faith and places his deed on record." (Italics supplied.) The questions whether the first deed is in the chain of title and whether the second purchaser is in good faith are ignored. The placing of the second purchaser's deed on record is *not* required in a notice jurisdiction, such as Judge Jones' state. In the sixth edition (1904) § 559, he treated the cases exactly as did Story in 1846, but he also, in § 541, repudiated Judge Shaw's views of search, so that his net opinion was clearly indorsement of the second view of our problem.

417. 1 JONES, *op. cit. supra* note 369, § 673 at 969.

418. JONES, *REAL PROPERTY IN MODERN CONVEYANCING* (1896) §§ 1502-4.

419. See p. 394 *supra*.

420. 2 WASHBURN, *REAL PROPERTY* (1st ed. 1862) § 595, preserved through 3 *id.* (5th ed. 1887) 327, 360. He also stated the problem as one necessarily of a race jurisdiction.

421. 3 POMEROY, *op. cit. supra* note 376, at 77.

422. *Ibid.*

423. The same assumption is implicit in Professor Washburn's statements cited in note 420 *supra*. Various other writers and judges have implied or stated the same. What the Chief Justice said was this: "Believing that this case may be decided . . . upon another and distinct ground, not impugning the authority of the cases cited"—that is, of the earlier Massachusetts cases—"we have preferred that course; the more so, as we are of opinion, that should the point, for which the above cases are cited as authority, be presented for direct adjudication, it is one of great importance, deeply affecting the law touching titles to real estate, deserving therefore of great consideration; and that such a rule of construction ought not to be drawn in question, without the fullest consideration of all the arguments bearing on the question." *Flynt v. Arnold*, 43 Mass. 619, 626 (1841).

424. See p. 434 *infra*.

prior to the conveyance to D cut off the latter's precedence, because D could claim nothing from C's *first* record, by reason of C's having actual notice."⁴²⁵ *Nota bene*, that although the leading cases were from a pure-notice and a notice-race jurisdiction (Massachusetts and New York, respectively) Mr. Pomeroy, writing in a notice-race jurisdiction, and, as has been seen, seemingly oblivious to that distinction,⁴²⁶ states the problem as though one of a notice-race jurisdiction only. (However, in doing so, he only followed others, some of them writing in pure-notice jurisdictions.)⁴²⁷ The issue being whether the recording of B's deed prevents D from acquiring priority as a purchaser in good faith, Mr. Pomeroy first merely begs the question at issue—D had no priority because the recording of B's deed precluded it; and then attempts to make this better than a mere assumption by offering a reason which is an extraordinary *non sequitur*: that B's record gave D constructive notice because for *another* reason he could not get title—namely, because his grantor, C, had also taken with notice. This slip was due, of course, to a careless restatement of holdings in old cases from a notice-race jurisdiction, above discussed, where a prior recording created a seeming "precedence," and in which the court decided both the point of D's notice from B's record and the point that he was then irretrievably lost if his grantor was not a *bona fide* purchaser.⁴²⁸ Mr. Tiffany likewise states that D "has usually been regarded" as defeated by B's record.⁴²⁹

It happens that the New England states, in which the second view was first adopted, are pure-notice jurisdictions; and also that New York, in which the second view originated, is a notice-race jurisdiction, and that a decided majority of the states following that view are jurisdictions of the latter type. But this distinction between pure-notice and notice-race jurisdictions has, as repeatedly stated, nothing to do with the problem of notice, the prior recording by the subsequent purchaser being merely a prerequisite added to the requirement that he be without notice.⁴³⁰ Chief Justice Dixon, in the first of his opinions in *Fallass v. Pierce*, *supra*, said, indeed, that "The question, whether a purchaser from a second grantee, whose deed was first recorded, is

425. 3 POMEROY, *op. cit. supra* note 376, § 760.

426. Mr. Pomeroy wrote in California. See text following notecall 107 *supra*.

427. Judge Jones had earlier stated the problem in the same way. 1 JONES, *op. cit. supra* note 369 (2d ed. 1879) § 575, and it so remained in later editions: (5th ed. 1894) § 540, (6th ed. 1904) § 559. Mr. Wade had not mentioned the problem in his first edition of 1878 (seemingly written in Missouri), but stated it as Jones and Pomeroy did in his second edition of 1886 (seemingly written in California). WADE, A TREATISE ON NOTICE (2d ed. 1886) § 231a. See p. 160 *supra*.

428. See text at and following notecall 391 *supra*.

429. 2 TIFFANY, *op. cit. supra* note 376, at 2192; unchanged in the third edition of 1939.

430. See pp. 161-2 *supra*.

bound to take notice of the record of a prior deed from the same grantor to another person, subsequently recorded, and before the time of such purchase, is one obviously depending upon the phraseology and proper construction of the statute law requiring deeds and other conveyances of land to be recorded, and declaring the effect of the omission, when the same are not recorded."⁴³¹ This "obvious" dependence is explained in four pages, but the remarks have no connection whatever with the question of record notice. They show, merely, that under a notice-race statute a would-be purchaser (D) must record his deed before B's is recorded, as well as be ignorant of B's deed when he records, in order to divest B of title. And therefore, in such a state, since in our problem D by hypothesis records last, he must lose regardless of the question of notice. As for *that* question, the Chief Justice merely quoted from Chief Justice Shaw a passage in which the existence of notice to D is *assumed*; but he knew that the Massachusetts court, in that case, although plainly inclined so to hold, explicitly abstained from deciding the case on that point, as has been above pointed out.⁴³² Moreover, Chief Justice Dixon's own opinion equally avoided a forthright decision of the point, for he said: "D, *even supposing B's deed on record was not constructive notice, which I cannot believe to be law under our statute*, . . . fails entirely to show compliance with the [statute's] other condition, to-wit, that his deed was [be] first duly recorded. A compliance with the first . . . is wholly unavailing unless it is at the same time shown that the other has been likewise observed. . . ." ⁴³³ And in his second and final opinion in the case, although *assuming* in one passage ⁴³⁴ a holding that B's record would give constructive notice and giving for this view a reason the merit of which will next be considered, the point was disposed of without emphasis and almost by indirection, presumably because its decision could not affect the outcome of the case.⁴³⁵

The reasons given by Chief Justice Dixon for holding B's record to give D constructive notice were two: "Now, the reason why the purchaser from C . . . who buys *after* the recording of the prior deed to B from A . . . is bound to take notice of B's deed, is that"—stat-

431. *Fallass v. Pierce*, 30 Wis. 443, 456, 458 (1872).

432. *Flynt v. Arnold*, 43 Mass. 619, 621-2, 626 (1841), and see note 423 *supra*.

433. *Fallass v. Pierce*, 30 Wis. 443, 459 (1872). (Italics supplied.) Mr. Patton correctly states this as the basis of the *decision* of the Wisconsin court. PATTON, LAND TITLES (1938) § 46 n. 80. Despite the long and unanswerable argument of the court, Mr. Tiffany goes no further than to say that "it seems that the last purchaser might . . . be postponed" if he had not also first recorded, though purchasing before the record of B's deed. 2 TIFFANY, *op. cit. supra* note 376, at 2192 n. 72. It would undoubtedly be postponed. Cf. *id.* (3d ed. 1939) 2192 n. 72; PATTON, LAND TITLES (1938) § 13 at notecall 159 and citations.

434. *Fallass v. Pierce*, 30 Wis. 443, 472 (1872).

435. *Id.* at 473.

ing the first reason, already discussed,⁴³⁶ and then proceeding with the second: "The purchaser from C, looking upon the record, sees, first, the *prior* conveyance from A to B, and, second, the *first recording* of C's deed. Of these two facts the record informs him."⁴³⁷ This passage was relied upon in an opinion by the Supreme Court of South Dakota on the problem under discussion.⁴³⁸ It has repeatedly been quoted as though it were enlightening, but obviously it merely begs the question. D might in fact see B's deed, but then the problem would be one of actual knowledge. As proposed for discussion, the question is solely one of constructive notice; in other words, whether D shall be treated *as if* he had seen the record. In such case he "sees" nothing unless the record is for other reasons held to be giving him constructive notice.

It seems clear that a choice between the two solutions of the problem must rest on the opinion held respecting the search that can reasonably be imposed upon subsequent purchasers. Mr. Tiffany commented upon the problem thus, after stating the first view:

"Under the doctrine stated . . . an intending purchaser, although he finds . . . that a particular person in the chain of title executed a conveyance of the land,"—that is, one consistent with the title offered him—"must nevertheless continue the examination of the records under the name of such person, in order to see whether there was subsequently recorded a *prior* conveyance by such person [made while record owner] though . . . he is under no such duty for the purpose of seeing whether there was subsequently recorded a *subsequent* conveyance by such person. If, however, he performs his duty in searching for any prior conveyance, he would usually discover any subsequent conveyance of record, and for this reason there seems a certain inconsistency in making the question of his constructive notice of a conveyance subsequently recorded depend upon the date of the conveyance."⁴³⁹

As for any "inconsistency" in making search depend upon dates of conveyances and dates of recording, that is impossible, for such, as already remarked, is the very basis of the recording system. As for the rest of the last sentence quoted, it defies understanding. The "duty" referred to is clearly one of making some search *less* than that required by the first view of our problem, for Mr. Tiffany was criticizing that view; moreover, under it the searcher would not merely "usually" but always necessarily discover *all* deeds of earlier owners, whensoever recorded. On the other hand, the search in mind was something *more* than that required by the second view of our problem; for under that

436. See pp. 396-7 *supra*.

437. *Fallass v. Pierce*, 30 Wis. 443, 474 (1872).

438. *Parrish v. Mahany*, 10 S. D. 276, 73 N. W. 97 (1897); see p. 427 *infra*.

439. 2 TIFFANY, *op. cit. supra* note 376, at 2192-3.

no deeds of earlier owners, recorded in the holding periods of later owners, would be discovered. What, then, was the "duty" referred to? The inescapable conclusion is that Mr. Tiffany had nothing definite in mind.

Of course, any burden can be imposed upon a prospective purchaser if a court is willing to do so. The Massachusetts court, in its earliest decision upholding the second view, remarked: "When a purchaser is examining his title in the registry of deeds, and finds a good conveyance to his grantor, he is not expected to look further. This case, it is true, presents the question in a very strong point of view for the demandants; as [D] had only to look to the registry for the next day, and perhaps 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."⁴⁴⁰ It is true that Chief Justice Shaw, commenting on the case just quoted and other early Massachusetts decisions, said in *Flynt v. Arnold*:⁴⁴¹

"Were it not for the cases . . . mentioned, we should have been strongly inclined to the opinion, that . . . before [D] took his deed of [C] . . . the mortgage from [A] to [B] was on record, and he might by ordinary inquiry have discovered it; and that this would constitute constructive notice to him of the existence of that incumbrance. . . . D could not hold against B; not in right of C because, in consequence of actual knowledge of the prior deed, C had but a voidable title; and not in his own right, because before he took his deed, B's deed was on record, and was constructive notice to him of the prior conveyance to B from A under whom his title is derived. . . . [The contrary view] is founded wholly on the suggestion, for which no reason is assigned,"—which is a statement wholly inaccurate—"that when a purchaser is examining a title in the registry of deeds, and finds a conveyance to his grantor, he is not expected to look further. . . . If an ordinary diligent search would bring the inquirer to a knowledge of a prior incumbrance or alienation, then he is presumed to know it. . . . It would seem that a search, so far as to ascertain whether any former proprietor, whilst he had the estate, had alienated or incumbered it, would be necessary, in order to render the public registry available to the full extent to which it was designed by law; and therefore it would be reasonable to presume in each case, that such search had been made, and if any such deed from a proprietor was on record, that it had been discovered and was known to the subsequent purchaser."⁴⁴²

440. *Connecticut v. Bradish*, 14 Mass. 296, 303 (1817).

441. 43 Mass. 619, 621-5 (1841).

442. *Id.* at 621-5.

These remarks of the very eminent judge were in due time dismissed as mere dicta when the problem again received from his successors that "fullest consideration of all the arguments bearing on the question" which, as he said, it merited,⁴⁴³ and the views of the older cases criticized by him were fully approved. In its latest pronouncement on the question the Massachusetts court remarked:

"The reasons upon which the earlier cases were decided seem to us the more satisfactory, because they best follow the spirit of our registry laws and the practice of the profession under them.

. . .

It would be a hardship to require an examiner to follow in the indexes of grantors the names of every person who, at any time, through perhaps a long chain of title, was the owner of the land.

"We do not think this is the practical construction which lawyers and conveyancers have given to our registry laws. The inconvenience of such a construction would be much greater than would be the inconvenience of requiring a person, who has neglected to record his prior deed for a time, to record it, and to bring a bill in equity to set aside the subsequent deed, if it was taken in fraud of his rights."⁴⁴⁴

The remarks of Chief Justice Shaw were doubtless the basis for Chief Justice Dixon's dogmatic pronouncement, already quoted, "that every consideration of the subject, and construction of the statute, founded upon the convenience, or inconvenience, real or supposed, of searching the records in the manner in which they are kept or indexed, is wholly impertinent, and therefore deceptive and liable to lead to error."⁴⁴⁵ What the two quotations, taken together, show is this: That Chief Justice Dixon, because he scorned even to consider the reasonableness of search, merely assumed that any recorded deed *must* give notice to all subsequent purchasers; and that Chief Justice Shaw did not assume notice, since he explicitly made the presence of that dependent on the reasonableness of search, but did assume (what is in substance the same) that any search is reasonable, since certainly none can be greater than the one here involved, of searching every period of record holding under the name of every prior record owner.

The Supreme Court of Mississippi has fully accepted the above views. It expressed as follows its reasons for approving the New York rule:

"We think the Massachusetts decisions are erroneous, because they hold that one not bound by the registry law is protected

443. See note 423 *supra*.

444. *Morse v. Curtis*, 140 Mass. 112, 113-5, 2 N. E. 929, 930-1 (1885).

445. See p. 104 *supra*.

by it. But for the registry law, where one has conveyed his legal title, he has nothing left to convey to another, and that other, with or without notice of the prior conveyance would get nothing, for his grantor had nothing to convey. Now, the statute comes and provides that, though a conveyance of the class named in the statute may be made, it shall as to certain persons, viz., creditors and purchasers without notice, be valid only from a certain time, viz., the time when it is filed for record. . . . But when filed for record it has full scope and effect against the world. . . . It is no answer to say that it is inconvenient to the purchaser to examine a long and voluminous record, made after the record of the title of his grantor. To this the sufficient reply is that, but for the registry acts, he would not have even the protection which such records afford. . . . It seems clear to us that one who buys an estate cannot invoke *the protection of the registry act* as against a deed recorded under such act at the time of his purchase." ⁴⁴⁶

It is a startling proposition that when a subsequent purchaser "invokes the protection of the registry act," decisions that give him priority "hold that one not bound by the registry law is protected by it." Were this so, the subsequent purchaser who is the declared beneficiary of the recording acts could never secure the benefits they grant him. The law binds everybody. True, a subsequent purchaser cannot *at one moment* be "bound" as the losing and "protected" as the winning litigant. But if "protected," under the circumstances of our problem, against the holder of a senior deed, he may subsequently be held "bound" under like circumstances against the holder of a junior deed. The court speaks of the statute as though it automatically solves the problem, although it says nothing of search, nor, explicitly, of notice in such a case. In various other situations the Mississippi court, like all others, gives meaning to the statute by defining the operation of search and notice. In the present problem the Court merely refused to do so.

The simple fact is—as already remarked, and as the Massachusetts court intimated ⁴⁴⁷—that the search required by the first view is not that recognized by lawyers and abstractors as requisite. It is judicial theory, remote from practice. Mr. Patton concedes that it "may be" true, as the Massachusetts court asserts, that its view is more consistent than the New York view with the spirit of the recording acts. ⁴⁴⁸ To concede this as respects pure-notice states, such as Massachusetts, is necessarily to concede it equally as respects notice-race jurisdictions

446. *Woods v. Garnett*, 72 Miss. 78, 86-7, 16 So. 390, 392 (1894).

447. See text at notecall 367, following notecall 375 *supra*, and pp. 433-4 *infra*.

448. PATTON, *LAND TITLES* (1938) § 46 n. 80.

such as New York. It is true, as he points out, that courts in states of the latter type "cannot decide the question upon the equitable features of notice or consideration alone, but [only, also] upon the strictly statutory requirement that the [subsequent] purchaser secure priority of record."⁴⁴⁹ But he also refers to the final opinion in *Fallass v. Pierce* as concluding "that the New York rule is correct for all states whose recording act limits its protection to those purchasers 'whose conveyance is first duly recorded.'"⁴⁵⁰ The Wisconsin case did not so state. Had it done so it would have been a gross confusion. The decision, in the sense of a *judgment for B* as against D, is indeed inevitably correct in notice-race jurisdictions since by hypothesis B first records. But a decision in such a jurisdiction *on the issue of notice* has nothing to do with the other requirement, and its acceptability or non-acceptability must rest on tests applicable equally to notice and to notice-race jurisdictions.

As regards the practice of the profession, the authors of a recent work on New York law dismiss with the following curt remark the cases which in that state established the first view of the problem in hand: "The principle of these cases is absurd, because it would necessitate a search to date against every name in the chain of title. This is never done. Search is only made against each name, from the day before the date of the deed into him, to the day after the record of the deed out of him."⁴⁵¹ As already said this is believed to be true throughout the United States. A legal construction of the recording acts that is utterly inconsistent with the practice of title examiners is, literally, nothing but a snare for the intending purchaser who is the intended favorite of those statutes.

We will now consider the case authority cited by Mr. Pomeroy, Judge Jones, Mr. Tiffany, Mr. Patton, and by their latest editors,⁴⁵² for the two views discussed above as matters of principle. In doing this, however, due heed will be paid to the distinction between decisions and dicta. This cannot be expected beyond a minimal degree of textwriters who deal with thousands of cases. The judicial opinions from which

449. *Ibid.* He adds, seemingly in defense of decisions in race jurisdictions, that the courts therein must bar an intending purchaser without notice who does not first record. Quite so, but that has nothing to do with the problem of notice in those jurisdictions.

450. *Ibid.*

451. 3 WEED, NEW YORK LAW OF REAL PROPERTY (3d ed. 1938) 1358; citing on 1356 this statement from *Abraham v. Mayer*, 7 Misc. 250, 253, 27 N. Y. Supp. 264, 266 (1894): "Intending purchasers of land are only required to search . . . against . . . [each] grantor during the time that the record title remains in him." This, to be sure, is only from the City Court of New York, but no doubt it also states modern professional understanding.

452. The editions used are the 4th and 5th of POMEROY, *op. cit. supra* note 376; the 8th of JONES, *op. cit. supra* note 369; the 2d and 3d of TIFFANY, *op. cit. supra* note 376; and the 1st (and only) edition of PATTON, LAND TITLES (1938).

their compilations of citations have always been largely drawn not only abound with original dicta⁴⁵³ but habitually cite earlier dicta indiscriminately with decisions, *except* when a distinction between the two types of authority serves a defensive purpose—as those discussed below will clearly illustrate. The elder Judge Lumpkin once illustrated the difficulty of avoiding this judicial sin when, at the conclusion of ironical comments upon dicta regarding the point before him, he seemingly slipped with casualness (but possibly with continued irony) into a monstrous example of his own, exclaiming: "Let us hear no more fault finding . . . with *obiter dicta*. Three-fourths of all the law in force in Christendom, as can be demonstrated by reference to the *English and American Reports*, originated in the obiter dicta of Courts and Judges."⁴⁵⁴ Be that as it may, the titles of all cases listed below which are in point as respects decision, even though that be supported by opinions which are vitiated by manifest weaknesses or which contain no discussion of the problem or cite no authorities, are printed in italics. The titles of cases, however, which cannot possibly be recognized as decisions on the point in issue are not italicized; nor are those of cases that have been overruled, or fatally discredited by later decisions, or which were decided in race jurisdictions without explicit ruling on the issue of notice. The justification for these distinctions is indicated in the analyses of the cases.

CASES SUPPORTING THE FIRST VIEW

The following cases allegedly support this view:⁴⁵⁵ New York: *Van Rensselaer v. Clark* (1837),⁴⁵⁶ *Jackson ex d. Merrick v. Post* (1836),⁴⁵⁷ *Schutt v. Large* (1849),⁴⁵⁸ *Ring v. Steele* (1867),⁴⁵⁹ *Goelet v. McManus* (1874);⁴⁶⁰ Massachusetts: *Flynt v. Arnold* (1841);⁴⁶¹ Iowa: *English v. Waples* (1862),⁴⁶² *Sims v. Hammond* (1872),⁴⁶³ *Gardner v. Early* (1887);⁴⁶⁴ Illinois: *Bayles v. Young* (1869),⁴⁶⁵ *Morrison v. Kelly* (1859),⁴⁶⁶ *Simmons v. Stum* (1882);⁴⁶⁷ California: *Mahoney v. Middleton* (1871),⁴⁶⁸ *Clark v.*

453. For example, see p. 288 and note 305 *supra*.

454. *Reed v. Roberts*, 26 Ga. 294, 299 (1858). (Italics supplied.)

455. See note 452 *supra*.

456. 17 Wend. 25 (N. Y. 1837).

457. 15 Wend. 588 (N. Y. 1836).

458. 6 Barb. 373 (N. Y. 1849).

459. 3 Keyes 450 (N. Y. 1867).

460. 1 Hun 306 (N. Y. 1874).

461. 43 Mass. 619 (1841).

462. 13 Iowa 57 (1862).

463. 33 Iowa 368 (1872).

464. 72 Iowa 518 (1887).

465. 51 Ill. 127 (1869).

466. 22 Ill. 610 (1859).

467. 101 Ill. 454 (1882).

468. 41 Cal. 41 (1871).

Sawyer (1874),⁴⁶⁹ County Bank of San Luis Obispo v. Fox (1897);⁴⁷⁰ Wisconsin: *Erwin v. Lewis* (1873),⁴⁷¹ Fallass v. Pierce (1872),⁴⁷² Butler v. Bank (1896);⁴⁷³ Michigan: Cook v. French (1893);⁴⁷⁴ Van Aken v. Gleason (1876);⁴⁷⁵ Missouri: Allen v. Ray (1888);⁴⁷⁶ Mississippi: *Woods v. Garnett* (1894);⁴⁷⁷ South Dakota: Parrish v. Mahany (1897);⁴⁷⁸ Texas: *Ryle v. Davidson* (1908),⁴⁷⁹ *Delay v. Truitt* (1916),⁴⁸⁰ White v. McGregor (1899);⁴⁸¹ Arkansas: White v. Moffett (1913);⁴⁸² Montana: Guerin v. Sunburst Oil & Gas Co. (1923).⁴⁸³

These cases will be considered by jurisdictions, which are arranged above in the order in which they became more or less committed to the doctrine in question.

New York (a notice-race jurisdiction) has consistently supported the first view. *Van Rensselaer v. Clark*⁴⁸⁴ is indicated as the leading case because its opinion is the earliest that is in point. It has already been seen that the earlier opinion in *Jackson ex d. Merrick v. Post*⁴⁸⁵ neither stated nor implied that record notice was given by B's deed; on the contrary, the decision was based on inquiry notice, on which ground it is completely indefensible.⁴⁸⁶ The *Schutt* case is even remoter from the question under examination.⁴⁸⁷ The other cases cited are decisions in point.

469. 48 Cal. 133 (1874).

470. 119 Cal. 61, 51 Pac. 11 (1897).

471. 32 Wis. 276 (1873).

472. 30 Wis. 443 (1872).

473. 94 Wis. 351, 68 N. W. 998 (1896).

474. 96 Mich. 525, 56 N. W. 101 (1893).

475. 34 Mich. 477 (1876).

476. 96 Mo. 542, 10 S. W. 153 (1888).

477. 72 Miss. 78, 16 So. 390 (1894).

478. 10 S. D. 276, 73 N. W. 97 (1897).

479. 116 S. W. 823 (Tex. Civ. App. 1908).

480. 182 S. W. 732 (Tex. Civ. App. 1916).

481. 92 Tex. 556, 50 So. 564 (1899).

482. 108 Ark. 490, 158 S. W. 505 (1913).

483. 68 Mont. 365, 218 Pac. 949 (1923).

484. 17 Wend. 25 (N. Y. 1837).

485. 15 Wend. 588 (N. Y. 1836).

486. See text pp. 403-4 *supra*.

487. 6 Barb. 373 (N. Y. 1849). If in this case D had any notice of B's deed it was inquiry notice, for the deed was never recorded, having in fact been destroyed by collusion between A and C. The case was sent back for retrial because the lower court had ruled that D's good faith "was an immaterial question." The case, moreover, has no merits. Its references to *Van Rensselaer v. Clark*, 17 Wend. 25 (N. Y. 1837), are misleading. Also, the court said that if D (who was the second grantee under C) had notice he would fail "although nothing appeared" to bring home to C's first grantee any knowledge of B's deed or C's fraud! *Schutt v. Large*, 6 Barb. 373, 381 (N. Y. 1849).

*Flynt v. Arnold*⁴⁸⁸ contained mere dicta favorable to the view in support of which it is here cited; but, as has already been seen, those dicta have been repudiated in Massachusetts.⁴⁸⁹

Iowa is a pure-notice jurisdiction.⁴⁹⁰ The *English* case involved assignment of a junior mortgage. The court said that the assignee, if regarded as taking merely a chose in action, was bound by the equities against his assignor who had actual notice of the senior instrument; and that, if regarded as a "purchaser," he had constructive notice of the senior mortgage which was recorded before the assignment to him of the junior.⁴⁹¹ Since the latter is now the established law, the case can be regarded as a holding in accord with the first view. *Sims v. Hammond*⁴⁹² is for several reasons neither in point nor, on its own basis, acceptable.⁴⁹³ *Gardner v. Early*⁴⁹⁴ is likewise not in point; it turned on inquiry notice only.⁴⁹⁵ In Iowa, therefore, only a single case supports the first view; and that only because an assignee of a mortgage has, since that decision, become a "purchaser." Strictly, there is as yet no Iowa authority. Moreover, the *English* case neither discussed the problem nor cited authorities. It merely assumed that a recorded deed should give constructive notice to any subsequent purchaser.

488. 43 Mass. 619 (1841).

489. See pp. 408 *supra* and 434 *infra*.

490. See Bordwell, *Recording of Instruments Affecting Land* (1916) 2 IOWA L. BULL. 51, 52-3. PATTON, LAND TITLES (1938) §9 and notes 105-6.

491. *English v. Waples*, 13 Iowa 57 (1862).

492. 33 Iowa 368 (1872).

493. A deed of Oct. 10th from B to A, and a mortgage of the same date from A to C, were recorded on the 12th an hour before a purchase money mortgage from A to B, dated as of the 12th, was recorded. C had knowledge, when he took his own, that B really received on the 10th a purchase money mortgage which was destroyed, and replaced by that dated as of the 12th. Now, (1) C's actual knowledge could not be imputed to D, provided the latter be treated as a purchaser. And, (2) from the record D could only learn that his vendor, C, held a deed of earlier date than B's and first recorded. However, (3) the court followed the first alternative stated in the opinion in *English v. Waples*, 13 Iowa 57 (1862), saying: "The assignment of the mortgage . . . was the assignment of a chose in action, and not an interest in lands. . . . The plaintiff [D] purchased his mortgage and parted with his money after defendant's [B's] mortgage was recorded, and could, therefore, be in no better situation than his assignor, and could claim no greater or other equities." *Sims v. Hammond*, 33 Iowa 368, 373 (1872). (Italics supplied.) Finally, (4) the prior recording of B's mortgage has nothing, logically, to do with the chose-in-action rule.

494. 72 Iowa 518 (1887).

495. As regards D (Early) and his grantees of part of the land the court concluded that they "had such knowledge of the conveyance to the plaintiffs as to have required them . . . to ascertain the facts in reference thereto." *Id.* at 520. They took their deed long after B's (the plaintiff's) deed was recorded. The above statement, unlike the opinion in *English v. Waples*, 13 Iowa 57 (1862), did not attribute record notice to B's deed, nor even inquiry notice *by it*. The knowledge referred to is seemingly knowledge of facts off the record. The opinion also erroneously states that "it was incumbent on [C] to show that she was an innocent purchaser for value, without notice." *Id.* at 520. It was, of course, incumbent on D, and on him alone, to show this, if, failing on his own merits, he sought to prevail by virtue of his grantor's merits.

Illinois is, as respects the form of its statutes, a pure-notice jurisdiction.⁴⁹⁶ It was committed to the first view by *Bayles v. Young*,⁴⁹⁷ a direct decision. However, the opinion cited no authorities and contained no discussion whatever of the problem. As for *Morrison v. Kelly*,⁴⁹⁸ what the court intended to decide is doubtful. The only basis on which the case can possibly rest, however, is inquiry notice, the sole reference to record notice being patently erroneous under established Illinois law—and equally erroneous everywhere else.⁴⁹⁹ *Simmons v. Stum*⁵⁰⁰ is likewise not in point. It involved no question of record notice whatever; it turned upon the burden of proof, as in a notice-race jurisdiction, respecting prior recordation.⁵⁰¹

California is a notice-race jurisdiction.⁵⁰² *Mahoney v. Middleton*⁵⁰³ cited and followed without discussion the New York cases already analyzed, pleading that the press of judicial business precluded consideration "of this interesting question, or a review of the authorities bearing upon it." But the case is a clear authority. The court's conclusion was based on record notice given by B's deed to D, who

496. The form of the statute since 1845, and one remarkable complexity left in the law by Mr. Brayman, the author of the Revision of that year, have already been commented upon. See p. 284 and note 292 *supra*. The revision also changed the Illinois statute from a notice-race to a notice type. The law was originally that of Pennsylvania, whence the first statute of the Northwest Territory was taken. See text at notecalls 39, 52, 53. This was left unchanged in the revisions of 1807, 1815, 1827, 1833. LAWS OF THE NORTHWEST TERRITORY (Pease, ed., 17 Illinois Historical Collections, 1925) 123, 199; LAWS OF INDIANA TERRITORY (Philbrick, ed., 21 Illinois Historical Collections, 1930) 290; 2 POPE'S DIGEST (Philbrick, ed., 30 Illinois Historical Collections, 1940) 288; REVISED CODE OF LAWS OF ILLINOIS (1827) 101; REVISED LAWS OF ILLINOIS OF 1833, §§ 15, 17. Mr. Patton says that "though the Illinois act follows Massachusetts in phraseology, it follows New York and Wisconsin in construction." PATTON, LAND TITLES (1938) § 46 n. 79. This is, I think, not sustained by all the cases, but it certainly is by some, as illustrated by *Simmons v. Stum*, referred to in the text at notecall 501 *infra* and note thereto.

497. 51 Ill. 127 (1869).

498. 22 Ill. 610 (1859).

499. C had inquiry notice of B's rights both by the latter's possession of the land and by information received from an interested party. The court said: "If [C] was chargeable with notice when he purchased, his grantee, receiving a conveyance after the deed to [B] was recorded, would be chargeable with the same notice that [C] had." *Id.* at 627. This extraordinary proposition is all there is in the opinion that applies to our problem. The court also said, of the notice had by possession and by information: "And having notice . . . he could not protect himself by waiting some months and then taking a conveyance without further inquiry, or by removing the improvements, that were sufficient notice when he first purchased." *Id.* at 625. This made it quite correctly a case of inquiry notice.

500. 101 Ill. 454 (1882).

501. In such a jurisdiction it would be necessary to prove prior recordation. D would bear this burden, but there was no evidence whatever as to when he recorded, whereas the date of B's recording was definite. The court therefore explicitly stated that the question of notice need not be inquired into. *Id.* at 456. In fact, however, D took his deed before B's was recorded, so that, as regarded record notice, no question existed. The court, in its last remark, must therefore have had in mind some matter of inquiry notice which does not appear in the opinion.

502. For the statute as it existed in 1871 see *Mahoney v. Middleton*, 41 Cal. 41, 47 (1871). It has always so remained.

503. *Ibid.*

took his conveyance from C after that deed was recorded, and it was explicitly stated that the question whether D had actual knowledge of B's interest need not, therefore, be discussed.⁵⁰⁴ *Clark v. Sawyer*⁵⁰⁵ followed the preceding case, also without discussion, with the remark: "We see no reason for changing the ruling here."⁵⁰⁶ *County Bank of San Luis Obispo v. Fox*⁵⁰⁷ supplies merely a dictum, but it is clear and direct. It did not appear when the assignments of the mortgage from C to D and D to E were made, nor whether for consideration, nor whether they were ever recorded. They might, the court said, both have been made after B's mortgage was recorded, and if so, "the assignees took . . . with constructive notice of the prior mortgage," citing the two preceding cases.⁵⁰⁸

Wisconsin has likewise always been a notice-race jurisdiction.⁵⁰⁹ Considering that there were five arguments of *Fallass v. Pierce*,⁵¹⁰ that four opinions were written therein, two of them by Chief Justice Dixon, and that the various problems involved had been troubling him⁵¹¹ ever since he had joined six years earlier in the decision in *Ely v. Wilcox*,⁵¹² the case as he left it is far from impressive or satisfying. The Chief Justice's opinions do have very considerable educational value, in that they discussed basic recording principles and queries, and for this reason they have already several times been cited herein.⁵¹³ Nevertheless, in their disposal of the problem before the court they displayed surprising weaknesses. After devoting a third of his two opinions to discussion of what was dictum and what decision in *Ely v.*

504. *Id.* at 50: There is, however, present in one statement by the court a seeming but doubtless unintended implication that prior recording by D would, alone, have sufficed to save him. Speaking of the conveyance by C (Pichoir and Spear, both of whom had actual knowledge of the prior conveyance to B, Mahoney, and to D, Borel), the court said: "Their conveyance to Borel, standing by itself, passed no title, and the only mode in which it could have been made effectual, was by recording it before the deeds to Mahoney were recorded." *Ibid.*

505. 48 Cal. 133 (1874).

506. *Id.* at 143.

507. 119 Cal. 61, 51 Pac. 11 (1897).

508. *Id.* at 64, 51 Pac. at 12. The assignees were treated as purchasers. They failed, manifestly, to bear the burden of proving prior recordation; nevertheless, the court chose to pass judgment on the other requirement of notice. See p. 162 *supra*.

509. The statute as it existed at the time of the earliest case cited, *Fallass v. Pierce*, 30 Wis. 443 (1872), is quoted therein at 457.

510. *Cf. id.* at 455, 461.

511. He so stated, *id.* at 465-6.

512. 20 Wis. 523 (1866) discussed in the text at pp. 435-8 *infra*.

513. He properly emphasized the fact that the first but unrecorded conveyance is, save as affected by the recording acts, wholly valid—*Fallass v. Pierce*, 30 Wis. 443, 473 (1872); that the basic purpose of those acts is to protect the subsequent purchaser—see note 65 *supra* and text at notecall 635 *infra*; that *bona fides* under the recording system has a very specific and narrow meaning—see note 22 *supra*; that it refers solely to the subsequent purchaser—see note 20 *supra*. Also, he made very clear the difference between pure-notice and notice-race statutes. See p. 422 and p. 424 at notecall 534 *infra* and citations in notes 431, 433 *supra*. Adverse comments made upon other positions taken in the opinion are made at pp. 164-5 *supra*.

Wilcox,⁵¹⁴ he left the decision in the *Fallass* case itself in great obscurity. No question whatever of record notice, by B's deed to D,⁵¹⁵ was before the court, as the dissenting Justice repeatedly emphasized,⁵¹⁶ since D took his deed before that to B (or that to C) was recorded. As for notice otherwise, it was admitted that he had none. The statement of facts correctly describes him as "a purchaser in good faith, and for value, who neglected to put his deed upon record until after the assignments of the mortgages to [B] . . . and . . . Fallass . . . were made and recorded."⁵¹⁷ The Chief Justice's elaborate attention to "the question, whether a purchaser [D] from a second grantee [C], whose deed [C's] was first recorded, is bound to take notice of the record of a prior deed from the same grantor to another person [B], subsequently recorded, and before the time of such purchase"⁵¹⁸ was due to a desire "so to lay down and expound the law of the case as not to conflict with what was said as by the court in *Ely v. Wilcox*."⁵¹⁹ What was said "as by the court" in that case was written by a former member of the court who was counsel for the successful party in the later case. The question quoted just above had nothing to do with the case before the Chief Justice; all that he wished to say on it would be dictum. His object was to show that everything said on it in the *Ely* opinion was also dictum⁵²⁰—that is, dictum adverse to what he now wished to say of it. Restive under the Chief Justice's elaborate analysis of the earlier opinion (from which there had been no dissent when it was rendered, although Dixon had then been Chief Justice), counsel finally retorted that "all that is said by this court about the case of *Ely v. Wilcox*, or upon the question of constructive notice, is inapplicable here."⁵²¹ Quite so. And since no issue of record notice was

514. *Fallass v. Pierce*, 30 Wis. 443, 455-6, 464-8, 470-1 (1872).

515. The letters used in the text to identify the parties correspond to the actual names as follows: A, Blanchard; B, Rice; C, Pierce; D, Parks. Fallass was an assignee of Rice, taking his interest after Parks had taken his, but recording earlier than Parks recorded.

516. *Fallass v. Pierce*, 30 Wis. 443, 447, 448, 451 (1872). Justice Cole did not formally dissent from the final judgment of his two fellow judges, but his two opinions (given when one of them had still agreed with him) are in effect dissenting opinions.

517. *Id.* at 445. (Italics supplied.)

518. *Id.* at 456. (Italics supplied.)

519. *Id.* at 455. (Italics supplied.)

520. His statement shows the identity of the two questions. Speaking of the opinion in *Ely v. Wilcox*, he said: "What was there said about the record of a prior deed not recorded till after the second deed from the same grantor, and before the conveyance by the vendee in the second deed, not being notice to the purchaser from the vendee in the second deed, must be regarded only as an expression of the views of the judge who wrote the opinion, and not as . . . any matter determined by the court. . . . As a member of the court at the time that case was decided, I know that the point was not considered or attempted to be adjudged by the court, and but for what thus irregularly found its way into the opinion, I am quite satisfied that the history of the case would have been very different." *Id.* at 455-6.

521. *Id.* at 464.

presented, it was wholly proper to leave that, as we have seen it was left,⁵²² without explicit decision—contrary to many citations of the case, by judges and textwriters, as having decided it.

It was not proper, however, even in dictum, to *assume* that if B's deed had been recorded before D's was taken it would have given constructive notice to the latter. Ostensibly, the Chief Justice did not make that assumption; he attempted to give reasons. It has been seen, however, that one was an absurdity and that the other begged the question.⁵²³ In substance there was nothing but assumption. As for discussion of the problem, as one of pure theory, there was absolutely not a word; the Chief Justice merely said, "even supposing B's deed on record was not constructive notice, which I cannot believe to be the law under our statute."⁵²⁴ And even this was not in the final opinion, but in one on the question of a rehearing. In the final opinion there are merely bare references to good faith as one of the two requirements which the subsequent purchaser must meet in a notice-race jurisdiction.⁵²⁵ Moreover, as regards the practical consideration of the reasonableness of search imposed upon D if the B deed gives him notice, it has been earlier pointed out that this, although not ignored, was peremptorily dismissed as "impertinent, and therefore deceptive and liable to lead to error."⁵²⁶

The sole question decided in the case was that, even though without notice of any kind, a subsequent purchaser must fail in a notice-race jurisdiction unless he also first records.

*Erwin v. Lewis*⁵²⁷ purported to follow the *Fallass* case. The decision in the *Fallass* case could not be followed, since in that case D's deed was taken before B's was recorded, whereas the contrary was true in the *Erwin* case. In a notice-race jurisdiction, therefore, judgment would necessarily be given for B, although such decision might be rested either on D's failure to record first, or on constructive notice given to him by B's record, or on both. As already several times remarked,⁵²⁸ no case in a notice-race state can be authority on the point of record notice unless explicit on that point. It is impossible to say what was the ground upon which the court based its decision. It said: "The recording of the mortgage [to B] before the conveyance to [D] was recorded, gave the mortgage priority over such conveyance, and it is entirely immaterial that she [D] did not know that her grantor

522. Text at notecall 433 *supra*.

523. See pp. 397, 411 *supra*.

524. 30 Wis. 443, 459 (1872).

525. *Id.* at 473-5, 477-8.

526. See text at notecall 132 *supra*.

527. 32 Wis. 276 (1873).

528. See p. 162 *supra*.

[C] was not a *bona fide* purchaser of the premises.”⁵²⁹ Had this statement been based upon an explicit holding that the recorded mortgage would give *constructive* notice, there would have been a clear application of the *dictum* in the *Fallass* opinion. But the court at once returned to the confusion in the *Fallass* case, adding: “When she [D] found the mortgage of record . . .”—which was not a fact in the case—“this was sufficient to *put her upon inquiry* as to whether [C] was a *bona fide* purchaser for value. After the recording of the mortgage she purchased at her peril. Had her grantor been a *bona fide* purchaser for value, she would have held the premises by a title paramount to the mortgage. But her grantor not being a *bona fide* purchaser, her title is subordinate to the mortgage. It was so held in *Fallass v. Pierce*.”⁵³⁰ There was, of course, no holding on any of these points in the *Fallass* case. The writer of the *Erwin* opinion had concurred in the *Fallass* case in two opinions by Justice Cole and had then concurred in the two contrary and (by his adherence) prevailing opinions given by Chief Justice Dixon. It is clear that he still persisted in his confusion, which Dixon, still Chief Justice, found it unnecessary or impossible to remove. To assume discovery of the prior deed when this was not actually seen, or knowledge otherwise had of it, was egregious error. This was a repetition of the Chief Justice’s loose language in the *Fallass* case.⁵³¹ It passes understanding how the error could be overlooked when the very issue before the court was whether the deed should be held to be giving record notice, and *constructive* knowledge of it be therefore attributed to D. The reference to inquiry, relating as it does only to the good or bad faith of C, and being wholly immaterial as the court stated to the issue before it, leaves the *decision* resting on record notice, although that is not explicitly stated. For this reason the case has been listed as the leading case in Wisconsin in our problem. In fact it is the only case, although a very poor one.

*Butler v. Bank of Mazeppa*⁵³² is not in point. The lower court made no finding upon D’s good or bad faith, with reference either to notice by the record or through facts off the record. The appellate court explicitly stated: “We shall assume that the purchase was in

529. 32 Wis. 276-7 (1873).

530. *Id.* 277. The statement of the case indicates that the lower court had decided for D “for the reason that, although when she purchased the premises she was chargeable with notice of the *existence* of the mortgage in suit, she did not know that [C] her grantor, was a fraudulent grantee of the premises.” *Id.* at 276. The origin of this perduring confusion has already been explained; see p. 402 *et seq. supra*. It is retained in the headnote to the case.

531. See p. 411 *supra*.

532. 94 Wis. 351, 68 N. W. 998 (1896).

good faith.”⁵³³ D was subordinated to B because he did not record first. As the court quite correctly states, “This was the doctrine finally adopted, after great deliberation and argument, in the case of *Fallass v. Pierce*.”⁵³⁴

Michigan has always been a notice-race jurisdiction.⁵³⁵ *Cook v. French*⁵³⁶ presents only a dictum. The case was remarkable in its facts. B was true and record owner and conveyed to A by a deed never recorded. A, the common grantor in our problem, gave to B a purchase-money mortgage that was recorded in the afternoon, and to C—who, however, knew of the mortgage, and doubtless also of A’s true title—an unconditional deed that was recorded in the morning, of the same day.⁵³⁷ Our problem was disposed of in five lines, without citation of authorities or discussion of principles: “When [D, second grantee under C] acquired his title, the mortgage from [A] to [B] was on record . . . and this was notice to him of the claim that [B] made upon the premises. He therefore took his title subject to any equities which [B] had under the mortgage.”⁵³⁸ Had A been record owner, the case would have presented our problem, and the decision would have been a direct holding in favor of the New York view. But A was not record owner; so that the case does not fall under the problem to be discussed in the present section of this article, but under the first of the six abnormal situations already discussed both with reference to record notice and inquiry notice,⁵³⁹ although the latter was not mentioned. The case holds that D, seeking earlier grantees of A, must discover him as such in a purchase money mortgage recorded *after* the recording of A’s unconditional conveyance to C. In addition to being irrelevant to our present problem for the reason above stated, the decision is bad if arguments elsewhere stated be accepted.⁵⁴⁰ It may be added that although D was negligent in taking a deed dependent for validity upon A’s unrecorded rights, nevertheless A did have true title. Whether D took that title *bona fide*, and so could keep it, was the question; but his negligence could in no way affect that question.

533. *Id.* at 354, 68 N. W. at 999. The notice point was ignored, evidently, because B’s mortgage was taken first, but later exchanged for an extension mortgage, which latter was alone recorded, an hour later than the recording of C’s mortgage. On the record, C’s appeared to be both senior in date and senior of record, although C knew the actual fact.

534. *Id.* at 356, 68 N. W. at 1000.

535. See MICH. COMP. L. (1929) § 13304 and earlier statutes cited in the note on the history of that section.

536. 96 Mich. 525, 56 N. W. 101 (1893). In our lettering A is Kerr; B, Cook; C, Marshall; and of various grantees under C, D is French (really the second transferee under C).

537. *Id.* at 527-8, 56 N. W. at 101.

538. *Id.* at 529, 56 N. W. at 102.

539. See pp. 167, 168 *et seq.*, 297, 299-303 *supra*.

540. *Ibid.*

Nor can the decision be sustained, assuming it be conceded that D was mistakenly held to have taken his deed with notice of B's rights, on the ground that in a notice-race jurisdiction he must also gain priority of record, and obviously D had not done so. To say that a subsequent purchaser, although he has no record notice from an isolated recorded paper because he has no means of discovering it, is nevertheless defeated in a notice-race jurisdiction by its prior recording, would be a palpable injustice. In truth, however, the race-to-the-record principle has no relation to such a situation. That rule assumes a race in putting titles on the record; B has not recorded a title, but only an individual document that was unconnected with record title.⁵⁴¹

*Van Aken v. Gleason*⁵⁴² is likewise not in point. Our problem is one of priorities, the question being whether D has record notice of B's deed. In the *Van Aken* case A's two conveyances were given on the same day, B's being first acknowledged but C's first recorded. There was no preference agreement, and the court found that the two mortgages were intended to be "on the same footing." "Although," it said, "the bill is framed on the theory of priority," the prayer for general relief justified the relief proper under the other principle. It therefore decreed foreclosure and sale, and a ratable application of the proceeds to the two mortgages if insufficient to pay both.⁵⁴³ The court did, however, remark: "Inasmuch as complainant when he purchased the [C] mortgage had constructive notice by the record of the [B] mortgage, of which [C] was actually informed, we think such notice as the record gave him was binding."⁵⁴⁴ This reference to priorities is manifestly dictum. Moreover, it is susceptible of the interpretation that notice to D may result from C's state of mind, and that hoary error⁵⁴⁵ is accordingly introduced into the headnote of the case. Assuming that the reporter's was also the court's understanding of its words, the statement has no bearing even as dictum on our problem.

Missouri is a pure-notice jurisdiction.⁵⁴⁶ The case cited^{546a} has nothing to do with our problem, and falls wholly outside the recording

541. See p. 299 *supra*.

542. 34 Mich. 477 (1876).

543. *Id.* at 480.

544. *Id.* at 479.

545. See p. 402 *et seq. supra*.

546. Mo. REV. STAT. (1939) §§ 3427-8, 3511. Mr. Patton's citation of Missouri as a race state is erroneous. PATTON, LAND TITLES (1938) § 10 at notecall III. In form the statute is of the invalid-till-recorded type (see pp. 127, 282 and note 292 *supra*) but it is construed simply as a notice act, as is shown by three cases cited by Mr. Patton: Ladd v. Anderson, 133 Mo. 625, 34 S. W. 872 (1895); Elliott v. Buffington, 149 Mo. 663, 51 S. W. 408 (1899); Hays v. Pumphrey, 226 Mo. 119, 125 S. W. 1109 (1909).

546a. Allen v. Ray, 96 Mo. 542, 10 S. W. 153 (1888).

system. The question presented therein was that of priority between two titles ostensibly deraining from a common grantor, a patentee whose title was never connected with the record, one title originating while he held the actual title and the other after he had parted with it.⁵⁴⁷

Mississippi is likewise a pure-notice jurisdiction.⁵⁴⁸ In *Woods v. Garnett*⁵⁴⁹ C's mortgage was taken (and recorded, which was immaterial) after B's mortgage had been recorded with an imperfect acknowledgment. An agent of C had seen and read this record, and the court held that C *had inquiry notice*. Later, B's deed was reacknowledged and re-recorded before C's conveyance to D, who admittedly had no "actual" notice. It was held that the deed gave D record notice.⁵⁵⁰ The case is a square holding on our problem. Further, it has the merits of discussing it, and of recognizing the connection between record search and record notice. However, as already seen, the court spurned the idea that *any* search required of a purchaser can be unreasonable; and, as a secondary reason for its decision, offered a proposition which has already been examined and found to be without merit.⁵⁵¹

South Dakota is a notice-race, and also a tract recording, jurisdiction.⁵⁵² For the latter reason the case of *Parrish v. Mahany*⁵⁵³ can have no relevance to our problem so far as its solution be admitted to turn on the test of reasonable search, since it is conceded that search can reasonably be required under a tract recording system for the deeds that are now under discussion, and that record notice by them can therefore justly be imputed to a purchaser.⁵⁵⁴ But, ignoring that aspect of the case, it is not a direct authority on our problem, and for several reasons is entitled to very scant attention.

If D be barred by notice of any type from taking in good faith, he can only prevail if his grantor, C, took title as a *bona fide* purchaser. Throughout the opinion it is *assumed* that D was barred, and attention

547. Defendant claimed as purchaser at a tax sale. The defendant in the tax suit was X, who had never been record owner of the land; and the proceeding could not operate *in rem* against the land because the statute limited that effect to suits against the person appearing to be the record owner. Moreover, although X had once been actual owner (patentee) he had ceased to be such. No title, therefore, could be acquired by the tax sale. See pp. 169, 180 *supra*. On the other hand, plaintiff had complete title through mesne conveyances from X. The case lies outside the recording system. The *absence* of any record title in X was warning to the defendant when he purchased at the sale "that the patentee, whoever he might be, had in all probability parted with his title." 96 Mo. at 548, 10 S. W. at 155.

548. See the statutes, quoted and construed in *Craig v. Osborne*, 134 Miss. 323, 98 So. 598 (1923).

549. 72 Miss. 78, 16 So. 390 (1894).

550. *Id.* at 84-7, 16 So. at 391.

551. See pp. 164, 413 *supra*.

552. S. D. COMP. L. (1939) § 3293. Compare PATTON, LAND TITLES (1938) § 46 n. 80.

553. 10 S. D. 276, 73 N. W. 97 (1897).

554. See pp. 165-6 *supra*.

is directed primarily to the status of C. But the question here primarily under consideration is not whether D is prevented by the prior recording of B's deed from being a purchaser in good faith; it is, rather, Does B's deed give *record* notice to D? To that answer the opinion gives no explicit answer. It does contain an explicit affirmation that D was put upon inquiry—not, however, as to B's rights, but as to C's. In addition to this, the opinion has the further weakness of implying that he could be put upon inquiry by the *mere* recording of B's deed (since no information otherwise received was involved). The statement of the problem by the court was as follows:

"Plaintiffs [D] are purchasers in good faith for a valuable consideration, without actual notice of respondent's [B's] conveyance and without actual notice that her deed was recorded when their mortgage was taken. Does the law impute notice [to D] of such conveyance, and what is the effect of such notice upon"—seemingly, this means: what limitation is put upon such notice in the case of—"the mortgagee [D], in good faith, and for a valuable consideration, of a grantee in a second deed [C], recorded before the first deed [B's], when the first deed is recorded before the mortgage is taken?"⁵⁵⁵

The court proceeded to express agreement with the New York cases, and disagreement with the Massachusetts cases, all of which turn on the issue of *record notice solely*. However, it supported its view only, first, by quoting the question-begging arguments, already analyzed, by which Chief Justice Dixon sought to sustain his dictum on that issue in the *Fallass* case, but confusing his dictum with his decision;⁵⁵⁶ and, secondly, by concurring, as respects the Massachusetts cases, in criticisms of them offered in a Mississippi case which have already been considered and found to be pointless.⁵⁵⁷ And then, although inquiry notice and record notice had been clearly distinguished by the Mississippi court (C being held to have had inquiry notice, and D record notice), the South Dakota court stated its own decision thus:

555. *Parrish v. Mahany*, 10 S. D. 276, 283, 73 N. W. 97, 99 (1897). (Italics supplied.)

556. *Id.* at 283-4, 73 N. W. at 99. See pp. 421-2 *supra*. The court spoke of the difference between the Massachusetts and Wisconsin statutes—that is between notice and race statutes—as though it had some bearing on the question before it, 10 S. D. 276, 283, 73 N. W. 97, 99 (1897). It was vital to the decision in *Fallass v. Pierce*, 30 Wis. 443 (1872). It had nothing to do, however, with notice, though the South Dakota court thought it "entitled to much weight," and believed that it was following the Wisconsin decisions. 10 S. D. 276, 284, 73 N. W. 97, 99 (1897). The court did not even refer to its own recording system by tracts. However, in such a state the attitude of Chief Justice Dixon toward the test of reasonable search (pp. 164, 413 *supra*), echoed in *Woods v. Garnett* (p. 426 *supra*), was no doubt wholeheartedly approved.

557. 10 S. D. at 285, 73 N. W. at 99. And see pp. 413-414 *supra* for the criticism in question.

"The record of respondents [B's] deed was sufficient to put the mortgagees [D] *upon inquiry* as to whether [C] was a purchaser in good faith, and for a valuable consideration."⁵⁵⁸

As respects the first point in this decision, it is clear that if the required "inquiry" by D had reference to B's rights this would be true "*inquiry notice*" respecting the prior hostile title. It has been several times pointed out, however, that to attribute *inquiry* notice to a purchaser because a deed is, simply, recorded is a subterfuge to evade the issue whether record notice is given,⁵⁵⁹ and that it is, moreover, a great injustice to the purchaser.⁵⁶⁰ Such an evasion is particularly unnecessary under a system of tract recording. Whether such an inquiry respecting the validity of the title under which D claims is *inquiry notice* at all is another question, and one exclusively of terminology. That it is not properly such seems clear, since it is incidental to a principle that has nothing whatever to do with the operation of the recording acts; a principle of equity lying outside of their purview, operative only after they have independently operated. The "inquiry" in question is only an example of the various investigations of possible defects of title, where notice is not involved, which have several times been adverted to and distinguished from true notice situations.⁵⁶¹

The ultimate disposition of the case turned upon the issue of C's good or bad faith.⁵⁶² The opinion's obscurity on the prior question *how* the record had barred D was not removed in a second opinion after a rehearing, except as that opinion revealed that "record notice" and "put on inquiry by a record" were, in the court's mind, synonymous.⁵⁶³ Strictly speaking, the case is no authority on the point under

558. 10 S. D. at 285, 73 N. W. at 99. (Italics supplied.)

559. See pp. 267, 305 *supra*.

560. See pp. 130-1, 270-1 *supra*.

561. See pp. 264-5, 285-6 *supra*. Mr. Patton has said that a purchaser who in a tract-recording state finds both the A-B and A-C deeds recorded is "put on inquiry as to which held the title." PATTON, LAND TITLES (1938) § 46 n. 80.

562. That issue was not determined by the lower court. The case was therefore remanded for further proceedings. In thus disposing of the case, the appellate court stated that in the absence of any evidence as to C's being a *bona fide* purchaser "the presumption is that he did so purchase the premises." *Parrish v. Mahany*, 10 S. D. 276, 285, 73 N. W. 97, 100 (1897). On a rehearing the court, receding from its earlier position as to that presumption, made this final statement: "Without deciding what presumption should prevail where the subsequent grantee or subsequent incumbrancer acquires his rights before a prior conveyance has been recorded, we think that where, as in this case, an incumbrancer's [D's] rights are acquired after the prior conveyance B's has been recorded"—*nota bene*, again with no specific statement that it gave D *record* notice—"such incumbrancer should assume the burden of proving that his grantor [C], the grantee in the [first] subsequent conveyance, was a *bona fide* purchaser for value, without notice of the [B's] prior conveyance." *Parrish v. Mahany*, 12 S. D. 278, 283, 81 N. W. 295, 296 (1899).

563. The court merely remarked: "Having decided that respondent's deed shall be deemed to have been recorded when plaintiffs parted with the consideration of their mortgage, this court concluded that if [C], their mortgagor, purchased 'in good faith,

discussion, containing at most a dictum by implication. Even if a ruling were present, the opinion would reduce it to scanty significance.

Texas is a pure-notice jurisdiction.⁵⁶⁴ Both *Ryle v. Davidson*⁵⁶⁵ and *Delay v. Truitt*⁵⁶⁶ are square decisions. They were preceded by a dictum in *White v. McGregor*.⁵⁶⁷ There is no discussion in the *Ryle* case. In the *Delay* case there is one paragraph of discussion, not above criticism.⁵⁶⁸ The decision is also unsatisfactory in two respects. Delay (D) was the fourth grantee under C; the defendant, Truitt, was B. A forged deed, purportedly from B to one of plaintiff's predecessors under C, was included among the title instruments delivered to Delay, and the court said that this put him upon inquiry by suggesting "that a deed from Truitt was necessary to perfect the title."⁵⁶⁹ No additional facts that could indicate anything dangerous to him in this deed are stated. The natural conclusion to be drawn from the presence of such a deed among his title instruments would be, seemingly, that it was a complete irrelevance.⁵⁷⁰ Besides, it came from his predecessors who claimed, like himself, under C—not from any person claiming under B's hostile title.⁵⁷¹ But, ignoring both of these objections, there are still two others. The first is that a forged deed is a nullity that cannot affect title, and therefore should give no record notice⁵⁷² nor inquiry notice⁵⁷³ as a matter of recording policy, if the policy is really to favor subsequent purchasers. The second is that, assuming D to be

and for a valuable consideration,' he was the owner of the land, and the lien of the plaintiff's mortgage is superior to the claims of the respondent. . . ." *Parrish v. Mahany*, 12 S. D. 278, 282, 81 N. W. 295, 296 (1899). And again: "When plaintiffs' mortgage was taken, respondent's conveyance was of record. Plaintiffs had"—*nota bene*—"record notice that [C's] title was in doubt, and, as was stated in our former decision, 'the record of respondent's deed was sufficient to put the mortgagees upon inquiry.'" *Id.* at 283, 81 N. W. at 296. (Italics supplied.)

564. TEX. ANN. REV. CIV. STAT. (Vernon, 1925), §§ 1289, 6646; cf. Webb, *A Treatise on the Law of Record of Title* (1890) § 477.

565. 116 S. W. 823 (Tex. Civ. App. 1908). The case is interesting on the point of burden of proof; see n. 81 *supra*. Cf. 116 S. W. 823, 828-9 with principles stated in *Delay v. Truitt*, 182 S. W. 732, 735 (Tex. Civ. App. 1916), syllabus points (8) and (9). See also *Houston Oil Co. v. Kimball*, 103 Tex. 94, 108-9 (1910).

566. 182 S. W. 732 (Tex. Civ. App. 1916).

567. 92 Tex. 556, 558, 50 S. W. 564 (1899).

568. 182 S. W. at 736 (para. 11). The court said: "The latter's [B's] deed, however, being a prior one in date [to C's], though subsequent of record, and the holder of the second deed [C] having notice of the first deed, all subsequent purchasers were further affected with notice afforded by the record, and would lose the land." *Ibid.* This seems to mean that because C had knowledge of B's deed, the record of the latter gives notice to all subsequent purchasers. The remark was made in commenting upon *Jackson v. Post*, 15 Wend. 588 (N. Y. 1836), and reflects the confusion attaching to that and other old cases already discussed; see p. 402 *et seq. supra*. Moreover, from the references to that case both in the *Delay* opinion and in *White v. McGregor*, 92 Tex. 556, 50 S. W. 564 (1899) one would infer that the court in both cases overlooked the fact that the decision in the *Post* case was based on inquiry, not on record notice; see pp. 402-4 *supra*.

569. 182 S. W. 732, 735 (Tex. Civ. App. 1916) under syllabus point (7).

570. See pp. 177-80 *supra*.

571. See pp. 260-1, 276, 291-5, 305-6 *supra*.

572. See pp. 168, 177 *supra*.

573. See pp. 275-281, 296-303 *supra*.

put upon inquiry, he could learn nothing thereby save the existence of the recording problem presented later to the court, and it has repeatedly been pointed out that it would be both fatuous and unjust to bar D for *bad faith* merely because of his failure to anticipate the court's opinion as to the relative rights of B and D.⁵⁷⁴ It would be equally unjust to deny him good faith because he failed to discover a forgery. All this, however, does not alter the fact that the court explicitly held that D had record notice of B's title.⁵⁷⁵

Arkansas is a pure-notice jurisdiction.⁵⁷⁶ The decision in *White v. Moffett*⁵⁷⁷ was not given on the ground of record notice by B's deed, which was recorded after the first conveyance under C, but on the theory of actual notice. The court said: "We do not deem it necessary to determine whether they [D and wife] were bound to take notice of such deed from its record, for the reason that . . . [D] . . . had notice in fact of the deed . . . the abstract of title furnished them showing such deed;"⁵⁷⁸ and again, "Appellants had actual notice of the deed before purchasing the land and knew that it was prior in time to [A's] deed to [C] and her [C's] deed to [him] under whom he [D] claims title."⁵⁷⁹ The "actual notice" referred to in these quoted passages is clearly true inquiry notice, in the sense adopted in this discussion.⁵⁸⁰ The decision, therefore, was not pertinent to our problem.

The opinion contains a statement by the court that "it is also a well-established principle of law that a purchaser of real estate must take notice of all prior recorded instruments *in the line of his purchased*

574. Citations in note 560 *supra*.

575. 182 S. W. at 734, 735-6, under syllabus point (2) as respects land certificate, and under syllabus points (10) and (11) as respects the deed to B.

576. DIG. STAT. ARK. (Pope, 1937) § 1847; but a race rule governs mortgages, *id.* § 9435. See also *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373 (1908).

577. 108 Ark. 490, 158 S. W. 505 (1913).

578. *Id.* at 496-7, 158 S. W. at 507. The third grantee under C is here referred to as D.

579. *Id.* at 498, 158 S. W. at 507.

580. See p. 266 *supra*. The opinion quotes the following passage from an earlier Arkansas case in which the notice given by the mere recording of a deed was declared to include record notice of anything therein that should suffice to put a prudent purchaser upon inquiry. "A person purchasing an interest in land, 'takes with constructive notice of whatever appears in the conveyance constituting [a link in] his chain of title.' If anything appears in such conveyance 'sufficient to put a prudent man on inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that which he is about to purchase, it is his duty to make the inquiry, and if he does not make it he is guilty of bad faith or negligence,' and the law will charge him with the actual notice he would have received if he had made it." *Gaines v. Summers*, 50 Ark. 322, 327, 7 S. W. 301, 302 (1887) embodying quotations from *Stroud v. Pace*, 35 Ark. 100, 103 (1879) quoted in *White v. Moffett*, 108 Ark. 490, 496, 158 S. W. 505, 507 (1913). This is, of course, quite correct, as has been pointed out in commenting upon recitals. See p. 273 *supra* and note 584 *infra*. But the decision in *White v. Moffett* was not concerned with the "constructive notice" and "actual notice" referred to in the quoted passage, but with inquiry notice given by matter dehors the record.

title.”⁵⁸¹ If the italicized words be disregarded, this proposition would mean that B’s deed gave record notice to D; and, in view of the wording of the passage first quoted above, it is possible that the court intended this to be the meaning of this additional statement. But if the italicized words are given the meaning that would *prima facie* properly attach to them—a meaning which would certainly exclude a deed by A to B recorded after the recording of that by A to C through which D claims—then the proposition becomes one that B’s deed would *not* give D record notice. The issue thus uncovered is, of course, the very question here under discussion; namely, whether the quoted phrase should or should not, in the situation before us, have the usual and *prima facie* meaning indicated.

It seems, then, that the *White* case contains nothing, either as to decision or as to dictum, that bears on the problem here under discussion, unless it be the proposition last commented upon, the meaning of which is ambiguous.

Montana is a notice-race jurisdiction.⁵⁸² The case of *Guerin v. Sunburst Oil & Gas Company*,⁵⁸³ however, has no bearing whatever upon the problem under discussion.⁵⁸⁴

The twenty-eight cases, from thirteen states, cited in leading textbooks as supporting one view of our problem have now been individually examined. Of decisions on the point there are only eleven,⁵⁸⁵ from seven jurisdictions; and of these decisions two can be so classified only if one wishes to make the utmost possible concession to the view under examination and to the writers citing the cases.⁵⁸⁶ In addition, five other cases contain dicta which are in point and have not been repudiated by later decisions;⁵⁸⁷ two of these five being from juris-

581. *White v. Moffett*, 108 Ark. 490, 496, 158 S. W. 505, 507 (1913).

582. MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 6935.

583. 68 Mont. 365, 218 Pac. 949 (1923).

584. It decided that when A gave to B an option for the fee, in a recorded deed that also contained a recital that the title was “subject to the Campbell lease,” which latter was unrecorded, and later A gave C an actual conveyance of the fee, B’s recorded deed gave constructive notice of the recital and therefore “notice of all material facts which an inquiry suggested by that recital would have disclosed.” 68 Mont. 365, 370, 218 Pac. 949, 951 (1923). The court had already said: “The trial court concluded . . . that Mrs. Guerien ‘purchased with *constructive* notice, at least, of the outstanding rights in the defendant under such lease,’ and it is the correctness of *that conclusion* which is challenged by counsel for plaintiff.” *Id.* at 368, 218 Pac. 950. (Italics supplied.) This seems to support what has been suggested above regarding recitals; see p. 273 *supra*.

585. Those italicized on pp. 416-7 *supra*.

586. *English v. Waples*, commented upon at p. 418 *supra*; *Erwin v. Lewis*, p. 422 *supra*.

587. *County Bank of San Luis Obispo v. Fox*, p. 420 *supra*; *Fallass v. Pierce*, p. 420 *supra*; *Cook v. French*, p. 424 *supra*; *Parrish v. Mahany*, p. 426 *supra*; *White v. McGregor*, p. 429. The dictum and reasoning in *Flynt v. Arnold*, p. 418 *supra*, have been repudiated in Massachusetts; note 489 *supra*.

dictions in which direct decisions on the point have never been made.⁵⁸⁸ The total number of decisions and dicta is sixteen, from nine states.

Ignoring the distinction between decisions and dicta, in nine of these sixteen cases there is either no statement whatever of the grounds upon which the view expressed is rested, or, which amounts to the same thing, none beyond an assertion that B's deed, being recorded, gave constructive notice to any person subsequently purchasing.⁵⁸⁹ In the opinions of the remaining seven cases there is matter which may be characterized as discussion. In one case, however, the dictum and the reasons supporting it have been repudiated by later decision.⁵⁹⁰ In two other cases it is only by considerable liberality that the courts' remarks can be characterized as discussion of the point.⁵⁹¹ Of the four remaining cases, one by *ipse dixit* excludes any limitation upon record search as unreasonable, and, aside from that, offers as reasoning remarks that are a pure *petitio principii*; ⁵⁹² another reproduces that case in both these respects; ⁵⁹³ and the two others reproduce and rely upon its question-begging reasoning.⁵⁹⁴

Something better than this last could assuredly be expected from every court. As respects the reasonableness or unreasonableness of a search requirement, one should also be able to expect a serious consideration of the general policy of the recording acts, and likewise some reference to the actual practice of professional title searchers under the system of recordation locally prevailing. Not a word on either of these matters is to be found in a single one of the cases supporting this first view of the problem under discussion. On the other hand, we have seen that the authors of a work on the law of real property in New York, where the view originated, have declared it to be "absurd," and inconsistent with the invariable practice of title searching in that state.⁵⁹⁵

CASES SUPPORTING THE SECOND VIEW

The following cases have been cited in standard textbooks as *contra* to those just considered:⁵⁹⁶ Massachusetts: *Connecticut v.*

588. Those in *Cook v. French*, p. 424 *supra*, and in *Parrish v. Mahany*, p. 426 *supra*.

589. Namely, referring to the cases listed on pp. 416-7 *supra* (and ignoring the twelve cases that are no wise in point); the three New York cases italicized; the Iowa case italicized; the Illinois case italicized; the three California cases (dictum in the third); the first Michigan case (dictum); the third Texas case (dictum).

590. *Flynt v. Arnold*, note 587 *supra*.

591. *White v. McGregor*, p. 429; *Delay v. Truitt*, p. 429 and note 568 *supra*.

592. *Fallass v. Pierce*, see text at notecalls 131, 445 and p. 178 *supra*.

593. *Woods v. Garnett*, p. 426 *supra*.

594. *Erwin v. Lewis*, p. 422 *supra*; *Parrish v. Mahany*, p. 427 *supra*.

595. See p. 415 *supra*.

596. Namely by the authorities cited in note 455 *supra*.

Bradish (1817),⁵⁹⁷ *Trull v. Bigelow* (1820),⁵⁹⁸ *Somes v. Brewer* (1824),⁵⁹⁹ *Glidden v. Hunt* (1836),⁶⁰⁰ *Morse v. Curtis* (1885);⁶⁰¹ Vermont: *Day v. Clark* (1853);⁶⁰² Wisconsin: *Ely v. Wilcox* (1866);⁶⁰³ Montana: *Mullins v. Butte Hardware Co.* (1901);⁶⁰⁴ Connecticut: *Wheeler v. Young* (1903);⁶⁰⁵ Virginia: *Bowman v. Holland* (1914);⁶⁰⁶ Texas: *Delay v. Truitt* (1916).⁶⁰⁷

Massachusetts is a pure-notice jurisdiction.⁶⁰⁸ There is nothing relevant to our problem in the *Somes* case.⁶⁰⁹ The other three cases cited are all in point and rest squarely on the propositions that B's deed is outside D's title chain, that it would be contrary to "the spirit" of the recording system and unreasonable to require him to search for it, and that therefore it gives him no record notice. The opinion to this effect in the earliest Massachusetts case cited, the *Bradish* case, has already been quoted.⁶¹⁰ In the *Trull* case the court very properly emphasized the negligence of the non-recording first grantee as the cause of all the difficulty, justifying his subordination to any subsequent purchaser "deriving his title from him who, in the public registry, appears to be the lawful owner. . . ." ⁶¹¹

References to D's ignorance of C's state of mind (a pertinent matter if D is for other reasons not himself a purchaser in good faith, but irrelevant to the question whether D is such) have been earlier discussed at length. Confusion on this point would appear to lurk in portions of the following passage from the opinion in the *Trull* case, which as a whole, however, makes perfectly clear the true principle as earlier stated.⁶¹²

597. 14 Mass. 296 (1817).

598. 16 Mass. 406 (1820).

599. 19 Mass. 184 (1824).

600. 41 Mass. 221 (1836).

601. 140 Mass. 112, 2 N. E. 929 (1885).

602. 25 Vt. 397 (1853).

603. 20 Wis. 523 (1866).

604. 25 Mont. 525, 65 Pac. 1004 (1901).

605. 76 Conn. 44, 55 Atl. 670 (1903).

606. 116 Va. 805, 83 S. E. 393 (1914).

607. 182 S. W. 732 (Tex. Civ. App. 1916).

608. MASS. GEN. LAWS (1932), c. 183, § 4. The statute has long read "actual notice," but in application this includes inquiry notice. See, for a convenient discussion of cases up to 1875, CROCKER, NOTES ON THE GENERAL STATUTES OF MASSACHUSETTS (2d ed. 1875) 176 *et seq.* See also PATTON, LAND TITLES (1938) § 9 nn. 101, 102.

609. 19 Mass. 184 (1824). The action was by a grantor against the purchaser from a grantee who had obtained title by fraud and without consideration. The recording act was in no way involved. As no actual knowledge or inquiry notice of the fraud was proved to have been had by the defendant, he was of course protected.

610. See p. 412 *supra*.

611. *Trull v. Bigelow*, 16 Mass. 405, 418 (1820). Cf. pp. 151, 182-4 *supra*. In fact, C's immediate grantee, Judd, took title as a *bona fide* purchaser under this view; and then the latter's grantee (*Trull*), though he himself had knowledge of B's deed (*Bigelow* being B's grantee), was saved by Judd's *bona fides*.

612. See pp. 396, 402 *et seq. supra*.

"It has been repeatedly decided, and is well known as a rule of law, that a second purchaser shall not set up a title under a registered deed, against the first purchaser [B], whose deed was not registered, if he had knowledge of the prior conveyance. . . . But [D], when he purchased of [C], did not know of the defect in his [C's] title; or that there was anything in the conduct of his [D's] ⁶¹³ grantor tending to impeach his [C's] conveyance [from A]. . . . He [D] held the estate, then, under his conveyance from [C], purged of the fraud, which vitiated it in the hands of [C]. . . . This principle is just; for the honest assignee [D] finds a good subsisting title on record in his grantor [C], pays him the value of the land, and is wholly ignorant of any circumstances which contradict the apparent fairness of the title. In such case, the negligence of the first purchaser [B, who did not record] is the cause of the difficulty; and although he shall not suffer, when his negligence is fraudulently taken advantage of by a subsequent purchaser [who has knowledge of it], yet when a third party claims the land, deriving his title from him who, in the public registry, appears to be the lawful owner, negligence ought to turn the scale against the party who was guilty of it." ⁶¹⁴

Although we have seen that in various more modern opinions the point has caused continuing confusion,⁶¹⁵ it has been kept entirely clear in the Massachusetts cases.⁶¹⁶

The *Glidden* case, without discussion, merely followed the earlier decisions. Chief Justice Shaw, however, in his dicta in *Flynt v. Arnold* ⁶¹⁷ discussed the problem at some length, although ignoring the reasons given in the *Bradish* case, and likewise ignoring the reason emphasized in the *Trull* opinion, above quoted.⁶¹⁸ The Chief Justice did clearly recognize that the limit of reasonable search is the limit to which record notice should be confined,⁶¹⁹ and to that extent his remarks had merit. His assumption that search for earlier deeds of the type here in question is reasonable was repudiated, and the reasoning of the earlier cases approved, in the *Morse* case, in a passage already quoted, as better adjusted to "the spirit of our registry laws and the practice of the profession under them." ⁶²⁰

613. "His" might be read as "D's" or "C's" (and therefore the next "his" as "C's" or "A's"). On the fraud of any subsequent purchaser in taking advantage of A's fraud, see pp. 142-5, 149-150 *supra*.

614. *Trull v. Bigelow*, 16 Mass. *406, *418-9 (1820).

615. See pp. 423, 426-8 *supra*.

616. So, in the latest case, *Morse v. Curtis*, 140 Mass. 112, 114, 2 N. E. 929, 931 (1885) the court remarked of the wording of the local statute (note 608 *supra*): "The reason why the statute requires actual notice to a second purchaser, in order to defeat his title is apparent: its purpose is that his title shall not prevail against the prior deed, if he has been guilty of a fraud upon the first grantee; and he could not be guilty of such fraud, unless he had actual knowledge of the first deed."

617. 43 Mass. 619 (1841).

618. *Ibid.*

619. See p. 412 *supra*.

620. See p. 408 *supra*.

Vermont is a pure-notice jurisdiction.⁶²¹ *Day v. Clark*⁶²² has been fully discussed earlier.⁶²³ Even if understood as by the writer it amounts to no more than an implied dictum on the problem before us; and even if there be an implied dictum that B's deed gives no notice to D, there is no statement that this is because it is outside D's chain of title, nor any other reason to support it. If otherwise understood it has no pertinence whatever to our problem.

Wisconsin is a notice-race jurisdiction.⁶²⁴ It is somewhat difficult to evaluate *Ely v. Wilcox*.⁶²⁵ Its facts were unusual and interesting. A preemptioneer, A, assigned his interest to B (Ely) by a deed which, being improperly acknowledged, was unauthorizedly recorded, and B gave back a purchase money mortgage of which the same was true. After B had made conveyances of his equitable title in various portions of the land, A received legal title from the government and then conveyed to C, who recorded his deed but "knew of the rights" of B when he purchased. A then executed a satisfaction of B's mortgage and gave him a second deed that was recorded; and thereafter C conveyed to D (Wilcox). When B brought a bill to have title quieted, praying annulment of the A-C and C-D deeds, a judgment given below for B was reversed.

Now, if *both* the recording of the first two deeds and B's rights *outside the record* be ignored, C would have taken and recorded his deed first, would have perfect title, and could pass such to D, regardless of any notice to D. But the court did not so reason. It assumed that C could not have priority, because he had knowledge of B's *unrecorded* rights; and Chief Justice Dixon, in his elaborate discussion of the *Ely* case in *Fallass v. Pierce*⁶²⁶ did likewise.⁶²⁷ Both dealt with D's rights as a question exclusively of notice.

As respects D, the court correctly held that the unauthorizedly recorded deeds could give him no constructive notice,⁶²⁸ and it was not shown that he had information which put him upon inquiry re-

621. Vt. Pub. L. 2596

622. 25 Vt. 397 (1853).

623. See pp. 405-7 *supra*.

624. See note 509 *supra*.

625. 20 Wis. 523 (1866).

626. 30 Wis. 443 (1872).

627. "Nathaniel Green Wilcox [C] had knowledge of such previous deed to Ely, at the time he took his conveyance." *Id.* at 465. But he also said: "Looking at the registry . . . the title of Ely had accrued and was held by a deed junior in time and junior in record to the deed to [Nathaniel Green] Wilcox, which, both by the common law and by the statute, made the title of Wilcox the superior and only true and real title." *Id.* at 467. This was meant only as a matter of the record alone, as seen by D.

628. See p. 176 *supra*.

garding them.⁶²⁹ What, then, of record notice by B's second deed? The cases, already discussed, which take the majority view of the problem here under discussion hold that a deed by A to B prior to that from A to C, a fraudulent grantee who records first, gives constructive notice, after its recording, to a purchaser thereafter from C. In the instant case B's second deed was both taken and recorded *after* C's. The court expressed a preference, which was dictum, for the Massachusetts view over the New York view of the former situation (that of our problem), and then refused to apply the New York rule in the case actually before it.⁶³⁰

The case therefore contains nothing but a dictum on our problem, one favorable to the Massachusetts view. And as already pointed out, all of Chief Justice Dixon's comments upon it in the *Fallass* case were likewise merely dicta to the contrary effect.⁶³¹ Although it has been stated by courts and textwriters that the *Ely* case was "overruled" by the *Fallass* case, the truth is that the opinion in the latter case explicitly approved it.⁶³² The dispute was not as to the decision, but

629. B charged D with "knowledge of plaintiff's purchase, payment, deed, mortgage, possession," but D pleaded good faith. *Ely v. Wilcox*, 20 Wis. 523, 525 (1866). The court held that "the evidence sustained the plea, unless there was constructive notice to the appellant [D] of the respondent's [B's] title." *Id.* at 528. A's wife had also given B a quitclaim that was properly recorded, but which *did not indicate* her relationship to A. Of this the court said: "If the appellant had had actual notice of this deed, it is doubtful whether it would have been sufficient to have put him upon inquiry. But constructive notice could only affect him with notice . . . at most of the contingent right of dower of Ann Matson, which is not the title in dispute—certainly not a sufficient title to enable the plaintiff to maintain this bill." *Id.* at 529. Cf. pp. 280-1 *supra*. The court also said that "it is held in New York that the record of a prior deed, though not recorded till *after* the second deed and *before* the conveyance by the vendee in the second deed, is notice to a purchaser from him, not only of the first deed, but such notice that he is bound to inquire whether the grantee in the second deed was a *bona fide* purchaser. . . . It is difficult to see any good reason for carrying the doctrine of constructive notice to that extent, and holding that constructive notice only is sufficient to put a vendee upon inquiry." *Id.* at 530. On this confusion, see p. 402 *et seq. supra*.

630. *Id.* at 530. But the opinion proceeds: "If we should so hold, then any vendor of land might, after he had conveyed to a *bona fide* purchaser, put on record a dozen deeds of the same land to different purchasers, and each of these would be a cloud upon the title." *Id.* at 530-1. Now, the supposed *bona fide* purchaser (no prior conveyance being mentioned) has true title. Assume (1) that he records it. Then his title cannot be divested; the later deeds are nullities; as such, they should not be held to give record notice (see pp. 168-171, 177, 278-281 *supra*); they could desirably be struck from the record (p. 279 *supra*) as clouds. See pp. 279-280 and n. 276 *supra*. The court's statement is true, but it has no necessary connection with notice. The manifest assumption is based upon the idea that a nullity can give notice. Assume (2) that the *bona fide* purchaser in question does not record. Then the taker of the first subsequent deed, if he has no knowledge or inquiry notice of the earlier deed and (in Wisconsin) records first, will have perfect and indefeasible title.

631. See p. 420 *et seq. supra*.

632. See especially *Fallass v. Pierce*, 30 Wis. 443, 471 (1872): "The case was rightly decided;" also at 467: "if that was so, then . . . the question was rightly decided." Chief Justice Dixon's two opinions in *Fallass v. Pierce* filled more than twenty-five pages. Of these he devoted well over half to a discussion of *Ely v. Wilcox*, decided when he was a non-dissenting member of the court. He insisted that what was said in the opinion of that case (written, he remarked, "as by the court" by Judge Downer, who was counsel for the successful party in *Fallass v. Pierce*, at 455) on the

merely as to one dictum in the opinion. The decision in *Erwin v. Lewis*,⁶³³ does not nullify the dictum in the *Ely* case; for, as already seen, it is impossible to say that the decision in that case was upon the issue of record notice.⁶³⁴ For this reason, dictum in the present case simply stands opposed to dictum in the *Fallass* case.

There is, however, another aspect of the *Ely* case which deserves emphasis because of its bearing upon the point that the courts should recognize and emphasize the recording policy of favoring the subsequent purchaser, alike as regards record and inquiry notice.

The facts in the case involved a puzzle. Taking into account B's actually prior deed, C was a subsequent purchaser who first properly recorded, but who, because of his knowledge of B's (legally) unrecorded deed, could not prevail over B. Did B, then, prevail over C? Not, of course, under the recording acts, for he was a prior non-recording purchaser, and the acts provide only for the *divestment* of such. Neither B nor C, then, could claim priority over the other under the recording acts. But recourse is had, in applying those acts, to knowledge of B's unrecorded deed in order to preclude good faith in C. Might not one then also say that when B got and properly recorded his second deed this should "operate back upon the title conveyed by the first, in the nature of a further assurance"?^{634a} In that case, B would get title as against C, being first purchaser and (in Wisconsin, a notice-race jurisdiction, fiction overriding fact) first recorder. This reasoning could certainly be regarded as not inequitable against C, who had knowledge of B's prior rights. In that case there would again be no place for the discussion of D's rights. He could get none from C. The court, however, did not follow such reasoning.

The object of the recording acts, as Chief Justice Dixon remarked in discussing the above problem, is "to protect the *subsequent* purchaser in good faith for value at the expense of the prior one. . . . Such being the purpose of the statute, it may be that the character and capacity of Ely as a *prior* purchaser, even in good faith for value, under a deed *not recorded*, and which in form as acknowledged, never could have been, ought not to have been taken into consideration in determining the question."⁶³⁵ But he went further in the following:

problem under discussion, "must be regarded as an expression of the views of the judge who wrote the opinion, and not as a point in decision or question ruled in any matter determined by the court." *Id.* at 455. Naturally, Judge Downer was irritated by Dixon's elaborate attempts to explain the earlier decision. His wholly justifiable retort on the issue of dictum has been quoted above, p. 421 *supra*.

633. 32 Wis. 276 (1873).

634. See p. 422 *supra*.

634a. *Fallass v. Pierce*, 30 Wis. 443, 466 (1872).

635. *Ibid.* And to same effect, *id.* at 467.

"Such being the information, conveyed by the record, to the purchaser [D] from [C], that [C] had the title and that [B] had none, either by the common law or by the statute, it would seem to follow that the purchaser might pass by [B's] deed and the registry of it, and treat them as so much waste paper, which gave [B] no interest in or claim whatever to the land. And . . . it would seem likewise to follow that the purchaser from [C] was under no obligation to . . . make any inquiry as to what right . . . [B] might by possibility have been supposed to claim under his deed. If the views here suggested are correct, and I must say I do not now see wherein they are not, then they are the key which unlocks the mystery of *Ely v. Wilcox*. . . ." ⁶³⁶

These arguments sustain views that have been emphasized throughout the present article. ⁶³⁷

Montana is a notice-race state. ⁶³⁸ However, there is nothing whatever pertinent to our problem in *Mullins v. Butte Hardware Co.* ⁶³⁹

Connecticut is a notice jurisdiction. ⁶⁴⁰ However, there is again nothing relevant to our problem in the cited case, *Wheeler v. Young*. ⁶⁴¹

Virginia is a pure-notice jurisdiction. ⁶⁴² The facts in *Bowman v. Holland* ⁶⁴³ were perhaps those of our standard case, but involving merely easements. A, owning 101 acres of land, granted 30 acres to B (Holland) with an easement over the remaining portion, then granted C an ostensibly unincumbered title to 21 acres, and the latter deed was first recorded. Before C conveyed to D (Bowman), A had conveyed to X another 50 acres with an easement identical with that given B, X had conveyed to Y (Pentecost), and both these deeds were recorded. A bill was brought by B and Y for an injunction restraining interference by D with their alleged easement. But the court, merely reciting the recording dates, without discussion or citation of

⁶³⁶ *Id.* at 468. See also *id.* at 470-1.

⁶³⁷ See pp. 175-6, 281-296 *supra*.

⁶³⁸ See note 582 *supra*.

⁶³⁹ 25 Mont. 525, 65 Pac. 1004 (1901). The problem involved was not one of record notice, but of inquiry notice by possession of the land. The record showed title to a mine to be in co-tenants, without reference to distinct surface rights. The question was whether a certain surface occupation gave notice of a hostile claim inconsistent with the record title.

⁶⁴⁰ CONN. GEN. STAT. (1930) § 5010. Cf. pp. 282-3 *supra*.

⁶⁴¹ 76 Conn. 44, 55 Atl. 670 (1903). The case turned upon the question of title by estoppel. A conveyed by warranty deed, before he held title, to X. The court refused to apply the doctrine of title by estoppel. See pp. 185-6 *supra*. The other conveyances were: deed by A to B (Burr); assignment by B to X (Wheeler); deed by X (A. Young, holder of estoppel deed, first recorded) to defendant (H. Young). Wheeler's title would be good when title in X by estoppel was excluded. If estoppel had operated the case would have been (in the usual lettering of our problem): deed A to B (A. Young), first taken and first recorded; A to C (Burr), C to D (Wheeler)—these last two manifestly void; B to E (H. Young, the defendant, who would have had good title).

⁶⁴² PATTON, LAND TITLES (1938) § 96 n. 105.

⁶⁴³ 116 Va. 805, 83 S. E. 393 (1914).

authority, said: "It is apparent, therefore, that Bowman took his land unaffected by the subsequent recordation of the deeds to Holland and Pentecost." ⁶⁴⁴ Neither actual knowledge nor inquiry notice of B's rights by D was proved; and C's state of mind was treated as immaterial, without decision. The case is a direct holding that D can rely upon the recorded title as of the time when he takes his conveyance.

Texas is a pure-notice jurisdiction. ⁶⁴⁵ But it has already been seen that *Delay v. Truitt* ⁶⁴⁶ supports not the present view, but the first and contrary view, of our problem. ⁶⁴⁷

The result is, that the solution of that problem urged by the writer, and supported by the cases just reviewed, is supported by five decisions in two jurisdictions; ⁶⁴⁸ by a dictum in a third jurisdiction which, at best, is only implied in the court's holding and is unsupported by reasoning; ⁶⁴⁹ and by a dictum in a fourth jurisdiction, citing the Massachusetts cases, which is opposed to another dictum in the same jurisdiction (supported by specious reasoning). ⁶⁵⁰ On the other hand, we have found that the contrary view is supported by eleven decisions in seven (of clear decisions, by nine in five) jurisdictions, in addition to two dicta from other jurisdictions. ⁶⁵¹

While this authority adverse to the view urged by the writer scarcely deserves Mr. Pomeroy's characterization of it as "overwhelming," ⁶⁵² since only nine states (at the most) are committed to one or the other view, it would certainly be convincing if the reasons supporting the majority decisions or dicta could be accepted. We have seen, however, that only a very few cases contain anything which could, with the utmost liberality, be regarded as discussion of the problem, and absolutely no acceptable reason has been advanced in support of the first view. ⁶⁵³ That view deprives the phrase "chain of title" of all meaning; ⁶⁵⁴ in theory it compels every purchaser to search the records up to the moment of his search for deeds *ever* given by *any* record holder of the title. ⁶⁵⁵ The cases which adopt it either ignore

644. *Id.* at 809, 83 S. E. at 394.

645. See note 564 *supra*.

646. 182 S. W. 732 (Tex. Civ. App. 1916).

647. See p. 429 *supra*.

648. Four in Massachusetts, one in Virginia—those italicized in the list on pp. 432-3 *supra*.

649. That in *Day v. Clark* (Vt.), see p. 405 *supra*.

650. That in *Ely v. Wilcox*, p. 435 *et seq. supra*, opposed to that in *Fallass v. Pierce*, p. 421 *supra*.

651. See pp. 431-2 *supra* and notes thereto.

652. See p. 408 *supra*.

653. See text at notecalls 589-594 *supra* and notes thereto.

654. See p. 393 *supra*.

655. See pp. 393-4 *et seq. supra*.

those facts or brush aside as irrelevant all considerations of the burden thus put upon purchasers;⁶⁵⁶ and they do this despite the fact that (except in tract-recording states) even professional title searchers have probably never anywhere made such a search as the rule theoretically requires.⁶⁵⁷ The view is therefore open to the greater, because basic, objection that it makes that law which is contrary to professional understanding and instinct. It is also open to the objection that it flouts the policy of favoring the subsequent purchaser that underlies the recording acts.

Not one of these criticisms applies to the minority authorities, except that discussion is confined to the Massachusetts cases. But there it has from the beginning been both ample and clear, and the reasons just stated resulted, after long consideration, in the repudiation of the opinion, favorable to the majority view, of so great a judge as Chief Justice Shaw.⁶⁵⁸ The second view, moreover, received the definite approval, as has been noted, of Judge Hare and Mr. Wallace, and of Judge Leonard Jones.⁶⁵⁹

656. See pp. 412, 426 *supra*.

657. See pp. 413, 426 *supra*.

658. See pp. 412, 434 *supra*.

659. See p. 407 *supra*.